Federal Court Cour fédérale

Date: 20191010

Docket: T-409-18

Citation: 2019 FC 1282

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 10, 2019

PRESENT: The Honourable Mr. Justice Paul Rouleau, Deputy Judge

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

and

THE CANADIAN JUDICIAL COUNCIL

Intervener

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, the Honourable Justice Michel Girouard (Justice Girouard), seeks an order to invalidate a number of decisions and procedural steps that resulted in a report to the Minister of Justice Canada (the Minister) recommending that the judge be removed from office. For the reasons that follow, I dismiss the application for judicial review.

[2] In 2012, the Canadian Judicial Council (the Council) was asked to conduct an inquiry into the conduct of Justice Girouard when he was still a lawyer. Following that request, the majority of the members of the Inquiry Committee (the first Inquiry Committee) was of the view that the allegations had not been proved but that Justice Girouard had deliberately and intentionally attempted to conceal the truth during the inquiry. The majority therefore recommended that he be removed from office. However, after reviewing the first Inquiry Committee's report, the Council refused to make such a recommendation to the Minister, stating that the allegation of misconduct on which the majority of the first Inquiry Committee's recommendation was based had not been put to the judge to allow him to respond and therefore could not be relied on to support such a recommendation for removal.

[3] In 2016, following a joint request from the ministers of Justice of Canada and Quebec (jointly, the Ministers), a second inquiry was launched to investigate said misconduct, and a new inquiry committee was constituted (the second Inquiry Committee). The second Inquiry Committee issued a report concluding that Justice Girouard should be removed from office as a result of his behaviour during the first inquiry. Upon review by a second panel of the Council,

a majority made up of 20 judges concluded that Justice Girouard was indeed guilty of misconduct and should therefore be removed from office. Three members of the panel dissented as, in their view, Justice Girouard was not granted a fair hearing.

[4] Justice Girouard now seeks, before the Federal Court, judicial review of the letter from the Ministers calling for an inquiry, the second Inquiry Committee's constitution and inquiry process, the decision of the second Inquiry Committee on the preliminary motions, and the second panel of the Council's report recommending his removal. Justice Girouard raises issues of procedural fairness and natural justice, claims that his language rights were not respected and raises constitutional issues.

II. FACTS

A. *History of the case*

[5] Justice Girouard was appointed to the Superior Court of Québec on September 30, 2010. Prior to that, he was a practising lawyer, primarily in criminal law, for 25 years in Abitibi.

[6] At about the same time as Justice Girouard's appointment, Mr. Lamontagne, one of the Justice's former clients, was arrested and charged with drug trafficking and gangsterism following an investigation by the Sûreté du Québec. The video rental store operated by Mr. Lamontagne was the subject of a search on October 6, 2010, during which video recordings were seized.

[7] Then, in 2012, the Director of Criminal and Penal Prosecutions informed the Chief Justice of the Superior Court of Québec, François Rolland, that Justice Girouard had been identified by a former drug trafficker as being one of his clients. A video collected during the investigation captured an interaction between Mr. Lamontagne and Justice Girouard dated September 17, 2010, when the latter was still a lawyer. Justice Girouard was then suspected of having purchased an illicit substance. On November 30, 2012, Chief Justice Rolland therefore asked the Council to investigate Justice Girouard's conduct.

[8] The video recording referenced in the previous paragraph shows an interaction between Justice Girouard and Mr. Lamontagne. There is no sound. As described by the first Inquiry Committee at page 21 of its report, this is what can be observed:

Time of the recording	**Description**
12:26:35	Mr. Lamontagne sits alone at his desk. He takes a "Post-it" self-stick note from a pad. The self-stick note seems to be of medium size. Mr. Lamontagne places the self-stick note in front of him on the desk.
12:26:48 to 12:26:57	Mr. Lamontagne takes a small object from the right pocket of his trousers and places it on the "Post-it" self-stick note that he had already placed on his desk.
12:26:58 to 12:27:06	Mr. Lamontagne rolls the small object (three or four times) inside the "Post-it" self-stick note and folds its two ends.
12:27:07 to 12:27:12	Mr. Lamontagne takes the small object rolled inside the "Post-it" self-stick note and places it in the right pocket of his trousers.
12:37:02 to 12:37:59	A woman enters Mr. Lamontagne's office. She files a document in a cabinet behind Mr. Lamontagne. They have a discussion.

	She walks out of the surveillance camera's field of view. She returns, takes a few papers, and then leaves the office. During this time, Mr. Lamontagne remains seated at his desk.
13:01:56	Mr. Girouard enters Mr. Lamontagne's office.
13:01:57 to 13:02:09	Mr. Girouard searches in the left pocket of his jacket and takes out dollar bills that he immediately slips under Mr. Lamontagne's desk pad. He also holds in his hands a piece of paper that he places on Mr. Lamontagne's desk.
13:02:01 to 13:02:08	Mr. Lamontagne searches in the right pocket of his trousers and takes out an object that he hides in his hand.
13:02:08 to 13:02:09	Mr. Lamontagne, hiding the object in his hand, places his hand on the desk and slides his hand toward Mr. Girouard. Mr. Girouard slides his hand forward in the same manner and receives the object from Mr. Lamontagne.
13:02:10	Mr. Lamontagne no longer has the object in his hand.
13:02:11 to 13:02:14	Mr. Lamontagne takes the money that Mr. Girouard had slipped under the desk pad.

[9] When the request for an inquiry was made, the late Chief Justice Blanchard was the Chairperson of the Judicial Conduct Committee. Following an initial review of the matter, he asked outside counsel to conduct a confidential inquiry and, subsequently, decided to constitute a review panel. Following the death of the late Chief Justice Blanchard, Chief Justice MacDonald succeeded him as Chairperson of the Judicial Conduct Committee.

[10] A review panel (Panel) was therefore established by the Council in October 2013 to deal with the request for an inquiry and have outside counsel conduct a preliminary inquiry.

Chief Justices Drapeau and Joyal, as well as Justice LeBlanc, were appointed to sit on the Panel. The Review Panel tabled its report on February 6, 2014, in which it recommended that an inquiry committee be constituted.

[11] On June 18, 2014, the Council constituted the first Inquiry Committee to conduct the requested inquiry. Chief Justices Chartier and Crampton and Mr. LeBlanc sat on the first Inquiry Committee.

[12] On March 17, 2015, the first Inquiry Committee issued a detailed notice of allegations. These allegations, as amended, included the following eight charges:

> Count 1: While he was a lawyer, Mr. Girouard allegedly used drugs on a recurring basis.
>
> . . .
>
> Count 2: For a period of three to four years between 1987 and 1992, while he was a lawyer, Mr. Girouard allegedly purchased cocaine from Mr. X for his personal use, namely a total of about 1 kilogram with an approximate value of between $90,000 and $100,000.
>
> . . .
>
> Count 3: On September 17, 2010, while his application for appointment as a judge was pending, and more specifically two weeks before his appointment on or about September 30, 2010, Mr. Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.
>
> . . .
>
> Count 4: In the early 1990s, while he was a lawyer, Mr. Girouard allegedly exchanged professional services provided to Mr. X worth about $10,000, in relation to a case before the predecessor of the Régie des alcools, des courses et des jeux, for cocaine for his personal use.

> . . .
>
> Count 5: While he was a lawyer, Mr. Girouard was allegedly under the influence of an organization involved in organized crime, since he allegedly set up a mini greenhouse for cannabis plants in the basement of his home with the help of two members of that organization.
>
> . . .
>
> Count 6: On January 25, 2008, Mr. Girouard signed the Personal History Form used by the Office of the Commissioner for Federal Judicial Affairs and failed to disclose the information included in this Notice of Allegations in answer to the following question: "Is there anything in your past or present which could reflect negatively on yourself or the judiciary, and which should be disclosed?".
>
> . . .
>
> Count 7: On 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.
>
> . . .
>
> Count 8: On or about January 11, 2013 and on or about August 14, 2013, Justice Girouard made unbecoming comments that discredited certain officers of the court (agents of the Crown, lawyers and police officers) by insinuating that they had acted together to encourage false statements against him as retaliation.

[13] Before the Inquiry Committee, Justice Girouard testified that the video depicts him paying Mr. Lamontagne for previously viewed movies. He also testified that the purpose of his visit was to discuss a tax matter for which he had been retained and which concerned Mr. Lamontagne. With regard to the "Post-it", Justice Girouard testified that it contained a note on which Mr. Lamontagne had written the amount he was prepared to accept to settle the tax matter.

[14] On November 18, 2015, the first Inquiry Committee issued its report. The majority of the members rejected all allegations against Justice Girouard, but nonetheless identified six contradictions, inconsistencies and implausibilities in Justice Girouard's testimony. This led them to conclude that Justice Girouard's testimony regarding the transaction captured on video was logically incoherent. The majority was of the view that Justice Girouard had deliberately and intentionally attempted to conceal the truth. Indeed, the majority determined that Justice Girouard's conduct was so manifestly destructive of the concept of integrity that public confidence was sufficiently undermined to render him incapable of executing his judicial office. The majority therefore recommended his removal from office.

[15] For his part, Chief Justice Chartier wrote dissenting reasons in which he did not recommend that Justice Girouard be removed from office. Although he stated that he agreed with much of the majority's analysis, his dissent focused mainly on the assessment of the evidence surrounding Justice Girouard's testimony and on the application of the law to the facts. Chief Justice Chartier opined, *inter alia*, that the inconsistencies identified by the majority in Justice Girouard's testimony were predictable, since they were of the kind that can be expected given the circumstances surrounding the inquiry and in a testimony that lasted five days. As for the content of the video recording, while Chief Justice Chartier certainly characterized it as being "shady", he was of the view that in order to conclude that Justice Girouard deliberately attempted to mislead the first Inquiry Committee or that he lied during the process, there needed to be more than a simple credibility assessment. According to Chief Justice Chartier, there needed to be evidence that was independent of Justice Girouard's testimony to confirm that what he had stated was not true. Chief Justice Chartier also concluded that the first Inquiry Committee could not

impose a consequence on Justice Girouard for his misconduct during the inquiry, as that was not part of the Notice of Allegations.

[16] Subsequently, the Council reviewed the recommendation of the first Inquiry Committee and, on April 20, 2016, filed its report to the Minister. In its report, the Council unanimously rejected the recommendation for removal made by the first Inquiry Committee and recommended to the Minister that Justice Girouard not be removed. The Council stated that it did not consider the conclusion of the majority of the first Inquiry Committee that Justice Girouard attempted to mislead the Committee by concealing the truth. The Council was of the view that Justice Girouard 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" (Canadian Judicial Council, *Report to the Minister of Justice* (April 20, 2016) at para 42).

[17] On June 14, 2016, in a joint letter, the Ministers requested a second inquiry "be held into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office".

[18] Following that request, the Council formed the second Inquiry Committee. Chief Justices Drapeau and Joyal, Associate Chief Justice Rivoalen, Bâtonnier Synnott and Mr. Veilleux sat on that committee.

[19] Before this second Inquiry Committee, Justice Girouard brought numerous preliminary motions and filed an application for a stay of proceedings and the dismissal of the second inquiry. The second Inquiry Committee dismissed all of the judge's applications during the February 22, 2017 hearing. Reasons were issued in a decision dated April 5, 2017.

[20] Justice Girouard brought, before the Federal Court, 20 applications for judicial review of the decision on the preliminary motions. He also filed an interlocutory application to suspend the inquiry process.

[21] On May 4, 2017, the Federal Court dismissed the application to stay the second Inquiry Committee's investigation and stayed the proceedings with regard to the 20 applications for judicial review.

[22] The Notice of Allegations issued by the Council for the second inquiry, as amended, included the following four allegations against Justice Girouard:

> **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;

Second Allegation

Judge Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason his misconduct and his failure in the due execution of the office of judge (ss. 65(2)(b) and (c) of the *Judges Act*), by falsely stating before the First Committee that:

> a) he never used drugs;
>
> b) he never obtained drugs;

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!"

Inquiry Committee concerning the Honourable Michel Girouard, *Report of the Inquiry Committee to the Canadian Judicial Council* (November 6, 2017) at para 1 [*Report of the Second Inquiry Committee*].

[23] In his testimony before the second Inquiry Committee, Justice Girouard attempted to explain once again the transaction captured on video. On November 6, 2017, the second Inquiry Committee filed its report in which it confirmed the contradictions, inconsistencies and implausibilities identified by the majority of the first Inquiry Committee. The second Inquiry Committee concluded that the first, third and fourth allegations had been established on a balance of probabilities and that Justice Girouard should be removed from office. As for the second allegation, it had not been established.

[24] On December 5, 2017, Justice Girouard provided his written submissions to the second panel of the Council. On February 20, 2018, the Council submitted its second report to the Minister, in which it recommended that Justice Girouard be removed from office. The Council only considered the first allegation and, after concluding that it had been established, determined that the judge's integrity had been fatally compromised, that public confidence in the judiciary had been undermined, and that Justice Girouard had become incapacitated or disabled from the due execution of his office of judge. Three members of the second panel of the Council, Chief Justices Smith and Bell and Associate Chief Justice O'Neil, wrote a dissenting opinion based on the Council's failure to translate into English all the transcripts of the testimonies before the first and second Inquiry Committees.

B. *History of the case*

[25] The conduct of this case was not simple. A great deal of work was done by the parties and Justice Noël, the case management judge, to ensure the progress of the case so that it could be heard on the merits. Indeed, Justice Girouard brought 24 separate applications for judicial

review before this Court to review the decisions of the second Inquiry Committee, the Council and the Minister. As part of the preliminary proceedings, this Court refused to allow an application by Justice Girouard to stay this judicial review (*Girouard v Canada (Attorney General)*, 2017 FC 449).

[26] Following a number of case management conferences, some of the 24 applications for judicial review were set aside and others were consolidated by order dated May 3, 2018. My judgment disposes of all the remaining applications for judicial review.

[27] Delays were also incurred following the Council's refusal to produce its record. Before this Court, on May 24, 2018, the Council filed motions to strike based on its claim that the Federal Court does not have jurisdiction to review a decision rendered by the Council. By judgment rendered on August 29, 2018, Justice Noël dismissed those motions and denied the Council's application to stay this judicial review (*Girouard v Canada (Attorney General)*, 2018 FC 865 [*Girouard* (2018)]). On May 16, 2019, an appeal to the Federal Court of Appeal was also dismissed (*Canadian Judicial Council v Girouard*, 2019 FCA 148). An application for leave to appeal to the Supreme Court of Canada is currently pending.

[28] Then, a series of appearances and motions before Justice Noël was required to resolve the content of the record and determine which documents are covered by privilege. A judgment rendered by Justice Noël, dated November 26, 2018, which dealt with these issues, was appealed by Justice Girouard (see *Girouard v Canada (Attorney General)*, 2018 FC 1184). The hearing of

the appeal before the Federal Court of Appeal was heard on September 30, 2019 (Docket A-394-18), and the decision is currently under reserve.

[29] On March 8, 2019, Justice Girouard filed his memorandum and his application record on the merits in this matter. They consist of 44 public volumes comprising 14,851 pages, in addition to a confidential volume.

[30] A notice of motion was filed by the Council on March 18, 2019, for an order under rule 109(1) of the *Federal Courts Rules*, SOR/98-106 authorizing it to participate in the proceeding as an intervener. The motion was granted in part by judgment of Justice Noël dated April 9, 2019 (see *Girouard v Canada (Attorney General)*, 2019 FC 434 [*Girouard* (2019)]). More specifically, the Council was granted permission to intervene only on topics related to the mission and functioning of the Council as well as the procedure followed for inquiries conducted under section 63 of the *Judges Act*, RSC 1985, c J-1 [the *Act*], including the application of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 [2015 *By-laws*] and the *Handbook of Practice and Procedure of CJC Inquiry Committees* [*the Handbook*]. The Council's memorandum of fact and law and record were filed on April 16, 2019, which consist of a single volume comprising 303 pages.

