Federal Court of Appeal  Cour d'appel fédérale

Date: 20190516

Docket: A-269-18

Citation: 2019 FCA 148

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

CANADIAN JUDICIAL COUNCIL

Appellant

and

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

Respondents

and

THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION,
THE HONOURABLE PATRICK SMITH

Interveners

Heard at Ottawa, Ontario, on May 3, 2019.

Judgment delivered at Ottawa, Ontario, on May 16, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

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REASONS FOR JUDGMENT OF THE COURT

I. OVERVIEW

[1] The Canadian Judicial Council (the Council or the appellant) is appealing the Federal

Court judgment (the Honourable Justice Noël), rendered on August 29, 2018 (the Decision), dismissing its motions to strike the applications for judicial review filed by the Honourable Justice Michel Girouard (Justice Girouard). The underlying applications cover various decisions made by the Council during inquiries conducted under sections 63 et seq. of the *Judges Act*, R.S.C. 1985, c. J-1