[31] On April 30, 2019, the Attorney General of Canada [the AGC] filed his memorandum of fact and law and record, which consist of ten volumes comprising 2,081 pages.

[32] On May 15, 2019, the applicant filed his reply, which consists of five volumes comprising 869 pages.

[33] Finally, on May 22, 2019, the first day of the hearing, the AGC filed his ten-page surreply.

[34] The Attorney General of Quebec did not file a record or make any submissions.

[35] The hearing was held on May 22 and 23, 2019, in Montréal. During the hearing, the parties filed compendiums and excerpts from statutes and the case law.

[36] A transcript of the hearing was made available on June 5, 2019.

C. *Background*

[37] Before proceeding to the analysis of the issues raised by Justice Girouard, it is important to describe the context in which these issues arise. I will thus first discuss the importance of judicial independence and then summarize the disciplinary process provided for by the *Act*.

(1) The importance of judicial independence

[38] The separation of powers among the three branches of government—the legislature, the executive and the judiciary—is one of the defining features of the Canadian Constitution (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, at para 10, 140 DLR (4th) 193). It follows from this separation that no government, stakeholder group,

individual or even another judge can interfere with the way in which a judge makes his or her decision (*Beauregard v Canada*, [1986] 2 SCR 56, at p 69, 30 DLR (4th) 481 [*Beauregard*]).

[39] A judge must be able to properly exercise his or her functions and be able to render a decision without fear of reprisal. The principle of judicial independence is one of the main reasons why a judge holds office during good behaviour. The public must have confidence that all decisions are impartial and objective; otherwise, the principle of the rule of law would be eroded.

[40] In *Conférence des juges de paix magistrats du Québec v Quebec (Attorney General*), 2016 SCC 39, the Supreme Court of Canada described three sources of the principle of judicial independence in Canada:

1. The *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*], which provides that the Constitution is "similar in Principle to that of the United Kingdom" (*Beauregard* at p 72);

2. Subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Part 1 of *the Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [*Charter*], which guarantees the accused's right to a fair trial by an impartial tribunal (*Valente v The Queen*, [1985] 2 SCR 673, at pp 685–89, 24 DLR (4th) 161 [*Valente*]); and

3. An unwritten constitutional principle (*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 Islan*d, [1997] 3 SCR 3, at paras 83-109, 150 DLR (4th) 577).

[41] In addressing this principle, the Supreme Court of Canada explained in *Valente* that judicial independence is essential to the capacity to do justice in a particular case and to public confidence in the administration of justice. It follows that, without this confidence, the system cannot command the respect and acceptance that are essential to its effective operation. The public must therefore have confidence not only in the judicial institution, but also in its main actors, the judges.

[42] For a judge, however, judicial independence is a double-edged sword. Indeed, in *Moreau-Bérubé v New*-Brunswick *(Judicial Council)*, 2002 SCC 11, at para 46 [*Moreau-Bérubé*], the Supreme Court of Canada explained the two branches of the integrity of the judiciary as follows:

> The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien*, *supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente*, supra.

[43] Thus, the security of tenure of judges is such that, while they are protected from external actors, they must also maintain high standards of behaviour so as to ensure the public's confidence in them and the judiciary as a whole. In the words of Philip B. Kurland, the

provisions for securing the independence of the judiciary were "not created for the benefit of the judges, but for the benefit of the judged" (*Gratton v Canadian Judicial Council*, [1994] 2 FC 769, at p 11, 115 DLR (4th) 81 [*Gratton*], citing Philip B. Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History" (1969) 36 U Chicago L Rev 665 at p 698, as cited by Irving R. Kaufman, "Chilling Judicial Independence" (1979) 88 Yale LJ 681 at p 690). As noted by the Supreme Court of Canada in *Moreau-Bérubé* at paragraph 59, citing *Therrien (Re)*, 2001 SCC 35 at para 111 [*Therrien*], litigants are therefore able to require

> virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

[44] It is therefore important that a process be put in place to launch an inquiry into any conduct of an individual judge that is inappropriate and may undermine public confidence in the judicial system.

[45] In the early 1970s, the *Act* was amended to create the Council. The Council's mission is to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts. The Council is responsible for, among other things, dealing with and investigating complaints filed against superior court judges and, where applicable, submitting a report to the Minister on the appropriate sanction.

[46] Accordingly, Justice Noël's explanation in his decision regarding the Council's intervention in *Girouard* (2019) at paragraph 26 includes the following point:

> I acknowledge at the outset that the [Council] is a special body with a special purpose, and that it is a group composed of chief justices and associate chief justices and is chaired by the Chief Justice of Canada. This in itself gives the [Council] a distinctive and notable status. The [Council], both collectively and through each of its members, has unique experience. When investigating the conduct of judges in response to a complaint, it has the confidence of those who are under investigation and the public. It also has an extraordinary knowledge and understanding of such matters.

(2) Description of the disciplinary process

(a) *The Act*

[47] Part II of the *Act* is entitled "Canadian Judicial Council". The *Act* provides that the Council may "investigate any complaint or allegation made in respect of a judge of a superior court" (*Act*, s 63(2)). Under subsection 63(1), the Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office, if the judge in respect of whom an inquiry or investigation has been conducted has become incapacitated or disabled from the due execution of the office of judge, notably by reason of having been found guilty of misconduct. Moreover, subsection 63(3) of the *Act* provides that the Council may constitute an inquiry committee comprising one or more of its members along with such members of the bar as may be designated by the Minister.

[48] The relevant excerpts from the *Act* read as follows:

***Judges Act*, RSC 1985, c J-1**	***Loi sur les juges*, LRC 1985, ch J-1**
Inquiries concerning Judges	**Enquêtes sur les juges**
Inquiries	**Enquêtes obligatoires**
63 (1) The Council shall, at the request of the Minister or the attorney general of a province,	**63 (1)** Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général

commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)a) à d).

Investigations

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

Enquêtes facultatives

(2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.

Inquiry Committee

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

Constitution d'un comité d'enquête

(3) Le Conseil peut constituer un comité d'enquête formé d'un ou plusieurs de ses membres, auxquels le ministre peut adjoindre des avocats ayant été membres du barreau d'une province pendant au moins dix ans.

Powers of Council or Inquiry Committee

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

Pouvoirs d'enquête

(4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :

a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment — ou de l'affirmation solennelle dans les cas où elle est autorisée en matière civile — et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

[…]

[…]

Report and Recommendations

Rapports et recommandations

Report of Council	**Rapport du Conseil**
65 (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.	**65 (1)** À l’issue de l’enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.
Recommendation to Minister	**Recommandation au ministre**
(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of	**(2)** Le Conseil peut, dans son rapport, recommander la révocation s’il est d’avis que le juge en cause est inapte à remplir utilement ses fonctions pour l’un ou l’autre des motifs suivants :
(a) age or infirmity,	**a)** âge ou invalidité;
(b) having been guilty of misconduct,	**b)** manquement à l’honneur et à la dignité;
(c) having failed in the due execution of that office, or	**c)** manquement aux devoirs de sa charge;
(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,	**d)** situation d’incompatibilité, qu’elle soit imputable au juge ou à toute autre cause.

(b) *The 2015 By-laws*

[49] The 2015 *By-laws* stipulate that when the Chairperson or Vice-Chairperson of the Judicial Conduct Committee receives a complaint or allegation made in respect of a judge of a superior court, the Chairperson or Vice-Chairperson may establish a review panel if they determine that a complaint or allegation might, on its face, be serious enough to warrant the removal of the judge. The review panel may, in turn, constitute an inquiry committee if it determines that the matter might be serious enough to warrant the removal of the judge (2015 *By-laws*, s 2(1)). Under section 7 of the 2015 *By-laws*, the inquiry committee must conduct its inquiry or investigation in accordance with the principle of fairness. Section 8 then provides that “[t]he Inquiry Committee must submit a report to the Council setting out its findings and its

conclusions about whether to recommend the removal of the judge from office". The four key players of the disciplinary process are therefore the Judicial Conduct Committee's Chairperson or Vice-Chairperson, the review panel, the inquiry committee and the Council.

[50] In accordance with subsection 9(1) of the 2015 *By-laws*, the judge being investigated may make written submissions to the Council regarding the inquiry committee's report, within 30 days after the day on which the inquiry committee's report is received. If the Council is of the opinion that the inquiry committee's report requires clarification or that a supplementary inquiry or investigation is necessary, the Council may "refer all or part of the matter back to the Inquiry Committee with directions" (2015 *By-laws*, s 12). Finally, the Council considers the inquiry committee's report and the judge's written submissions and presents its report to the Minister (2015 *By-laws*, s 13).

[51] The relevant excerpts from the 2015 *By-laws* read as follows:

***Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203**	***Règlement administratif du Conseil canadien de la magistrature sur les enquêtes, (2015)*, DORS/2015-203**
[…]	**[…]**
Establishment and Powers of a Judicial Conduct Review Panel	**Constitution et pouvoirs du comité d'examen de la conduite judiciaire**
Establishment of Judicial Conduct Review Panel	**Constitution du comité d'examen de la conduite judiciaire**
2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be	**2 (1)** Le président ou le vice-président du comité sur la conduite des juges constitué par le Conseil afin d'examiner les plaintes ou accusations relatives à des juges de juridiction supérieure peut, s'il décide qu'à première vue une plainte ou une accusation pourrait s'avérer

serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

suffisamment grave pour justifier la révocation d'un juge, constituer un comité d'examen de la conduite judiciaire qui sera chargé de décider s'il y a lieu de constituer un comité d'enquête en vertu du paragraphe 63(3) de la Loi.

[…]

[…]

Legal Counsel and Advisors

Avocats et conseillers

Persons to advise and assist

Conseils et assistance

4 The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry.

4 Le comité d'enquête peut retenir les services d'avocats et d'autres personnes pour le conseiller et le seconder dans le cadre de son enquête.

[…]

[…]

Principle of fairness

Principe de l'équité

7 The Inquiry Committee must conduct its inquiry or investigation in accordance with the principle of fairness.

7 Le comité d'enquête mène l'enquête conformément au principe de l'équité.

Inquiry Committee Report

Rapport du comité d'enquête

Report of findings and conclusions

Rapport du comité d'enquête

8 (1) The Inquiry Committee must submit a report to the Council setting out its findings and its conclusions about whether to recommend the removal of the judge from office.

8 (1) Le comité d'enquête remet au Conseil un rapport dans lequel il consigne les constatations de l'enquête et statue sur l'opportunité de recommander la révocation du juge.

Copy of report and notice to complainant

Rapport remis au juge et avis au plaignant

(2) After the report has been submitted to the Council, its Executive Director must provide a copy to the judge and to any other persons or bodies who had standing in the hearing. He or she must also notify the complainant, if any, when the Inquiry Committee has made the report.

(2) Une fois le rapport remis au Conseil, le directeur exécutif du Conseil en transmet une copie au juge et à toute autre personne ou à tout organisme ayant eu la qualité de comparaître à l'audience, et, le cas échéant, il informe le plaignant que le comité d'enquête a établi son rapport.

Hearing conducted in public

Audience publique

(3) If the hearing was conducted in public, the

(3) Le rapport de toute audience publique est

report must be made available to the public and a copy provided to the complainant, if any.

mis à la disposition du public et une copie en est remise au plaignant.

Judge's Response to Inquiry Committee Report

Réponse du juge au rapport du comité d'enquête

Written submission by judge

9 (1) Within 30 days after the day on which the Inquiry Committee's report is received, the judge may make a written submission to the Council regarding the report.

Observations écrites du juge

9 (1) Le juge peut, dans les trente jours suivant la réception du rapport du comité d'enquête, présenter des observations écrites au Conseil au sujet du rapport.

Extension

(2) On the judge's request, the Council must grant an extension of time for making the submission if it considers that the extension is in the public interest.

Prolongation de délai

(2) Sur demande du juge, le Conseil prolonge ce délai s'il estime qu'il est dans l'intérêt public de le faire.

[…]

[…]

Consideration of Inquiry Committee Report by Council

Examen du rapport du comité d'enquête par le conseil

Consideration of report and written submissions

11 (1) The Council must consider the Inquiry Committee's report and any written submission made by the judge.

Examen du rapport et des observations écrites par le Conseil

11 (1) Le Conseil examine le rapport du comité d'enquête et les observations écrites du juge.

Who must not participate

(2) Persons referred to in subsection 3(4) and members of the Inquiry Committee must not participate in the Council's consideration of the report or in any other deliberations of the Council related to the matter.

Personnes exclues de l'examen

(2) Les personnes visées au paragraphe 3(4) et les membres du comité d'enquête ne peuvent participer à l'examen du rapport par le Conseil ni à toutes autres délibérations du Conseil portant sur l'affaire.

Clarification

12 If the Council is of the opinion that the Inquiry Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry

Éclaircissements

12 S'il estime que le rapport du comité d'enquête exige des éclaircissements ou qu'une enquête complémentaire est nécessaire, le Conseil peut renvoyer tout ou partie de l'affaire au comité d'enquête en lui

Committee with directions.	communiquant des directives.
Council Report	**Rapport du conseil**
Report of conclusions to Minister	**Rapport des conclusions du Conseil**
13 The Council's Executive Director must provide the judge with a copy of the report of its conclusions that the Council presented to the Minister in accordance with section 65 of the Act.	**13** Le directeur exécutif du Conseil remet au juge une copie du rapport des conclusions du Conseil présenté au ministre conformément à l'article 65 de la Loi.

(c) *The respective responsibilities of the inquiry committee and the Council*

[52] The *Act* provides that the Council may conduct inquiries or investigations or decide to constitute an inquiry committee to conduct inquiries into complaints or allegations. Once an inquiry committee has been established, it has the power to hear witnesses and to "engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry" (2015 *By-laws*, s 4).

[53] Following its inquiry, the inquiry committee submits its report to the Council. The 2015 *By-laws* provide that the Council "must consider the Inquiry Committee's report and any written submissions made by the judge" (2015 *By-laws*, s 11(1)).

[54] Under the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2002-371, repealed, SOR/2015-203, s 15 [2002 *By-laws*], the judge under investigation could, upon request, make an oral statement before the Council. Under the 2002 *By-laws*, the Council had also established a policy stating that "[t]he review by the Council is based on the record and report of the Inquiry" [emphasis added]. However, these aspects of the procedure

were not included in the new 2015 *By-laws* or the *Handbook* in effect during the second inquiry in the present case.

[55] Under the 2015 *By-laws*, it is the inquiry committee that investigates the complaint or allegation, despite the broad language of the *Act*, according to which inquiries or investigations should be conducted by the Council or an inquiry committee. Under both the 2015 *By-laws* and the *Handbook*, the inquiry committee undertakes this task.

[56] After the inquiry committee has completed its report and submitted it to the Council, the Council reviews the report and, if it is of the opinion that clarification or supplementary inquiry or investigation is necessary, it may "refer all or part of the matter back to the Inquiry Committee with directions" (2015 *By-laws*, s 12). The Council is not required to repeat the inquiry committee's work or to act as investigator and review all of the evidence. If it were, the process would be unnecessarily long and complex.

[57] However, the Council is the final decision-maker when it comes to the recommendation to the Minister. It therefore has to study the inquiry committee's report and the impugned judge's submissions to determine the appropriate recommendation. To do so, the Council generally accepts the findings of fact made in the inquiry committee's report, but applies its own judgment to determine the recommended penalty. This interpretation is consistent with the interpretation in the Council's report to the Minister in *Matlow* (Canadian Judicial Council, *Majority Reasons of the Canadian Judicial Council in the Matter of an Inquiry into the Conduct of the Honourable P.*

Theodore Matlow (December 3, 2008) [*Matlow*]). It is important to summarize and adopt some of the principles set out by the Council therein:

- The Council's role "is to make its own report and recommendation" (*Matlow* at para 48);
- The Council is not an appellate tribunal from the inquiry committee. The inquiry committee is charged with hearing evidence, finding facts and coming to its own conclusions (*Matlow* at para 52);
- The Council cannot interfere with factual findings or inferences made by an inquiry committee without good reason. If the Council disagrees with the inquiry committee's factual findings or inferences, it must explain why (*Matlow* at para 53); and
- The Council may decide which sanctions to impose (*Matlow* at para 54).

(d) *The inquisitorial role and the truth-seeking process*

[58] The Council plays an inquisitorial role in the process of removing a judge. It acts as a bridge between the principle of judicial independence and the governor general's power to remove a judge.

[59] The Council and the courts have dealt with the Council's function on many occasions. It has been established that the Council is not a forum before which two opponents appear for a final verdict on the penalties to be imposed on a judge. Two previous inquiry committees have had the following to say in this regard:

> [An inquiry committee] does not adjudicate disputes between parties and does not render legally enforceable decisions; its purpose is to conduct an inquiry and report to the Council.
>
> Inquiry Committee Established by the Canadian Judicial Council to Conduct a Public Inquiry Concerning Mr. Justice Robert Flahiff, *Decision of Inquiry Committee on Preliminary Motions by Mr. Justice Robert Flahiff* (April 9, 1999) at p 10.

And:

> The Inquiry Committee has no power to impose penalties of any kind. It cannot establish civil liability or criminal guilt on the part of the judge. The same goes for the Council after receiving the Committee's report. Thus, whatever the outcome of the process, it is certain that it does not expose the judge who is the subject of the inquiry to penalties of a criminal nature.
>
> Inquiry Committee of the Canadian Judicial Council Regarding the Conduct of the Honourable Michel Girouard, S.C.J., *Reasons for Decisions on Preliminary Motions* (April 5, 2017) at para 106.

[60] The Federal Court has also noted that "[s]ections 63 and 65 of the *Judges Act* do not confer an adjudicative function on the Council or its committees" (*Taylor v Canada (Attorney General)*, 2001 FCT 1247 at para 49, aff'd 2003 FCA 55). This excerpt was quoted by the Federal Court in *Douglas v Canada (Attorney General)*, 2014 FC 299 at para 117, where the Court provided the following clarification:

> In this instance, the Inquiry Committee stressed in its May 15, 2012 ruling that its purpose and function were fundamentally different from those of a trial court, and that a judge facing a conduct inquiry is not entitled to, and cannot expect the same procedural safeguards as a litigant in a trial court. The process is not that of an adversarial judicial proceeding but inquisitorial in nature, the Committee found. This approach appears to have been consistently taken by each of the Inquiry Committees since the CJC was established. It is also consistent with that stated by the Court in *Taylor v Canada (Attorney General)*, [2002] 3 FC 91, at paragraph 49: "[…] Sections 63 and 65 of the *Judges Act* do not confer an adjudicative function on the Council or its committees."

[61] Similarly, the Federal Court gave this explanation in *Gratton* at page 31:

> It is true that a council can cause a committee to carry out an inquiry as to whether a judge should be removed, but ultimately all that the Council can do is to "recommend" to the Minister of Justice that the judge be removed from office. The power to recommend is not the power to make a binding decision. [Footnote omitted].

[62] Because of the Council's inquisitorial nature, its procedure is not designed to resolve a conflict between two parties by declaring a single winner. Its goal is simply to seek the truth. Counsel for Justice Girouard recognize this principle in their memorandum, at paragraph 4, when they state that [TRANSLATION] "in principle, the goal of an inquiry should be the search for the truth".

[63] The Supreme Court of Canada has ruled on the nature of the Council's mandate on two occasions. In *Therrien* at paragraph 103, citing *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 at para 89, 130 DLR (4th) 1 [*Ruffo*], the Supreme Court noted in the following excerpt that the dispute is not adversarial in nature:

> My comments in *Ruffo*, *supra*, regarding the nature of the mandate assigned to the committee of inquiry provide some insight that is useful for disposing of this question. Thus, at paras. 72-74, I said:
>
>> 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.
>>
>> 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 *CJA* confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. <u>Any idea of prosecution is thus structurally</u>

> 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.
>
> Moreover, it is for this purpose and in order to conduct the inquiry for which it is responsible that the Conseil may retain the services of an advocate, as provided by s. 281 *CJA*.

This passage clearly shows that the committee's purpose is not to act as a judge or even as a decision-maker responsible for settling a dispute; on the contrary, it is to gather the facts and evidence in order, ultimately, to make a recommendation to the Conseil de la magistrature. It also illustrates the intention of avoiding the creation of an adversarial atmosphere between two opponents each seeking to prevail. [Emphasis added; some emphasis in original omitted].

[64] Even though in *Ruffo*, the Supreme Court of Canada was interpreting the provincial disciplinary procedure under the *Courts of Justice Act*, RSQ, c T-16, in my view, the same principles apply to the case at bar.

[65] It is therefore clear that the Council's role is to give the Minister a recommendation, and not to hand down a final judgment on the issue of sanctions.

III. ISSUES

[66] The issues are the following:

1. Was procedural fairness breached, and is the Minister's request for an inquiry valid?

2. Did the second Inquiry Committee and the Council reverse the burden of proof?

3. Were language rights violated?

4. Are the provisions of the *Act* creating the Council *ultra vires* Parliament's legislative authority?

5. Was the recommendation to remove the judge from office unreasonable?

IV. ANALYSIS

A. *Applicable standard of review*

(1) Positions of the parties

[67] This application for judicial review raises issues that engage the Constitution, the interpretation of the Council's enabling statute, and procedural fairness. According to Justice Girouard, the standard of review that applies to these three categories is correctness.

[68] The AGC accepts that the applicable standard of review for constitutional questions is correctness. However, the AGC submits that the findings of fact and questions of law concerning the interpretation of the *Act* and the 2015 *By-laws* should be reviewed according to the standard of reasonableness. Regarding the issues of procedural fairness, the AGC believes that it is up to the Court to determine whether the procedure that was followed was fair.

(2) Analysis

[69] It is trite law that the applicable standard of review for constitutional questions is correctness (see *Cosgrove v Canadian Judicial Council*, 2007 FCA 103 at para 25, leave to

appeal to SCC refused, 32032 (November 29, 2007) [*Cosgrove*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58 [*Dunsmuir*]).

[70] The standard of reasonableness applies to issues involving the Council's interpretation of its enabling statute and the 2015 *By-laws*. This principle was recently confirmed by the Supreme Court of Canada in *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 46 [*Groia*], in which the Supreme Court provided the following clarification:

> [D]ecisions of specialized administrative bodies "interpreting [their] own statute or statutes closely connected to [their] function" are entitled to deference from courts, and are thus presumptively reviewed for reasonableness.

[71] As noted by Justice Noël, the Council is "a special body with a special purpose" (*Girouard* (2019) at para 26); its decisions are therefore entitled to deference from this Court.

[72] Regarding the issues of procedural fairness, both parties cited Canada (*Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], where Justice Binnie's explanation at paragraph 43 reads as follows:

> Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> > (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no

> substantial wrong or miscarriage of justice (*Pal*, at para. 9). This is confirmed by s. 18.1(5). It may have been thought that the Federal Court, being a statutory court, required a specific grant of power to "make an order validating the decision" (s. 18.1(5)) where appropriate.

[73] In this case, therefore, the applicable standard of review for issues of procedural fairness is that of correctness, but if the procedural error is "purely technical and occasions no substantial wrong or miscarriage of justice", the Court will not grant a remedy (*Khosa* at para 43, citing *Pal v Canada (Minister of Employment and Immigration)* (1993), 70 FTR 289 at p 8, 24 Admin LR (2d) 68 (FC)).

B. *Procedural fairness and the Minister's decision*

[74] Justice Girouard submits that the second Inquiry Committee did not respect the procedural rules established by the Federal Court of Appeal in *Cosgrove*. In that decision, the Federal Court developed five rules that ensure procedural fairness. According to Justice Girouard, the essence of these rules can be summarized as follows:

1. Rule 1: The judge has the right to be informed of the complainant's allegations and to respond to them;

2. Rule 2: The inquiry is entrusted in the first instance to a group of judges and lawyers, and their recommendation is reviewed independently by a larger group;

3. Rule 3: The inquiry is guided by the participation of independent counsel;

4. Rule 4: The attorney general is not required to present or prosecute the case against the judge, and has no formal role in the conduct of the inquiry; and

5. Rule 5: The outcome of the proceedings is a report to the Minister. The Minister, as the Attorney General of Canada, is obliged and presumed to consider that question in good faith, objectively, independently and in the public interest.

[75] Justice Girouard alleges that all of these rules were violated in the matter at bar. He makes the following arguments:

1. Regarding rule 1, Justice Girouard was unable to appear before the second panel of the Council to address the arguments raised when the second panel examined the report submitted by the second Inquiry Committee, which infringes the *audi alteram partem* rule.

2. Regarding rule 2, the principle of the separation of functions was violated many times, meaning that there was no independent review. For example, (a) Chief Justices Drapeau and Joyal sat as members of the Review Panel following the first request for an inquiry and on the second Inquiry Committee; (b) Chief Justice MacDonald sat as chairperson of the Judicial Conduct Committee following the creation of the Review Panel in response to the first request for an inquiry and also acted as chairperson of the second panel of the Council; (c) the Executive Director of the Council participated in the process at several stages; and (d) 13 members of the first panel of the Council sat as members of the second panel of the Council.

3. Regarding rule 3, the function of independent counsel has been abolished, and there is no equivalent now.

4. Regarding rules 4 and 5, in submitting her request for an inquiry, the Minister was seeking to have the decision of the first panel of the Council set aside and to dictate the approach of the second inquiry. The request was motivated by political considerations and was therefore not made in the public interest.

[76] Justice Girouard is also challenging the second Inquiry Committee's decision, specifically the refusal to grant him the opportunity to refer to a compendium during his cross-examination. In his opinion, this decision violated the principles of natural justice.

[77] I will deal with each of these items in the following paragraphs.

(1) Was Justice Girouard entitled to appear before the second panel of the Council or to be informed of the minority's concerns before the recommendation was made to the Minister?

[78] Justice Girouard argues that he had the right to hear the Council's concerns and that he should have been given an opportunity to address them before the second panel of the Council made its decision. He submits that this follows from the *audi alteram partem* rule, and consequently, procedural fairness was violated, as he was not able to appear before the Council. As a result, the Council could not share its concerns with him, including those regarding the dissenting opinion, and Justice Girouard did not have an opportunity to address them.

[79] I reject this allegation. The Council may establish the procedure that it deems suitable for dealing with a complaint, as long as the procedure is reasonable and complies with the parameters established in the *Act*. As confirmed by the case law, tribunals are masters of their

own procedure and "[i]n the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice" (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at pp 568–69, 57 DLR (4th) 663).

[80] The inquiry was conducted by the second Inquiry Committee, not the Council. The second Inquiry Committee was therefore responsible for hearing the witnesses, including Justice Girouard. In this regard, it is worth noting that the second Inquiry Committee informed Justice Girouard of the allegations that it would be investigating. In the course of the inquiry, Justice Girouard was granted a full opportunity to present evidence and respond to the allegations against him.

[81] The second Inquiry Committee's report, which contained the Committee's comments and findings to be examined by the Council, was also shared with Justice Girouard. Justice Girouard had an opportunity to address in writing the comments and findings of the second Inquiry Committee before the second panel of the Council. Indeed, he made lengthy written submissions to the Council in response to the report.

[82] As a result, Justice Girouard had an opportunity to understand the allegations against him and address them at each stage of the process. What Justice Girouard is requesting is in effect permission to attend and participate in the Council's deliberations. Procedural fairness and the *audi alteram partem* rule do not go that far.

[83] Regarding the concerns of the minority of the second panel of the Council regarding the violation of Justice Girouard’s language rights, this issue was fully addressed before this Court and, as I will explain later, the dissenting members’ concerns were unfounded. The Council therefore had no obligation to hear Justice Girouard on this issue.

(2) Was the principle of the separation of functions violated?

[84] According to Justice Girouard, the principle of the separation of functions was violated on four occasions, as follows:

1. Chief Justices Drapeau and Joyal were members of the Review Panel and subsequently participated in the second Inquiry Committee;
2. The Chairperson of the Judicial Conduct Committee, Chief Justice MacDonald, allegedly constituted the Review Panel and later chaired the second panel of the Council;
3. The Executive Director of the Council, Mr. Sabourin, participated in several stages of the process; and
4. Thirteen members who sat on the first panel of the Council also sat as members on the second panel of the Council.

[85] I will address each of these concerns in the following paragraphs.

(a) *The participation of Chief Justices Drapeau and Joyal*

[86] According to Justice Girouard, the most egregious violation of the principle of the separation of functions in this case is the participation of Chief Justices Drapeau and Joyal in

the work of the second Inquiry Committee. Both chief justices had previously participated as members of the Review Panel, which dealt with the first request for an inquiry. It was the Review Panel which recommended the first public inquiry into Justice Girouard's conduct.

[87] Justice Girouard submits that the subsequent participation of Chief Justices Drapeau and Joyal as members of the second Inquiry Committee was prohibited by paragraph 3(4)(c) of the 2015 *By-laws* and created a reasonable apprehension of bias. In that regard, Justice Girouard explains that the second Inquiry Committee substantially re-examined the same facts as those that had been studied by the review panel created in response to the first request for an inquiry.

(b) *Paragraph 3(4)(c) of the 2015 By-laws*

[88] The principle of the separation of functions is codified in paragraph 3(4)(c) of the 2015 *By-laws*:

***Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203**	***Règlement administratif du Conseil canadien de la magistrature sur les enquêtes 2015*, DORS/2016-203**
Persons not eligible to be members	**Admissibilité**
3(4) The following persons are not eligible to be members of the Inquiry Committee:	**3(4)** Ne peuvent être membres du comité d'enquête :
[…]	**[…]**
(c) a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted.	**c)** les membres du comité d'examen de la conduite judiciaire qui ont participé aux délibérations sur l'opportunité de constituer un comité d'enquête.

[89] Since Chief Justices Drapeau and Joyal were both members of the Review Panel, it is clear that they could not be members of the first Inquiry Committee. However, at issue is rather whether members of a first review panel are automatically disqualified from participating in a second inquiry committee, one that is not constituted following the recommendation of a first review panel, but which deals with a later inquiry concerning the same judge.

[90] In considering this matter, the second Inquiry Committee concluded as follows at paragraph 126 of its reasons for decision on the preliminary motions:

> [W]e are of the opinion that 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.

[91] In its report to the Minister, the second panel of the Council also considered the argument submitted by Justice Girouard, namely that the participation of Chief Justices Drapeau and Joyal in the Review Panel for the first request for an inquiry disqualified them from participating in the second Inquiry Committee. The second panel of the Council expressed its agreement with the second Inquiry Committee's decision that the chief justices were not disqualified. Paragraphs 30 to 32 of its report to the Minister read as follows:

> The *By-Law* provides that a person may not sit on an inquiry committee if they participated in the deliberations of the review panel which deliberated on the necessity of constituting <u>that</u> inquiry committee.

> As noted in the Preliminary Ruling, the *by-laws* do not prohibit a member of a review panel from sitting on an inquiry committee relating to matters arising subsequently that are the subject of a fresh and separate allegation of misconduct.
>
> We agree with the Preliminary Ruling. [Emphasis in original].

[92] Justice Girouard alleges that this excerpt establishes that in referring to "that" inquiry committee rather than "an" inquiry committee, as provided for in the 2015 *By-laws*, the second panel of the Council misread the 2015 *By-laws*. Consequently, according to Justice Girouard, the Council misinterpreted paragraph 3(4)(c), which, according to Justice Girouard, stipulates that a member of a review panel cannot participate in any inquiry committee that might be constituted at a later date to examine the conduct of the same judge. As a result, according to Justice Girouard, the Council erred in limiting the scope of the by-laws' provisions to the inquiry committee established following the same review panel. In other words, Justice Girouard alleges that the Council amended the wording by replacing "an Inquiry Committee" with "that Inquiry Committee".

[93] I am not of the view that the Council misinterpreted the 2015 *By-laws*. There is no reading error in the second panel of the Council's reasons, which agreed with the second Inquiry Committee's reasoning that paragraph 3(4)(c) does not apply when a new inquiry is ordered into the conduct of the same judge. The 2015 *By-laws* cover only the inquiry committee tasked by the review panel with investigating the issues identified by the review panel. It does not concern any inquiry committees that might be established at a later date to deal with different issues involving the same judge. In my opinion, the second Inquiry Committee's interpretation, which was adopted by the Council, is reasonable, and even correct. Moreover, I would add that the Council

is entitled to a great deal of deference when it comes to interpreting its own by-laws (see *Dunsmuir* at para 54; *Groia* at para 46).

[94] In the case at bar, the Review Panel examined the request for an inquiry made by the Chief Justice of the Superior Court of Québec, the Honourable François Rolland, regarding the purchase of drugs. The second Inquiry Committee was the result of the Ministers' request for an inquiry into the conduct of Justice Girouard when he testified before the first Inquiry Committee, which occurred after the Review Panel had completed its work. The new inquiry therefore concerned a different request for inquiry from the one examined by Chief Justices Drapeau and Joyal as part of the Panel's work.

[95] In support of his allegation, Justice Girouard cites *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577 [*Régie des permis d'alcool*]. It is true that, in that case, the Supreme Court of Canada recognized that the possibility that an individual could decide to conduct an inquiry and could then participate in the decision-making process "would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases" (*Régie des permis d'alcool* at para 60). However, this is not the case here. The problem identified in *Régie des permis d'alcool* is addressed by paragraph 3(4)(c) of the 2015 *By-laws*, which prohibits members of a review panel from participating in the inquiry committee established following the review panel's recommendation. As explained in the previous paragraphs, Chief Justices Drapeau and Joyal participated in an inquiry committee that dealt with a different complaint from the one assessed by the Review Panel.

(c) *Does the participation of Chief Justices Drapeau and Joyal give rise to a reasonable apprehension of bias?*

(i) The issue

[96] Justice Girouard maintains that, even if the 2015 *By-laws* do not prohibit Chief Justices Drapeau and Joyal from participating in the second Inquiry Committee, the comments contained in the report of the Review Panel, of which both chief justices were also members, reveal their bias against Justice Girouard. As such, according to Justice Girouard, the two chief justices were incapable of being impartial in addressing the request for inquiry submitted by the Ministers.

[97] Justice Girouard argues that, at minimum, there is a reasonable apprehension of bias because a fair-minded and reasonable observer would not believe that Chief Justices Drapeau and Joyal were capable of making a fair decision. According to Justice Girouard, this situation breaches the procedural fairness rule set out in paragraph 2(e) of the *Canadian Bill of Right*s, SC 1960, c 44, which reads as follows:

***Canadian Bill of Rights*, SC 1960, c 44**	***Déclaration canadienne des droits*, SC 1960, c 44**
[…]	**[…]**
2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to	**2.** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la Déclaration canadienne des droits, doit s'interpréter et s'appliquer de manière à ne pas supprimer; restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s’interpréter ni s’applique comme

[…]	**[…]**
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	**e)** privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations.

[98] From the start of the second inquiry, Justice Girouard objected to the inclusion of these two chief justices in the second Inquiry Committee. In its decision on the preliminary motions, the second Inquiry Committee rejected the request that Chief Justices Drapeau and Joyal recuse themselves. At paragraphs 127 and 128 of the reasons for the decision on the preliminary motions, the second Inquiry Committee made the following points with regard to the report of the Review Panel on which Chief Justices Drapeau and Joyal sat:

> [TRANSLATION]
>
> The report of this Review Panel made no findings as to Justice Girouard's credibility, and Chief Justices Drapeau and Joyal obviously cannot have formed an opinion with regard to any conduct subsequent to the filing of this report, and this reality would be clear to any reasonable and informed observer.
>
> Ultimately, we cannot imagine any such observer would have an apprehension of bias owing to the fact that the *Act* and *By-laws* do not exclude members of a review panel whose work focused on separate allegations from sitting on a review panel that is examining new allegations, even if these new allegations concern the same judge.

[99] Justice Girouard raised a similar objection before the second panel of the Council, which concurred with the decision of the second Inquiry Committee.

[100] In my view, the situation is not as simple as the second Inquiry Committee finds it to be. While it is true that the Ministers' request deals with events that occurred after the report of the

Review Panel had been submitted to the Council, the second Inquiry Committee could not completely disregard the factual framework that gave rise to the first inquiry and to the report of the Review Panel. Allow me to explain.

[101] What stands out from the Ministers' request for an inquiry is that Justice Girouard tried to mislead the first Inquiry Committee by concealing the truth. Justice Girouard was found to have failed to cooperate and was not forthright in his testimony. In other words, according to the Ministers and the majority of the first Inquiry Committee, Justice Girouard's testimony regarding the video-recorded exchange between himself and Mr. Lamontagne on September 17, 2010, was not truthful.

[102] However, the explanation provided by Justice Girouard to the first Inquiry Committee with regard to the video-recorded exchange is essentially the same one he had previously given to the outside counsel who had investigated the matter before the Panel was constituted. That explanation was the one the Review Panel, including Chief Justices Drapeau and Joyal, had addressed in its report at paragraphs 25 and 26. The Review Panel's comments regarding Justice Girouard's explanation read as follows:

> [TRANSLATION]
>
> The explanations provided by Justice Girouard to counsel regarding the events of September 17, 2010 are, in the opinion of the Panel's members, very difficult to reconcile with the video images. Without making any definitive determination on the factual debate surrounding the issue, which is not within its purview, the Review Panel is of the view that the recording could lead one to reasonably believe that it captured an illicit transaction between Mr. Girouard and Mr. Lamontagne. A more in-depth examination of this hypothesis and, more generally, of the issue of

> the purchase, production and consumption of illicit substances by Mr. Girouard is needed.
>
> Justice Girouard's explanations with respect to the video images raise doubts as to his credibility. The tenor of these explanations is troubling, given the concerns raised by the police investigators' interpretation, namely, that it was a purchase of an illicit substance. To the extent that it could be proved that Justice Girouard had tried to mislead the Canadian Judicial 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. This calls for an Inquiry Committee to look into the matter.
>
> Canadian Judicial Council, *Report of the Review Panel* (February 6, 2014), Applicant's Record, vol 2 at pp 209-10 [*Report of the Review Panel*].

[103] It appears from these excerpts that the Review Panel, of which Chief Justices Drapeau and Joyal were part, was of the view that:

1. Justice Girouard's explanations were [TRANSLATION] "very difficult to reconcile with the video images";

2. Justice Girouard's explanations of the video images [TRANSLATION] "raise doubts as to his credibility"; and

3. To the extent that, in his response to requests for comments, Justice Girouard attempted to mislead the Council, this could, in itself, amount to serious misconduct.

[104] In view of these statements, the question then becomes whether there is a reasonable apprehension of bias based on the fact that members of the Review Panel, who had expressed these points of view, subsequently sat on the second Inquiry Committee that was to consider

essentially the same explanations in order to determine whether Justice Girouard had attempted to mislead the first Inquiry Committee.

(ii) Case law

[105] The applicable test for determining whether there is a reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty v The National Energy Board*, [1978] 1 SCR 369 at p 394, 68 DLR (3d) 716 (Justice de Grandpré), wherein it states:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

[106] This test was more recently reiterated in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20.

[107] Judicial impartiality is presumed, and the burden is on the party alleging the bias to establish that the judge must be disqualified (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 59 [*Wewaykum*]).

[108] A court's inquiry will depend on the specific facts of each case and be conducted in light of the entire context (*Wewaykum* at para 77).

(iii) Is there a reasonable apprehension of bias?

[109] I acknowledge that certain portions of the report of the Review Panel, particularly those cited above, may be perceived as being problematic. However, upon reviewing them in their context, I am of the view that they do not give rise to a reasonable apprehension of bias. As the Review Panel explains at paragraph 8 of its report, its mandate was to [TRANSLATION] “gather information and to decide, in light of this information, what is to be done, in accordance with the provisions of the *Act*, the *By-laws* and the *Procedures*”. Its mandate was not to decide evidentiary questions.

[110] In its report, after noting that the recording may have captured an illicit transaction, the Review Panel pointed out that it had not sought to make [TRANSLATION] “any definitive determination on the factual debate on the issue, which is not within its purview” (*Report of the Panel* at para 25). Similarly, after stating that the explanations provided to counsel by Justice Girouard [TRANSLATION] “raise doubts as to his credibility”, the Review Panel added that these were only preliminary comments and that an inquiry committee should look into the matter given that “this could in itself, amount to serious misconduct” [emphasis added] (*Report of the Review Panel* at para 26). In addition, it is important not to lose sight of the fact that the Review Panel was dealing with a very different issue than the one dealt with by the second Inquiry Committee. While the first involved an allegation of an illicit drug transaction, the second involved the judge’s conduct before an inquiry committee.

[111] Thus, when considered within the entire context, it appears that the Review Panel was simply raising concerns about an explanation that Justice Girouard had given. These concerns were ones that were later considered and adjudicated by the first Inquiry Committee.

[112] I note that the mandate of the Review Panel is limited to gathering information and determining whether or not to recommend constituting an inquiry committee. Its role is not to make a decision on the merits of the complaint or request for an inquiry.

[113] According to the case law, the fact that a judge may have commented on a matter at another point in the proceedings does not necessarily disqualify the judge from sitting in a later stage of the proceedings in the same matter. One must rather consider whether the judge has demonstrated a predisposition or prejudged the matter.

[114] In *Lac La Ronge Indian Band v Canada*, 2015 FCA 154, the tribunal had decided to bifurcate the claim into two phases: one to examine the issue of validity and the other to consider compensation. In that case, the applicants argued that the observations of one of the tribunal's members during the first phase had given rise to a reasonable apprehension of bias during the subsequent phase. They contended that the member's comments on the issue of compensation, which were included in the reasons given for the determination made in the first phase, showed that he had prejudged the issue to be decided in the second phase. The Federal Court of Appeal opined, at paragraph 43, that here was no reasonable apprehension of bias, and stated as follows:

> The Tribunal expressly recognized that the question of loss was not relevant to the first phase of the proceedings and the issue could not be prejudged. These comments are accurate and indicate that Whalen J. has not already determined the applicants' entitlement to compensation. A reasonable person, one who has read the decision and is aware of the nature of the proceedings, including the bifurcation order, would not conclude that Whalen J. would approach the second phase of the claim other than with a fair and an open mind.

[115] In that case, the Federal Court of Appeal further added that the tribunal's comments on the question of compensation were reasonable and that, to the extent that those observations were relevant, the applicants would have an opportunity to challenge them at the second phase of the proceeding.

[116] The same may be said of the comments of the Review Panel in this case. The comments dealing with the fact that Justice Girouard's explanation was very difficult to reconcile with the video images were of a preliminary nature, made with the knowledge that Justice Girouard would have an opportunity to address the concerns raised. Indeed, the Review Panel was dealing with a preliminary step of the process prior to Justice Girouard's testimony, before any decision on the merits was made. In addition, the comments in question were made in the context of a separate matter. Thus, in my view, the Review Panel's remarks do not give rise to a reasonable apprehension of bias when considered in their context and not in an isolated fashion. There is nothing to suggest that Chief Justices Drapeau and Joyal did not have open minds or would not act in an impartial manner with respect to the allegations contained in the Minister's request dated June 14, 2016.

(d) *Chief Justice MacDonald's role*

[117] Justice Girouard maintains that Chief Justice MacDonald's role in the Council's actions with regard to the two requests for inquiry breached the separation of functions rule. Chief Justice MacDonald, as Chairperson of the Judicial Conduct Committee, established the Review Panel to examine the first request for inquiry and later chaired the deliberations of the Council's second panel.

[118] Upon reading the record, it is apparent that the Review Panel had been established by the late Chief Justice Blanchard prior to his death, and not by Chief Justice MacDonald, who replaced him. In any event, operating on the premise that it was Chief Justice MacDonald who had established the Review Panel, he did not make any determination on the merits of the matter to be determined by the second panel of the Council. He merely decided that the request for inquiry submitted by Chief Justice Rolland, regarding the possibility that Justice Girouard had purchased drugs from a drug trafficker, ought to be studied by a review panel. The issue upon which he had to make a determination as a member of the second panel of the Council was a different one altogether. Thus, I reject Justice Girouard's premise, for essentially the same reasons as those expressed in my analysis of Chief Justices Drapeau and Joyal's participation in the second Inquiry Committee.

(e) *The Executive Director's participation*

[119] Justice Girouard contends that the participation of the Executive Director at every stage of the process amounts to a breach of the separation of functions rule.

[120] I see no merit to this argument. The Executive Director is responsible solely for the administration of the complaints process. His role is limited to receiving the complaint and reviewing it to determine whether the complaint meets the following criteria:

1. It involves one or more federally-appointed judges;

2. It is not clearly irrational; or

3. It is not an obvious abuse of the complaints process.

[121] The Executive Director does not assess any evidence at this stage of the process. If the complaint is well founded in light of these three criteria, it is referred to the Chairperson of the Judicial Conduct Committee. Although the Executive Director does carry out administrative duties at various stages of the complaints process, he or she plays no decision-making role in the inquiry at any of those stages.

(f) *Thirteen members of the Council participated in the first and second panels of the Council*

[122] Justice Girouard asserts that 13 Council members participated in both panels of the Council, namely, the one that dealt with Chief Justice Rolland's request for an inquiry and the one that dealt with the Ministers' request for an inquiry. In Justice Girouard's view, their participation in both panels of the Council amounts to a breach of the separation of functions rule.

[123] In my view, there is no merit to this complaint. There is nothing that would prevent a member of the Council from dealing with more than one request for an inquiry involving the same judge. In fact, given that the *quorum* for Council meetings is 17 members, it would be practically impossible to hold a second meeting with a quorum constituted of different chief justices. It would take several years for a sufficient change in the composition of the Council to occur, in order to have 17 different chief justices in place to make up that *quorum*. In any event, the same aforementioned rationale regarding the distinction between the first and second inquiries suffices to reject this allegation.

(3) Did the removal of the independent counsel function compromise Justice Girouard's rights?

[124] Justice Girouard argues that, on an institutional level, the Council's by-laws infringe the security of tenure of judges, as they provide no guarantee of impartiality. According to Justice Girouard, a breach of procedural fairness arises from the fact that the 2015 *By-laws* do not provide for the appointment of an independent counsel. He notes that this function existed under the 2002 *By-laws*, but that it was not included in the 2015 reforms. In support, Justice Girouard cites the Federal Court of Appeal's decision in *Cosgrove* to argue that the intervention of independent counsel should be part of the rules to ensure procedural fairness.

[125] In my view, the absence of an independent counsel is not problematic in the least. The *Cosgrove* decision dealt with the constitutionality of subsection 63(1) of the *Act* with regard to provincial attorneys generals. In *Cosgrove*, the appellant argued that judicial independence did not permit a provincial attorney general from filing a request for an inquiry with the Council with regard to a federally-appointed judge. In its finding that there was no breach of procedural fairness, the Federal Court of Appeal identified five aspects of the inquiry process that, taken as a whole, show that an inquiry, once initialed, is fair. These factors, which include independent counsel, are summarized above at paragraph [74].

[126] There is nothing in *Cosgrove* to suggest that the presence of an independent counsel was deemed necessary to upholding procedural fairness. The Federal Court of Appeal simply took the view that the presence of such counsel was one factor among others that ensured the procedural fairness of the inquiry.

[127] The issue raised by Justice Girouard was considered and rejected by the second Inquiry Committee. At paragraphs 143 and 144 of its reasons for decision on the preliminary motions, the second Inquiry Committee stated that:

> [TRANSLATION]
>
> [T]he process currently in place bears a certain resemblance to the one established in Quebec pursuant to the *Courts of Justice Act*, which provides at section 281 that the Conseil de la magistrature du Québec may retain the services of counsel to assist the inquiry committee.

And that:

> [T]he Supreme Court of Canada confirmed in *Therrien* that this model, under which presenting counsel acts under the direction of the inquiry committee, raises no reasonable apprehension of bias.

[128] However, Justice Girouard fails to identify any error in the Committee's detailed analysis on this point. In my view, the removal of the independent counsel function from the process implemented in 2015 does not infringe upon the principles of judicial independence, fundamental justice or procedural fairness.

[129] In this case, as in *Therrien*, in the absence of an independent counsel, the second Inquiry Committee availed itself of the option to retain the services of counsel. The counsel retained acted under the direction of the committee, while remaining bound by their obligation to preserve their professional independence (*Code of Ethics of Advocates*, c B-1, r 3.1, s 13). The first guiding principle of the mandate of the counsel retained required that [translation] "the hearing on the merits be part of an inquiry process dedicated to truth-seeking and carried out in accordance with procedural fairness" (Inquiry Committee of the Canadian Judicial Council with respect to the conduct of the Honourable Michel Girouard, J.S.C., *Directions to Counsel*

(March 17, 2017) at para 10). This principle is consistent with the inquisitorial, rather than adversarial, role played by the Inquiry Committee and the Council. Thus, when counsel for the second Inquiry Committee were examining and cross-examining witnesses, they were not acting as prosecutors, but were rather "providing the committee with help and assistance in carrying out the mandate assigned to it by the statute" (*Therrien* at para 103).

[130] Furthermore, there is nothing in this case to suggest that, had independent counsel been appointed, the interests of Justice Girouard would have been better represented. In this regard, it is worth noting that Justice Girouard had access to his own counsel to represent him in this matter.

[131] For all these reasons, I am not of the view that the removal of the independent counsel function infringed on Justice Girouard's procedural fairness rights.

(4) Ministers' request

[132] The second inquiry was undertaken further to the Ministers' request. Subsection 63(1) of the *Act* provides that "[t]he Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d)".

[133] The letter issued by the Ministers requested that an inquiry be held with regard to Justice Girouard. It was received by the Council on June 14, 2016. In that letter, the Ministers

expressed their concern regarding the findings of the majority of the first Inquiry Committee to the effect that Justice Girouard had committed misconduct during the first inquiry.

[134] Thus, the letter requested, "pursuant to subsection 63(1) of the *Judges Act*, that an inquiry be held into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office". Following receipt of the letter, the Council constituted the second Inquiry Committee. On December 23, 2016, under subsections 5(1) and 5(2) of the 2015 *By-laws*, the second Inquiry Committee sent Justice Girouard a notice of allegation containing two allegations detailing the elements that were the subject of the inquiry. The notice of allegation was later amended on May 17, 2017, to include the four allegations that appear in paragraph [22] above.

[135] Only the first allegation is relevant to this application, given that it was this one that the Council concurred with and on which the recommendation to remove Justice Girouard from office was based. That allegation reads as follows:

> Justice Girouard has become incapacitated from the due execution of the office of judge by reason of having been guilty of misconduct and having failed in the due execution of the office of judge (paragraphs 65(2)(b) and (c) of the *Judges Act*) during the inquiry held by the First Committee, particulars of which are as follows: a) Justice Girouard failed to cooperate with transparency and forthrightness in the First Committee's inquiry; b) Justice Girouard failed to testify with transparency and integrity during the First Committee's inquiry; c) Justice Girouard attempted to mislead the First Committee by concealing the truth.

[136] This first allegation was later amended to specify that the misconduct that was the subject of the inquiry was "more fully set out in the findings of the majority reproduced at

paragraphs 223 to 242" of the report of the first Inquiry Committee. Paragraphs 223 to 242 of the report of the first Inquiry Committee document the contradictions, inconsistencies and implausibilities in relation to each important element in the sequence of events captured in the video recording and one aspect of Justice Girouard's testimony.

[137] Justice Girouard explains that the Minister's authority to request an inquiry must be exercised in good faith, objectively, independently and in the public interest. In Justice Girouard's opinion, the Minister's request was made in bad faith, was based on irrelevant factors and dictated which approach the inquiry was to take. Thus, Justice Girouard maintains that the Minister's request is invalid, thus invalidating the entire process that followed. At the hearing, counsel for Justice Girouard indicated that I should not consider the issue relating to the request by the Minister of Justice of Quebec, given that an agreement between the parties had been reached in that regard.

[138] The AGC maintains that the Minister's decision cannot be the subject of an application for judicial review, in particular because the decision lacks the required finality and has not produced any determinative effects on Justice Girouard's rights. The AGC explains that, even if the decision were reviewable, it has already been challenged twice: first before the second Inquiry Committee and later before the Council. On each occasion, Justice Girouard's arguments were rejected.

[139] As I explain in the paragraphs that follow, I am of the view that the Minister's decision is in no way flawed. Accordingly, I see no need to decide whether the decision is reviewable and, for the purposes of my analysis, I will assume that it is.

(a) *Did the Minister act in the public interest?*

[140] In support of his allegation that the Minister's request was made in bad faith, Justice Girouard refers to some briefing notes. The first note, dated April 21, 2016, recommended that the Minister take no action following the Council's first report. The recommendation reads as follows:

> RECOMMENDATION – Accept the recommendations in both cases and develop a very strong Communications Strategy to explain your decision and to talk about your expectations around the ethical behaviour of members the judiciary.

This note was followed by two more briefing notes, one of which is dated May 1, 2016, and contains the following statement:

> Your decision is required on how to respond to the CJC's report recommending against removal of Justice Girouard of the Quebec Superior Court. [redacted]. POLITICAL CONSIDERATIONS – This may negatively impact your relationship with the CJC, but would likely be well received by the Canadian public. – You would have the support of Quebec's Attorney General.

The other briefing note is dated June 3, 2016, and reads as follows:

> POLITICAL CONSIDERATIONS – I have reviewed the joint letter and think it is very good. I recommend you concur [redacted] and with the content of the letter. – The CJC is likely to react very unfavourably, DOJ Comms will work with their counterparts in Quebec on communications products. – I think you have made an

> important and decidedly appropriate decision to proceed in this manner.

[141] In contrast to the first briefing note, one can see that the subsequent notes appear to recommend that the Minister pursue the matter, which explains the receipt of the Ministers' letter dated June 14, 2016, by the Council.

[142] The briefing notes that followed the first one raise "political considerations", but nearly the entire text of these notes has been redacted. It is therefore impossible to know why the recommendation to the Minister changed. According to Justice Girouard, the redactions as well as the references to political considerations allow this Court to infer that the Minister failed to review the matter in good faith, or in an objective and impartial manner.

[143] Based on my reading of the documents, there is nothing to indicate that the Minister acted in bad faith. The notes were written by one or more advisers who merely sought to apprise the Minister of possible options, recommendations and reactions. Moreover, the Minister is presumed to have carried out her duties in accordance with her obligation to exercise her discretion according to established norms, and there is nothing in this case to displace that presumption (see *Cosgrove* at para 51).

[144] The contents of the joint letter explain that the Minister is motivated by "the public's confidence not only in the judicial discipline process, but in the judiciary and justice system as a whole". This joint letter further states that the effect that the Minister's motivations are guided by fairness toward Justice Girouard, who "was entitled to notice regarding these findings before the

Committee issued its report”. As submitted by the AGC, these objectives fall squarely within the provisions of the *Act* and the role of the Minister as a guardian of the public interest in the administration of justice.

[145] The briefing notes in no way suggest that the Minister’s decision was motivated by political considerations. As stated in the joint letter, the motivation for the request was the public interest in the proper administration of justice. The fact that the Minister was apprised of potential reactions and strategies to minimize or better manage reactions following her decision does not show bad faith in this case. As for the redactions, there is no evidence that the redactions hide any unlawful motives or considerations on the part of the Minister. To suggest otherwise and allege that the Minister acted in bad faith is pure conjecture.

(b) *Did the Minister dictate which approach the Council was to take?*

[146] Justice Girouard maintains that by requiring that the Council address the findings of the majority of the first Inquiry Committee, the Minister was dictating that the findings of the minority of the first Inquiry Committee should be disregarded. Justice Girouard adds that the findings of the minority had nonetheless been accepted unanimously by the members of the first panel of the Council. In support of this, he refers to paragraph 46 of the report of the first panel of the Council, which states that “in light of the minority conclusion about the judge’s credibility, we would in any event have been unable to act on the majority’s findings”.

[147] Thus, Justice Girouard maintains that the Minister required the reopening of debates that had already been decided by the Council, which is contrary to the principle of estoppel

(see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44; *Toronto (City) v PSAC, Local 79*, 2003 SCC 63). In Justice Girouard's view, the Council ought to have concluded that the purpose of the Minister's request was solely to overturn the decision of the Council's first panel, and the Council should therefore have refused to conduct such an inquiry.

[148] In my view, the Minister was entitled to request that an inquiry be held into Justice Girouard's misconduct during the first inquiry, and it cannot be concluded that her request dictated the approach that the Council should take.

[149] The *Act* is clear that the Minister may request that the Council commence an inquiry. Subsection 63(1) of the *Act* provides that, following the Minister's request, the Council must commence an inquiry. After an initial review of the issues raised by the Minister, it is then for the Council to decide not to continue the inquiry if it turns out that the inquiry request is clearly unfounded or raises issues that were already decided by the Council in its first report, as was suggested by Justice Girouard in this case (see *Cosgrove* at para 52). That was what the Council noted following a complaint about Justice Jean-Guy Boilard when it wrote the following:

> Although the circumstances may vary from case to case, if there is nothing of that nature [bad faith or abuse of office], the Council or an Inquiry Committee should, as a general rule, decline to deal with the matter further on the basis that the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry.
>
> . . .
>
> [T]he Canadian Judicial Council concludes that the Inquiry Committee ought to have acceded to the advice of the Independent Counsel to deal with the issues as a preliminary matter which should then have led, on the facts disclosed, to a decision to decline to deal further with the Attorney General's request.

> Accordingly, there is no basis for any finding that the decision of Mr. Justice Boilard to recuse himself constituted failure in the due execution of his office.
>
> Canadian Judicial Council, *Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec* (December 19, 2003) at pp 3–4, Applicant's Record, vol 44 at pp 14718–14719).

[150] Evidently, since the Council continued the inquiry, it concluded that the purpose of the Minister's request was not to reassess the decision of the first panel of the Council. This conclusion is well founded because the two inquiries dealt with different allegations. Indeed, the first one dealt with Justice Girouard's actions before he was appointed to the judiciary, while the second dealt with his testimony given during the first inquiry.

[151] I also reject Justice Girouard's submission that paragraph 46 of the report of the first panel of the Council (cited above) is a confirmation that Justice Girouard was not guilty of misconduct when he testified before the first Inquiry Committee. First, the first panel of the Council was very clear to that effect at paragraph 42 of its report to the Minister when it submitted the following conclusion:

> 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.

[152] Thus, the first panel of the Council expressly refrained from deciding the issue of misconduct identified by the majority of the first Inquiry Committee.

[153] Additionally, when the reasons of the first panel of the Council are read as a whole and in their context, it is clear that the comment at paragraph 46 does not support the conclusion suggested by Justice Girouard. When the Council stated that "in light of the minority conclusion about the judge's credibility, [it] would in any event have been unable to act on the majority's findings", it was not rejecting the majority's concerns with regard to Justice Girouard's conduct. That statement is only an observation that the Council should not seek to decide whether the majority was correct, given their agreement with the minority that Justice Girouard should have been informed of these concerns to be able to respond to them before making a decision on the merits. It is therefore clear that the first panel of the Council did not deal with the issue on the merits, having expressly refused to take on that task.

[154] I also reject the suggestion that, by requesting an inquiry into the conclusions of the majority of the first Inquiry Committee, the Minister excluded the reasons of the minority of the first Inquiry Committee from consideration or otherwise restricted the analysis that a new inquiry committee had to undertake. The second Inquiry Committee was in no way restricted by the Ministers' letter, and it was free to reframe the subject matter of the inquiry by amending the misconduct allegations (see *Girouard v Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175 at para 26). In addition, nothing was preventing the second Inquiry Committee from taking the observations of the minority of the first Inquiry Committee into consideration in its analysis. Indeed, in addition to taking them into consideration in its analysis, as I will explain below, the second Inquiry Committee addressed the minority's observations on several occasions.

[155] In conclusion, there is nothing to suggest that the Minister's motivation was anything other than in accordance with the public interest. The inquiry request falls within the exercise of the Minister's discretion in accordance with the *Act*, and the inquiry undertaken afterward is valid.

(5) Did the second Inquiry Committee breach the rules of natural justice in refusing Justice Girouard the right to refer to a compendium?

[156] During his testimony before the second Inquiry Committee, Justice Girouard consulted a compendium prepared by his counsel. The compendium, a document of about 50 pages, contained various excerpts of Justice Girouard's testimony before the first Inquiry Committee, as well as excerpts of the reasons issued by the first Inquiry Committee. Justice Girouard used the compendium during his examination-in-chief, and the second Inquiry Committee commented that the compendium was somewhat helpful.

[157] However, during his cross-examination, Justice Girouard continued to refer to his compendium despite the fact that counsel for the Inquiry Committee, Mr. Gravel, was seeking answers concerning Justice Girouard's contemporary knowledge. By constantly seeking to consult the compendium before answering, Justice Girouard was delaying the process and not answering questions directly. On the request of Mr. Gravel, the second Inquiry Committee thus prohibited Justice Girouard from continuing to refer to the said compendium.

[158] Justice Girouard maintains that the compendium was a [TRANSLATION] "key component of the defence" and that, by prohibiting Justice Girouard from referring to it, the second Inquiry

Committee refused to consider relevant and admissible evidence. According to Justice Girouard, that constitutes a breach of the rules of natural justice.

[159] This argument must be rejected because the compendium was not a piece of evidence. The excerpts it contained had already been admitted into evidence. Thus, nothing prevented Justice Girouard from referring to it during his submissions, since the second Inquiry Committee had access to the transcript of the testimony before the first Inquiry Committee and to the first Inquiry Committee's reasons.

[160] The second Inquiry Committee's decision that Justice Girouard had to put the compendium aside during the cross-examination was reasonable. A tribunal has the right, and even the obligation, to manage the proceeding and to apply a proportionate procedure to it, which enables, among other things, a timely determination of the case before it (see *Hryniak v Mauldin*, 2014 SCC 7 at para 28).

[161] In this case, Justice Girouard's use of the compendium slowed the progress of the cross-examination. In addition, Mr. Gravel had the right to ask Justice Girouard to answer his questions without constantly going back to consult the compendium prepared by his counsel, looking for an answer. In cross-examination, a lawyer has a great deal of latitude regarding how the examination proceeds and restrictions are rare (see *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 at para 96, leave to appeal to the SCC denied, No. 37162 (January 19, 2017)). In addition, Justice Girouard has not demonstrated that he suffered harm because he could not use the compendium in cross-examination.

C. *Reversal of the burden of proof*

[162] Justice Girouard alleges that the second Inquiry Committee reversed the burden of proof by requiring him to show that the observations of the majority of the first Inquiry Committee were erroneous. In addition, according to Justice Girouard, the second Inquiry Committee did not take into account the assessment and observations made by Chief Justice Chartier in his dissent.

[163] Justice Girouard also alleges that the second panel of the Council did not examine the evidence and erred in reversing the burden of proof. He explains that the second panel of the Council did not actually review any facts and that there was no mention of the conclusions of Chief Justice Chartier, who dissented on the first Inquiry Committee, or of the unanimous decision of the first panel of the Council, which supported the minority.

[164] In my view, as I will explain in detail below, there was no reversal of the burden of proof, and the Council's decision to accept the recommendation of the second Inquiry Committee was reasonable.

(1) Did the second Inquiry Committee reverse the burden of proof?

[165] The issues before the second Inquiry Committee were whether Justice Girouard had been untruthful during his testimony, had not cooperated or had knowingly misled the first Inquiry Committee.

[166] On the one hand, the majority of the first Inquiry Committee found in the affirmative, based on the following six aspects of Justice Girouard's testimony, which were described as inconsistent and implausible:

1. Upon entering Mr. Lamontagne's office, they discussed a tax file;

2. His explanation regarding the payment made to Mr. Lamontagne;

3. The reason why he put the money under the desk pad instead of handing it directly to Mr. Lamontagne;

4. His explanation regarding the object that was handed to him by Mr. Lamontagne after he had placed the money under the desk pad;

5. His justification for his failure to immediately verify the contents of the object he received; and

6. His claim that he had not read the summary that was given to him by Mr. Doray, the inquiry committee's counsel.

[167] Most of these points are related to the sequence of events captured on the video recording, which is at the very heart of the accusations brought against Justice Girouard.

[168] On the other hand, there are the observations made by Chief Justice Chartier, dissenting, which can be summarized as follows:

1. The inaccuracies raised by the majority could have been caused by nervousness or been mere oversights;

2. "[I]t is important to make a distinction between a version of the facts that is disbelieved and one that is deliberately fabricated." More evidence was needed to conclude that Justice Girouard deliberately attempted to mislead the first Inquiry Committee or that he lied; and

3. Justice Girouard had the right to respond to the Inquiry Committee's concerns.

[169] The purpose of the second Inquiry Committee was to investigate and to decide whether the conclusion of the majority of the first Inquiry Committee regarding Justice Girouard's misconduct should be upheld. In the affirmative, if the failures noted by the majority of the first Inquiry Committee concerning Justice Girouard's conduct were established, they would be particularly serious given the high standards expected of a judge.

[170] According to Justice Girouard, the second Inquiry Committee effectively accepted the findings made by the majority of the first Inquiry Committee because nothing would allow it to disregard them. Justice Girouard maintains that this constitutes a reversal of the burden of proof. In other words, the findings made by the majority of the first Inquiry Committee were considered as established from the start of the second inquiry, and Justice Girouard had the burden of demonstrating that the majority of the first Inquiry Committee was incorrect.

[171] Indeed, certain passages of the second Inquiry Committee's reasons, when read in isolation, may be interpreted as suggested by Justice Girouard. For example, at paragraph 110, it

states: “[n]othing in Judge Girouard’s testimony before our Committee justifies setting aside the findings of the majority.” In addition, at paragraph 177, the second Inquiry Committee explains that “no evidence in the record, including the testimony of Judge Girouard, justifies the setting aside [of the majority’s findings].” However, when read in their overall context, the reasons indicate that the second Inquiry Committee’s analysis was not as limited as Justice Girouard claims. In fact, the second Inquiry Committee conducted a three-step analysis to address the problem before it.

[172] The first step was to determine whether the reasoning and the analysis of the majority of the first Inquiry Committee that had led to its findings were reasonable and free of errors.

[173] The second step was to examine the evidence submitted to it during the second inquiry, including Justice Girouard’s testimony, to decide whether Justice Girouard’s explanations, given in response to the allegations, were adequate and made it possible to disregard the findings of the first Inquiry Committee.

[174] At the third step, the second Inquiry Committee examined the factual record independently to determine whether, based on its own assessment of the evidence, the majority’s findings with respect to Justice Girouard’s misconduct had been established on a strong balance of probabilities by clear and convincing evidence.

[175] These three steps in the analysis are described at paragraph 177 of the second Inquiry Committee’s reasons, which reads as follows:

> [T]he 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*.

[176] In my view, this process was entirely reasonable and appropriate in the specific circumstances of this matter. Indeed, it was legitimate for the second Inquiry Committee to take into account the findings of the first Inquiry Committee. The first Inquiry Committee's findings are conclusions that were drawn by an authority, which heard the oral testimony given under oath before it, including that of Justice Girouard. In this regard, at paragraph 30 of its report, the second Inquiry Committee provided the following explanation: "All things considered, we concluded the unfavourable findings regarding Judge Girouard's credibility and integrity contained in the majority opinion could not be equated to a run-of-the-mill complaint that has not been the subject of an inquiry under the *Judges Act*." However, the first Inquiry Committee's findings were the subject of the Ministers' request for an inquiry. They were only a starting point and were not considered *res judicata*. Justice Girouard was therefore given a full and fair hearing during which he was free to point out any errors in the first Inquiry Committee's analysis and was able to rebut, explain or justify the conduct with which the first Inquiry Committee found fault.

[177] The reasons of the majority of the first Inquiry Committee served as a detailed summary of the allegations to which Justice Girouard had to respond. Even though the second Inquiry Committee took into account the findings made by the majority of the first Inquiry Committee,

that does not constitute a reversal of the burden of proof. It is also important to point out that, as I will explain below, the second Inquiry Committee also took into account the assessment made by the dissent in the first Inquiry Committee, namely, that of Chief Justice Chartier.

[178] Thus, at the first step, the second Inquiry Committee considered whether there was an error in the analysis of the first Inquiry Committee. Since it concluded that there was no error, its assessment could therefore legitimately serve as a starting point.

[179] The second Inquiry Committee then considered the evidence and explanations put forward by Justice Girouard and concluded that they did not justify disregarding the unfavourable findings regarding Justice Girouard's credibility and integrity made by the majority of the first Inquiry Committee. To that effect, the second Inquiry Committee provided the following explanation at paragraph 94 of its report:

> The main problem with Judge Girouard's testimony is that each of his explanations is disharmonious with the most reasonable conclusion. In connection with each controversy, Judge Girouard would have us park our incredulity to accept his version of the facts. At any rate, this essentially intellectual process of evaluating the objective plausibility of Judge Girouard's explanations is supplemented by our observation of his demeanour while testifying. That demeanour buttressed our finding that his explanations are not credible.

[180] In any case, even if that approach could be viewed by Justice Girouard as a reversal of the burden of proof, the second Inquiry Committee did not stop there. It independently reviewed the transcripts, the evidence on the record as well as the relevant evidence submitted by Justice Girouard, including his testimony, and concluded that the misconduct witnessed was established. As the second Inquiry Committee stated at paragraph 5 of its report, they would

accept the findings of the majority of the first Inquiry Committee "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" [emphasis added]. Following that independent analysis, the second Inquiry Committee concluded at paragraph 177 that it came to the same conclusions at the majority of the first Inquiry Committee.

[181] The second Inquiry Committee also took into account the concerns raised by Chief Justice Chartier. However, as noted by the second Inquiry Committee, Chief Justice Chartier erred in saying that in civil matters there must be evidence independent of Justice Girouard's testimony to conclude that he fabricated his testimony in an attempt to mislead the first Inquiry Committee regarding the events captured on video (see *Stoneham v Ouellet*, [1979] 2 SCR 172 at pp 195–196, 278 NR 361). Moreover, even in a criminal trial, contradictions in an accused's testimony can be used as independent evidence of fabrication (*R v Shafia*, 2016 ONCA 812 at para 288, leave to appeal to the SCC denied, No. 37387 (April 13, 2017)). The second Inquiry Committee did, in fact, point out numerous contradictions following an analysis of Justice Girouard's testimony and his various statements.

[182] Finally, the second Inquiry Committee noted that, had Chief Justice Chartier had at his disposal the amplified record that was available to the second Inquiry Committee, Chief Justice Chartier "would have endorsed the findings and conclusions of the majority" (*Report of the Second Inquiry Committee* at para 98). For its part, the second Inquiry Committee had the benefit of Justice Girouard's testimony, provided in response to the accusations, and

Mr. Doray's testimony. However, Chief Justice Chartier did not have this testimony, which he considered necessary before being able to draw a conclusion.

[183] I therefore conclude that the second Inquiry Committee did not reverse the burden of proof and did not ignore the dissent of Chief Justice Chartier. The second Inquiry Committee took into account the observations made by every member of the first Inquiry Committee, and its conclusions are based on an independent analysis of the evidence on the record, which includes Justice Girouard's testimony. The second Inquiry Committee's analysis is not vitiated by error and its findings are reasonable.

(2) Did the second panel of the Council reverse the burden of proof?

[184] Justice Girouard argues that the decision of the second panel of the Council is devoid of reasons and is not structured in a manner that would enable a reviewing court to conduct a real analysis. This flows from his argument that there was no review of the facts or analysis undertaken by the second panel of the Council. According to him, the explanation of the second panel of the Council, following its review of the second Inquiry Committee's report, that they "gave appropriate weight to the Committee's findings, but considered its recommendations afresh, applying [their] independent judgement to the facts" is clearly insufficient (Canadian Judicial Council, *Report to the Minister of Justice* (February 20, 2018) at para 21 [*Report of the Second Panel of the Council*]). Justice Girouard submits that the Council simply accepted the second Inquiry Committee's conclusions to the effect that Justice Girouard had not demonstrated that the findings of the first Inquiry Committee were unreasonable. According to Justice Girouard, this is a second example of a reversal of the burden of proof.

[185] In addition, according to Justice Girouard, the second Inquiry Committee refused to take into account a relevant piece of evidence by failing to consider the conclusions of Chief Justice Chartier, dissenting, and the unanimous decision of the Council, which constitutes a second error of law (see *Université du Québec à Trois Rivières v Larocque*, [1993] 1 SCR 471, 101 DLR (4th) 494).

[186] In a section above, I rejected the claim that the first panel of the Council supported the Chief Justice Chartier's dissent to conclude that Justice Girouard had not deliberately attempted to mislead the first Inquiry Committee. As I have already explained, the first panel of the Council simply refused to decide on the merits of the issue because the allegation of misconduct was not part of the notice of allegation to which Justice Girouard had to respond.

[187] With respect to the other criticisms submitted by Justice Girouard, in my view, they are based on a misconception of the role that the Council must play. As previously explained, the Council is not to redo the work of the Inquiry Committee or to act as an investigator and review the evidence in its entirety. That is why it does not hear new evidence and does not assess the credibility of the testimony given before the Inquiry Committee. It is the Inquiry Committee that hears and assesses the evidence to determine the facts. As indicated in its report, the second Inquiry Committee noted that Justice Girouard's misconduct, under the first allegation, had been established on a balance of probabilities.

[188] Normally, unless there is an error that may be qualified as palpable and overriding, the Council accepts the assessment of the evidence made by the inquiry committee because it is the

inquiry committee that is responsible for conducting the inquiry under the *Act*, the 2015 *By-Laws* and the *Handbook*. The Council, for its part, receives the results of the inquiry and is responsible for making the appropriate recommendation to the Minister.

[189] Justice Girouard did not demonstrate before this Court that the second Inquiry Committee made any strictly factual errors or that he raised such errors in his submissions to the second panel of the Council. In addition, he did not demonstrate that the second Inquiry Committee's findings of fact were baseless or unreasonable. Instead, Justice Girouard takes issue with the second Inquiry Committee's interpretation of certain facts, the inferences drawn, the credibility assessment and the weight given by the second Inquiry Committee to the various testimonies received. These tasks usually fall to an inquiry committee, and the Council is ill placed to interpret them differently or to draw different inferences of fact. Thus, the lack of review and analysis of the facts by the Council reflects its conclusion that none of the points raised by Justice Girouard in his submissions led it to question the assessment of the evidence and the determination of the facts made by the second Inquiry Committee. It is the same before this Court. Nothing in Justice Girouard's submissions leads me to conclude that the Council should have rejected or questioned the findings made by the second Inquiry Committee.

[190] As the Supreme Court of Canada explained in *Moreau-Bérubé*, the inquiry committee is in a privileged position and is the primary trier of fact (*Moreau-Bérubé* at para 71).

[191] After noting Justice Girouard's misconduct, and as provided in the 2015 *By-Laws*, the second Inquiry Committee decided on the possibility of removing the judge from office and

concluded that the misconduct was serious enough to warrant a recommendation for removal. When the second panel of the Council stated in its reasons that it "gave appropriate weight to the Committee's findings", it took into account the recommendation made by the second Inquiry Committee that Justice Girouard should be removed from office. However, it was for the Council to decide on the recommendation to the Minister. Under the *Act* and the 2015 *By-Laws*, the Council is not bound to accept the conclusions of the inquiry committee. It is for the Council to use its own judgment regarding the appropriate recommendation in light of the committee's findings following an inquiry.

[192] In his amended application for judicial review and for a declaration of constitutional invalidity, Justice Girouard explains that he finds it surprising that the second panel of the Council wrote at paragraph 59 of its reasons that his submissions did not provide "a simple, rational, coherent, all-encompassing or satisfying explanation of what takes place in the 17 second video". According to Justice Girouard, his simple explanation is found at paragraph 94 of his submission, where he explains that the object exchanged between him and Mr. Lamontagne contains the amount of the proposed settlement in the tax matter for which he was representing Mr. Lamontagne.

[193] In my view, Justice Girouard's criticism is baseless. The explanation put forward by Justice Girouard addresses only one aspect of what appears in the video without any further explanations regarding the context. This piecemeal explanation is therefore far from satisfactory within the overall context of everything the video shows and of the testimony given, when considered as a whole. Clearly, the Council adopted the reasons of its inquiry committee, which

explain in great detail why it rejects Justice Girouard's testimony. The second Inquiry Committee carefully dissected each of the elements considered not credible by the first Inquiry Committee and whose cumulative effect "compels the conclusion Judge Girouard did not testify truthfully about the nature of the September 17, 2010 video-taped exchange" and that "[t]he main problem with Judge Girouard's testimony is that each of his explanations is disharmonious with the most reasonable conclusion" (*Report of the Second Inquiry Committee* at paras 93–94).

[194] I therefore find that the second panel of the Council did not reverse the burden of proof.

D. *Language rights*

(1) Introduction

[195] Justice Girouard alleges that his language rights were violated. However, in his written and oral submissions, the specific nature of the rights violated was not clearly stated. Based on my reading, the main complaint brought forward by Justice Girouard is the same as the one brought forward by the dissenting members of the second panel of the Council. The dissenting members were of the opinion that, to conclude that procedural fairness was respected, all members of the Council, even those who do not understand French, had to have access to the same documentation. Since transcripts of several thousand pages of stenographic notes taken during the hearings of the first and second Inquiry Committees were not translated into English, unilingual anglophone members did not necessarily have access to the same information as those who understood French. Justice Girouard argues that he was therefore not given a fair hearing and that, for that reason, the Council's decision must be set aside. According to the dissenting

members and to Justice Girouard, it is simply unfair that decision-makers are not able to understand the complete record on which they are to make a decision.

[196] For the reasons that follow, I cannot agree with Justice Girouard's argument.

(2) Analysis

[197] In support of his argument, Justice Girouard relies on section 133 of the *Constitution Act*, the *Charter* and the *Official Languages Act*, RSC 1985, c 31 (4th supp). The relevant excerpts of these various statutes read as follows:

(a) *The Constitution Act*

***CONSTITUTION ACT, 1867*, (UK) 30 & 31 Vict, c 3**

Use of English and French Languages

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

***LOI CONSTITUTIONNELLE DE 1867*, (R-U), 30 & 31 Vict, c 3**

Usage facultatif et obligatoire des langues française et anglaise

133. Dans les chambres du parlement du Canada et les chambres de la législature de Québec, l'usage de la langue française ou de la langue anglaise, dans les débats, sera facultatif; mais dans la rédaction des archives, procès-verbaux et journaux respectifs de ces chambres, l'usage de ces deux langues sera obligatoire; et dans toute plaidoirie ou pièce de procédure par-devant les tribunaux ou émanant des tribunaux du Canada qui seront établis sous l'autorité de la présente loi, et par-devant tous les tribunaux ou émanant des tribunaux de Québec, il pourra être fait également usage, à faculté, de l'une ou de l'autre de ces langues.

Les lois du parlement du Canada et de la législature de Québec devront être imprimées et publiées dans ces deux langues.

(b) *The Charter*

CONSTITUTION ACT, 1982

LOI CONSTITUTIONNELLE DE 1982

PART I

PARTIE I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

[…]

[…]

LEGAL RIGHTS

GARANTIES JURIDIQUES

[…]

[…]

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

[…]

[…]

OFFICIAL LANGUAGES OF CANADA

LANGUES OFFICIELLES DU CANADA

OFFICIAL LANGUAGES OF CANADA

LANGUES OFFICIELLES DU CANADA

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

[…]

[…]

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

[…]

[…]

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

[…]

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

> **(a)** there is a significant demand for communications with and services from that office in such language; or
>
> **(b)** due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

[…]

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Procédures devant les tribunaux établis par le Parlement

19. (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

[…]

Communications entre les administrés et les institutions fédérales

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

> **a)** l'emploi du français ou de l'anglais fait l'objet d'une demande importante;
>
> **b)** l'emploi du français et de l'anglais se justifie par la vocation du bureau.

[…]

Maintien en vigueur de certaines dispositions

21. Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Droits préservés

22. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

***Official Languages Act*, RSC 1985, c 31 (4th Supp.)**

Interpretation

Definitions

3(1) […]

federal institution includes any of the following institutions of the Parliament or government of Canada:

(a) the Senate,

(b) the House of Commons,

(c) the Library of Parliament,

(c.1) the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner,

(c.2) the Parliamentary Protective Service,

(c.3) the office of the Parliamentary Budget Officer,

(d) any federal court,

(e) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the Governor in

***Loi sur les langues officielles*, LRC 1985, ch 31 (4e suppl.)**

Définitions

Définitions

3(1) […]

institutions fédérales Les institutions du Parlement et du gouvernement du Canada, dont le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique et le bureau du commissaire aux conflits d'intérêts et à l'éthique, le Service de protection parlementaire, le bureau du directeur parlementaire du budget, les tribunaux fédéraux, tout organisme — bureau, commission, conseil, office ou autre — chargé de fonctions administratives sous le régime d'une loi fédérale ou en vertu des attributions du gouverneur en conseil, les ministères fédéraux, les sociétés d'État créées sous le régime d'une loi fédérale et tout autre organisme désigné par la loi à titre de mandataire de Sa Majesté du chef du Canada ou placé sous la tutelle du gouverneur en conseil ou d'un ministre fédéral. Ne sont pas visés les institutions de l'Assemblée législative du Yukon, de l'Assemblée législative des Territoires du Nord-Ouest ou de l'Assemblée législative du Nunavut ou celles de l'administration de

Council,

(f) a department of the Government of Canada,

(g) a Crown corporation established by or pursuant to an Act of Parliament, and

(h) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown,

but does not include

(i) any institution of the Legislative Assembly or government of Yukon, the Northwest Territories or Nunavut, or

(j) any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people;

chacun de ces territoires, ni les organismes — bande indienne, conseil de bande ou autres — chargés de l'administration d'une bande indienne ou d'autres groupes de peuples autochtones.

[…]

Definition of federal court

(2) In this section and in Parts II and III, **federal court** means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament.

[…]

Définition de tribunal

(2) Pour l'application du présent article et des parties II et III, est un tribunal fédéral tout organisme créé sous le régime d'une loi fédérale pour rendre la justice.

[…]

Administration of Justice

Official languages of federal courts

14 English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

[…]

Administration de la justice

Langues officielles des tribunaux fédéraux

14 Le français et l'anglais sont les langues officielles des tribunaux fédéraux; chacun a le droit d'employer l'une ou l'autre dans toutes les affaires dont ils sont saisis et dans les actes de procédure qui en découlent.

[…]

Duty to ensure understanding without an interpreter

16 (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

> **(a)** if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
>
> **(b)** if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and
>
> **(c)** if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

[…]

Obligation relative à la compréhension des langues officielles

16 (1) Il incombe aux tribunaux fédéraux autres que la Cour suprême du Canada de veiller à ce que celui qui entend l'affaire :

> **a)** comprenne l'anglais sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en anglais;
>
> **b)** comprenne le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en français;
>
> **c)** comprenne l'anglais et le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu dans les deux langues.

[198] Depending on the circumstances before a court or tribunal in a given case, various language rights are granted to an individual appearing before it. The relevant rights in this case are the following:

1. the right to plead in one's official language; and

2. the right to be heard by a court in which the person hearing the matter understands the official language chosen by the individual.

[199] Even where there are no language rights in issue or where the language rights have been respected, access to translated transcripts for the benefit of the decision-maker does indeed raise an issue of procedural fairness. In the paragraphs below, I will analyze the language-rights violations alleged by Justice Girouard, as well as the issue of procedural fairness.

(c) *The right to plead in one's official language*

[200] The right to plead in one's official language flows from several legislative sources, including the *Official Languages Act* and section 133 of the *Constitution Act*.

[201] In my view, to the extent that these statutes grant Justice Girouard the right to plead his case in the official language of his choice, the right was fully respected. Justice Girouard was able to testify and argue his case in his chosen language, and the Council ensured that all of the evidence and all of the decisions rendered were provided to him in the official language of his choice.

(d) *The right to a court that understands the official language chosen by the party*

[202] The *Official Languages Act* applies to federal institutions. The definition of "federal institution" is very broad and includes the Council. Part III of this statute provides that some federal institutions are subject to specific obligations. When a federal institution is a "federal court", as defined by this statute, section 16 requires that, "if French is the language chosen by the parties for proceedings conducted before it in any particular case", the court must understand "French without the assistance of an interpreter". Justice Girouard chose to testify and argue his case in French. Therefore, if the Inquiry Committee and the Council are federal courts, the

members of the second Inquiry Committee and of the Council who heard the matter must be able to understand French, the official language chosen by Justice Girouard.

[203] In this case, it has been established that the members of the second Inquiry Committee all understood French. However, it is equally clear that some members of the Council did not understand French. Therefore, if the Council is a federal court for the purposes of the *Official Languages Act*, Justice Girouard's rights were violated.

[204] In my opinion, although the Council is a federal institution, as defined in the *Official Languages Act*, it is not included within the definition of "federal court", as established by that statute. It is therefore not bound by the requirements of section 16 of the *Official Languages Act*. I will explain.

[205] Subsection 3(2) of the *Official Languages Act* states that "[i]n this section and in Parts II and III, federal court means any court, tribunal or other body <u>that carries out adjudicative functions</u> and is established by or pursuant to an Act of Parliament" [emphasis added].

[206] As the Supreme Court of Canada explained in *Ruffo*, the investigation of a complaint lodged with a judicial council 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" (*Ruffo* at para 72). A complaint, or a request for an inquiry, sets the inquiry process in motion, but its "effect is not to initiate litigation between the two parties" (*Ruffo* at para 73).

Ruffo may have dealt with the Conseil de la magistrature du Québec rather than the Council, but the structures and objectives of both entities are essentially the same.

[207] Thus, when the function of the proceedings of the federal institution is investigative and there is neither a prosecutor nor a dispute in the traditional sense, the institution is not a federal court within the meaning of the statute because it does not carry out adjudicative functions (see *Hanna v Mission Establishment* (1995), 102 FTR 275 at p 10, 28 WCB (2d) 541 (FC); *Bélair v Canada (Attorney General)*, 2000 CanLII 14967 (FC)).

[208] I therefore find that the Council, though it does constitute a federal institution, is not a "federal court" because it does not carry out adjudicative functions within the meaning of the *Official Languages Act*. Thus, there is no violation of Part III of the *Official Languages Act*.

(e) *The right to procedural fairness*

[209] At the hearing, Justice Girouard stated that he was relying [TRANSLATION] "primarily" on the breach of procedural fairness with respect to the translation of the record. He submits that the dissenting members of the Council's second committee were correct, for the reasons they provided.

[210] According to the dissent, there was a denial of Justice Girouard's right "to a fair hearing; a denial founded on Council's failure to ensure that all participants in the decision-making process could understand and consider the complete record" (*Report of the Second Panel of the Council*, Dissent at para 8). In support, the dissent cited *Valente*, as well as the principle that

"he who decides must hear". According to the dissent, "he who decides on the strength of a written record, which includes a transcript, must be able to read the transcript" (*Report of the Second Panel of the Council*, Dissent at para 3). The dissent then notes that "the 2010 CJC *Policy on Council Review of Inquiry Committee Report* expressly provided that 'The review by the Council is based on the record and report of the Inquiry Committee and on written submissions by the judge and by independent counsel'" (*Report of the Second Panel of the Council*, Dissent at para 3).

[211] Therefore, because the transcript was provided to all the members of the Council, and this transcript of the oral evidence was in French, without the benefit of an English translation, "the record available to be considered by the unilingual English-speaking members of the Council was different than the record available for consideration by the bilingual members" (*Report of the Second Panel of the Council*, Dissent at para 4). Justice Girouard argues that this constitutes a denial of his right to a fair hearing.

[212] In his reply, Justice Girouard adds that if he had opted to testify in English, all of the members of the Council would have been able to read the transcript of his testimony. He submits that he therefore suffered prejudice because he is a francophone and chose to proceed and testify in French. In his view, this situation violated his language rights.

[213] The AGC explains in response that what was submitted to the Council in both official languages was more than sufficient to enable it to fulfill its mandate, which was to review the

report of the second Inquiry Committee and draw its own conclusion with respect to the recommendation for removal from office.

(f) *Was a language right violated?*

[214] It is important to properly identify the issue at the outset. Is this a language rights issue, as Justice Girouard claims, or is it simply a question of procedural fairness? In support of his allegation that the lack of a fully translated record violates his language rights, Justice Girouard cites the *Official Languages Act*, section 133 of the *Constitution Act* and sections 14, 16 and 19–22 of the *Charter*. As I noted above, the rights conferred by the *Official Languages Act* and cited by Justice Girouard, as well as section 133 of the *Constitution Act*, have all been respected. In this case, these provisions do not require that the full record be translated for a decision-maker such as the Council and are therefore not relevant to this part of my analysis of the Council's decision.

[215] The rights granted by the *Charter* were also respected.

[216] Section 14 of the *Charter* involves a party's or a witness's right to an interpreter. Section 21 deals with the preservation of other rights, privileges and obligations under other provisions of the *Constitution Act*, and section 22 deals with protections for the use of languages other than French and English. None of those sections are relevant to this case.

[217] As for the rights conferred by sections 16, 19 and 20 of the *Charter*, they are substantially the same as those granted by the *Official Languages Act*. As I explained above when addressing

the right to plead in one's official language, to the extent that the rights apply in this case, they have been respected.

[218] It is important not to conflate language rights with the issue of procedural fairness. In my view, all of the language rights have been respected. The sole issue that remains at this stage of the analysis is whether there was a breach of Justice Girouard's right to procedural fairness. Since we are dealing with a question of natural justice, the analysis is essentially the same regardless of the language used by the person affected.

[219] Naturally, in a bilingual country, the ideal, perhaps even the goal, is that, regardless of the official language chosen by a citizen, that individual may rest assured that any decision-maker, tribunal, board or other group established to perform a governmental function pursuant to an Act of Parliament with whom he or she interacts would be able to understand him or her in one or the other of the two official languages chosen by the individual. At the very least, the full record would be translated into the other official language if the authority did not understand the official language chosen. This would ensure that the use of one or the other official language would be irrelevant. Therefore, regardless of the official language chosen, the authority involved, even on appeal, could consult that complete record and understand the testimony given by the individual without the need for translation, or as a result of the translation of the full record. This is not, however, the current state of affairs in Canada. As pointed out by the majority of the second panel of the Council, certain appellate courts decide appeals in which the record is partly in French, despite the fact that some of the judges are unilingual anglophones (see Sébastien Grammond & Mark Power, "Should Supreme Court Judges be Required to be Bilingual?" in

Nadia Verelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court*, Montréal, McGill-Queen's University Press, 2013, 49 at p 51). The same is true for the Supreme Court of Canada. Thus, in the absence of language rights, the issue is one of procedural fairness.

(g) *Procedural fairness*

[220] The AGC recognizes that Justice Girouard is entitled to procedural fairness, but is of the view that this right does not have the scope attributed to it by the dissenting members of the second panel of the Council. The scope of the procedural protections must be assessed in light of the procedures set out in the Council's enabling statue and its associated regulations. On this point, the AGC submits the following explanations at paragraphs 104–105 of its memorandum of fact and law:

> [TRANSLATION]
>
> The *Judges Act* specifically provides that the Council may establish an inquiry committee vested with investigative powers, and it allows the Council to enact administrative regulations to govern the proceedings of its inquiries . . . the Council chose to establish a two-step procedure, delegating the task of establishing the facts to an inquiry committee. It is the role of the Inquiry Committee to hear the evidence, determine the facts and report to the Council. The Inquiry Committee's report is shared with the judge who is the subject of the complaint, and the latter is given an opportunity to make written submissions directly to the Council.
>
> The Council therefore relies on the Inquiry Committee's report and the written submissions of the judge to arrive at its recommendation. The Council brings its own independent judgment to the facts, but it is not its role to re-examine all of the evidence. [Footnotes omitted.]

[221] Under this two-step procedure, the inquiry is conducted by an inquiry committee. Its role is to establish the facts, which includes assessing the credibility of the witnesses. The 2015 *By-laws* then provide, at subsection 8(1), that the Inquiry Committee must "submit a report to the

Council setting out its findings and its conclusions about whether to recommend the removal of the judge from office”. After the report has been submitted to the Council, a copy is provided to the judge. The judge may then make written submissions to the Council regarding the report.

[222] According to subsection 11(1) of the 2015 *By-laws*, “[t]he Council must consider the Inquiry Committee’s report and any written submission made by the judge”. The 2015 *By-laws* also state that if the Council “is of the opinion that that the Inquiry Committee’s report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry Committee with directions” (2015 *By-laws*, s 12).

[223] Therefore, before making its recommendation to the Minister, the Council hears no evidence, receives no oral submissions and does not itself investigate the facts. It does not take over the file that was before the Inquiry Committee. Following its analysis of the Inquiry Committee’s report and the written submissions, if the Council is of the view that clarifications or a supplementary inquiry or investigation are necessary, it refers the matter back to the Inquiry Committee.

[224] Contrary to the statements of the dissenting members of the second panel of the Council, the 2002 *By-laws* and the 2010 policy based on them are not relevant to this matter, as they were replaced in 2015. The Council, therefore, is not required to base its decision “on the record”, as was the case under the former regime. It bases its decision on the inquiry committee’s report and the submissions of the judge under investigation. Only the latter two elements are to be considered by the Council in its decision-making process.

[225] There was therefore no obligation to translate all of the transcripts. They were not part of the record that the Council was required to consult before reaching the recommendation contained in its report to the Minister. Thus, the majority of the second panel of the Council was correct to compare the situation to certain provincial courts of appeal, which, despite the presence of unilingual judges, must decide issues without having the full record available in both official languages.

(i) Was it necessary for the Council members to consult the transcripts?

[226] It appears from the reasons of the dissent of the second panel of the Council that the transcripts of the evidence presented to the first and second Inquiry Committees were distributed to each member of the Council. According to Mr. Sabourin's affidavit (Applicant's Record, vol 9 at p 6520), these documents were distributed electronically via an electronic link.

[227] The issues that are now raised are whether this access to the transcripts was necessary for the administration of justice in this case and whether the hearing was unfair because the untranslated transcripts could be consulted by the Council members who could read French but not by the members who could not read French.

[228] Justice Girouard argues in the affirmative. He explains that the report of the second Inquiry Committee and his submissions to the second panel of the Council contain several footnotes that refer the reader to pages of the transcripts. Therefore, if a unilingual Council member wished to read these pages of the transcripts, he or she should have been able to do so. According to Justice Girouard, they were prevented from doing so because the transcripts were

not translated into English, while francophone or bilingual members could consult them without difficulty.

[229] I recognize that by circulating an electronic link to the transcripts to the full second panel of the Council, Mr. Sabourin was facilitating access to the documents for the bilingual and francophone members, but that the unilingual anglophone members could not understand the content of those documents. However, all of the documents, including the transcripts of Justice Girouard's testimony before the first and second Inquiry Committees, were public documents. Therefore, even if the link had not been sent to the Council members, these documents were accessible to all on the Council's website.

[230] As noted above, the 2015 *By-laws* provide that the record that must be considered by the Council consists solely of the inquiry committee's report and the judge's written submissions. These documents were translated and were available to all of the members. According to the 2015 *By-laws*, if clarifications had been required, or if Justice Girouard's written submissions had raised points that were not adequately covered in the inquiry committee's report, it would have been necessary to refer the matter back to the inquiry committee.

[231] In the reasons provided by the second panel of the Council, there is no indication that any member of the Council, including dissenting members, had expressed the need to obtain clarifications or to consult the pages of transcripts cited in a footnote. The objection of the dissenting members was limited to deploring the fact that the transcripts could only be read by bilingual and francophone members. Despite the fact that a member of the second panel of the

Council had asked whether a full translation of the evidence would be made available to unilingual anglophone members, there is nothing in the record to indicate that this member, or that other members of the Council, deemed it necessary to read the transcripts, or even that they had any desire to do so. In that regard, I note that ten pages of the transcripts were translated and provided to members of the Council at the request of one of the Council members (Applicant's Record, vol 9 at p 6524).

[232] The second Inquiry Committee, in its report, and Justice Girouard, in his written submission, made reference to and cited excerpts of transcripts that they deemed relevant. The complete contents of the report and written submission, including the excerpts, were translated. Thus, the information needed to fully assume and exercise their role so as to make an informed decision was available to all members of the Council in both official languages. There was therefore no breach of procedural fairness.

[233] My conclusion might well have been different had questions been raised as to the second Inquiry Committee's interpretation of one of the aspects of the testimony, which would have required a detailed analysis of the transcripts, and had the Council not referred those questions to the committee to obtain clarifications. However, this is not the case here, given that the central question was clear and simple: what was it that transpired during those 17 seconds captured on video during the meeting of September 17, 2010, between Justice Girouard and Mr. Lamontagne? In his 117-page submissions filed with the Council, Justice Girouard did not dispute the second Inquiry Committee's description of the contents of the video recording. Moreover, Justice Girouard did not identify one single explanation that he had presented to the

second Inquiry Committee to justify his conduct and that might have been disregarded by the second Inquiry Committee in its analysis and report. Thus, there was no need for members of the Council to review the transcripts, and Justice Girouard suffered no prejudice from the fact that the transcripts had not been translated. As was noted by the majority, all Council members had "access to all of the necessary documentation to enable [them] to fully consider the case in an informed, independent and thoughtful manner" (*Report of the Second Panel of the Council* at para 72).

E. *Is Part II of the Act ultra vires?*

(1) Positions of the parties

[234] Part II of the *Act* deals with the inquiry process that is conducted prior to the removal of superior court judges from office. Justice Girouard argues that any inquiry process involving superior court judges falls under provincial jurisdiction. He explains that subsection 92(14) of the *Constitution Act* confers exclusive jurisdiction in the area of administration of justice on provincial governments, which includes the power to constitute, maintain and organize provincial superior courts.

[235] In Justice Girouard's view, this power therefore includes the power to investigate a judge's conduct. Accordingly, he claims that the provisions of the *Act* allowing the Council to handle complaints, investigate and report on the conduct of superior court judges are *ultra vires* Parliament's legislative authority. He is therefore asking that sections 60, 61(3)(c) and 63 to 66 of the *Act*, sections 1.1(2) and 5(1) of the 2002 *By-laws*, sections 2(1), 3(1), 3(2), 3(3), 4 and 5(1)

of the 2015 *By-laws* and sections 3.1, 3.2 and 3.3 of the *Handbook* all be declared unconstitutional.

[236] Justice Girouard explains that section 99 of the *Constitution Act* confers upon the Senate and the House of Commons the power to send an address to the Governor General to remove a judge. By assigning this power to the Governor General in person and not to the Governor in Council, the *Constitution Act* confers a royal prerogative rather than an area of legislative authority upon the federal government. Justice Girouard argues that only those matters contained in Part VI of the *Constitution Act* entitled "Distribution of Legislative Powers" grant the power to legislate and the purpose of the *Act* is nowhere to be found under the headings of this part. He points out that section 99 of the *Constitution Act* on which the AGC relies is found in Part VII entitled "Judicature", a section which, in his view, confers no legislative authority upon Parliament.

[237] In addition, Justice Girouard notes that section 99 of the *Constitution Act* contains no basis on which to implicitly conclude that legislative authority has been conferred. He maintains that where the *Constitution Act* confers legislative power upon a federal authority, it does so expressly upon the Parliament of Canada or upon provincial legislatures. Given that section 99 contains no mention of the Queen, one of the components of Parliament, it is an additional indication to the effect that section 99 does not grant "Parliament" the power to legislate.

[238] In support of his argument, Justice Girouard cites a recent Federal Court decision, namely *Girouard* (2018). In that matter, Justice Girouard submits that the Federal Court found that the *Act* was not a "*codification of a constitutional power*".

[239] For his part, the AGC argues that sections 96-100 of the *Constitution Act* constitute a consistent whole that ousts provincial jurisdiction over the appointment, remuneration and removal of superior court judges. He acknowledges that Part VI of the *Constitution Act* is effectively aimed at the sharing of legislative powers between the Parliament of Canada and provincial legislatures, but notes that a number of other provisions set out in other sections also confer legislative authority. The AGC therefore contends that section 99, when interpreted in light of sections 91 and 96 to 100, confers upon Parliament the power to establish a process leading up to the removal of superior court judges. Alternatively, the AGC argues that if the pith and substance of the *Act* does not fall within the purview of section 99 of the *Constitution Act*, the provisions are valid under the doctrine of ancillary powers or pursuant to the residual jurisdiction of Parliament.

(2) Analysis

[240] In *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 25–26, the Supreme Court of Canada set out the two criteria needed to interpret constitutional provisions that confer legislative authority:

1. 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; and

2. The interpretation must be consistent not only with other express terms of the Constitution, but also with requirements that “flow by necessary implication from those terms”.

[241] The relevant sections of the *Constitution Act* are the following:

***CONSTITUTION ACT, 1867* (UK)**	***LOI CONSTITUTIONNELLE DE 1867***
30 & 31 Victoria, c. 3 (U.K.)	**(R-U) 30 & 31 Vic, c 3**
[…]	[…]
VI. DISTRIBUTION OF LEGISLATIVE POWERS	**VI. DISTRIBUTION DES POUVOIRS LÉGISLATIFS**
POWERS OF THE PARLIAMENT	**POUVOIRS DU PARLEMENT**
LEGISLATIVE AUTHORITY OF PARLIAMENT OF CANADA	**AUTORITÉ LÉGISLATIVE DU PARLEMENT DU CANADA**
91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government […]	**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada…
[...]	[...]
92. (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	**92. (14)** L’administration de la justice dans la province, y compris la création, le maintien et l’organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux.
[…]	[…]
VII. JUDICATURE	**VII. JUDICATURE**
Appointment of Judges	**Nomination des juges**
96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New	**96.** Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le

Brunswick.

[…]

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

Nouveau-Brunswick.

[…]

Durée des fonctions des juges

99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

Cessation des fonctions à l’âge de 75 ans

(2) Un juge d’une cour supérieure, nommé avant ou après l’entrée en vigueur du présent article, cessera d’occuper sa charge lorsqu’il aura atteint l’âge de soixante-quinze ans, ou à l’entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

Salaires, etc. des juges

100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l’Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.

[242] Justice Girouard does not dispute that the functions of appointing, paying and removing superior court judges fall under federal jurisdiction. Indeed, these legislative powers are expressly set out in the sections cited above. Furthermore, it is not disputed that the structural principle of judicial independence requires that the removal of a judge by a legislator be carried out only after an inquiry during which the judge is provided with an opportunity to respond to the allegations (see *Valente* at para 30; *Moreau-Bérubé* at paras 46–48; *Cosgrove* at para 32).

Thus, the question is whether the federal government has the authority to adopt legislation that establishes such an inquiry process.

[243] As the AGC noted at paragraph 4 of his rejoinder, since at least 1882, the federal government has provided for inquiries to be held prior to the removal of superior court judges:

> [TRANSLATION]
>
> Parliament has historically exercised this authority to hold an inquiry prior to the removal of a judge of a superior court established under section 96 of the *Constitution Act*. As of 1882, federal legislation provided for the holding of an inquiry on the aptitude of county court judges (*An act respecting county court judges (1882)*, 45 Vict c 12, s. 2); until 1971, inquiries into superior court judges also fell under federal legislation (the *Inquiries Act*), under which an *ad hoc* commissioner could be appointed to conduct an inquiry. Since 1971, the *Act* has assigned this responsibility to the Council.

[244] In the instant case, the element of Part II of the *Act* that is disputed is the power conferred upon the Council to initiate an inquiry of superior court judges and subsequently make a recommendation as to the potential removal of those judges.

[245] As a starting point, I note that statutes benefit from a presumption of constitutionality and that it is the party alleging invalidity that bears the onus of proving its unconstitutionality (*Reference re Firearms Act (Canada)*, 2000 SCC 31 at para 25).

[246] In my view, it would be inconsistent to grant the federal government the power to remove a judge, but not the necessary jurisdiction to ensure that an inquiry process is provided prior to exercising that power. Thus, if we accept the position advanced by Justice Girouard, the federal

government would have the exclusive jurisdiction to remove a judge from office, but would only be able to exercise that power after a process it could not establish was conducted.

[247] When the provisions in sections 96, 99 and 100 are read harmoniously with each other and in conjunction with the case law on judicial independence, it is clear that the federal government must ensure and provide for the holding of an inquiry if it intends to exercise its authority to remove a judge. The legislative authority to establish a process for ensuring an inquiry is held naturally flows from this.

[248] In his memorandum of fact and law and his oral submissions, Justice Girouard submits that the "objects" of the Council set out at section 60 of the *Act* infringe on provincial jurisdiction. Justice Girouard explains that this section provides that the objects of the Council are "to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts".

[249] I reject this suggestion. Contrary to what Justice Girouard claims, I am of the view that on reading Part II of the *Act* as a whole, it is clear that the Council's powers of inquiry are directly linked to the power to appoint, pay and remove superior court judges. The fact that the actions taken by the Council were aimed at achieving a better "administration of justice" do not render them *ultra vires* the federal government's jurisdiction. All of the powers granted to the federal government in sections 96 to 100 seek, to some degree, to ensure a better administration of justice. Moreover, I note that the only question that concerns us is the constitutionality of the process undertaken by the Council, the purpose of which is to determine whether or not to

recommend the removal of a judge from office. There is therefore no need to comment on the other aspects of the Council's work.

[250] Furthermore, contrary to Justice Girouard's assertion, the recent decision of the Federal Court in *Girouard* (2018) does not support his argument. As the AGC maintains, that decision must be read as a whole. In that matter, the Federal Court was dealing with an application brought by the Council, which claimed that it was not subject to the jurisdiction of the Federal Court in matters of judicial review. With respect to the investigative functions performed by the Council in overseeing the conduct of judges and disciplining the judiciary, the Council was of the view that the source of its jurisdiction was not a statute adopted by Parliament (the *Act*), but rather section 99 of the *Constitution Act*. As a result, the Council was of the opinion that it was not subject to judicial review (*Girouard* (2018) at paras 29, 105).

[251] It was precisely this theory that the Federal Court rejected, and Parliament's legislative authority to adopt the *Act* was not called into question in that case.

[252] Because I am of the view that the pith and substance of the *Act* is directly linked to a federal power, it is not necessary to dispose of the issue as to whether the provisions are valid under the doctrine of ancillary powers or pursuant to the residual jurisdiction of Parliament.

F. *Was the recommendation for removal reasonable?*

[253] During the hearing, Justice Girouard did not spend much time challenging the reasonableness of the decision recommending his removal to the Minister. Rather, he focused

on the points that were raised and addressed throughout this judgment. Nevertheless, I think it would be helpful to address the question briefly.

[254] The reasonableness of a decision "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In my view, the Council's recommendation was justified, its decision-making process was transparent and its decision falls within a range of possible, acceptable outcomes.

[255] In accordance with its mandate, the Council reviewed the report of the second Inquiry Committee and the judge's submission. In light of the entire record that was before the Council, it was reasonable to conclude that Justice Girouard was guilty of misconduct and that the integrity of Justice Girouard was irremediably compromised to the point that the public's confidence in the judiciary was undermined (*Therrien* at para 146; *Moreau-Bérubé* at para 66).

V. CONCLUSION

[256] As evidenced by the numerous proceedings initiated and delays incurred in order to arrive at this judgment, the case took on an unexpected scope and appearance of a conflict between two opposing parties. Nevertheless, it is important to remember that the role of the Council and purpose of the process are to handle complaints and to search for the truth in order to ultimately provide a recommendation to the Minister. It is not to issue a final judgment.

Obviously, procedural protections are necessary and appropriate, but as I have explained in this decision, these were all respected.

[257] Justice Girouard raised the following three constitutional questions in this case:

[TRANSLATION]

1. Are Part II of the *Act* and the 2015 *By-laws*—if they were to be interpreted as permitting the Council to conduct an inquiry that involves examining the same facts twice, a breach of the separation of functions rule, a breach of procedural fairness, an appearance of bias, an unclear standard of review by the Council, a partly secretive and *ex parte* process, an inquiry framed by an unwarranted Ministerial request that limited the inquiry—contrary to the principles judicial independence and impartiality as guaranteed by the *Constitution Act* and the *Charter*?

2. Did the failure to translate the record in its entirety breach the right to procedural fairness and infringe on the language rights guaranteed under sections 14, 16, and 19 to 22 of the *Charter*, thereby constituting a process that is detrimental to judicial independence?

3. Is Part II of the *Act ultra vires* Parliament's legislative authority?

[258] For the reasons set out in this judgment, I must answer each of these questions in the negative. The application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES AS FOLLOWS:

1. The application for judicial review is dismissed;

2. This judgment and its reasons also dispose of the applications for judicial review in dockets T-733-15, T-2110-15, T-1106-16 and T-423-17;

3. The Registry shall file a copy of this judgment and its reasons in dockets T-733-15, T-2110-15, T-1106-16 and T-423-17;

4. Without costs.

"Paul S. Rouleau"
Deputy Judge

Certified true translation
This 11th day of October, 2019

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-409-18
STYLE OF CAUSE:	THE HONOURABLE MICHEL GIROUARD v THE ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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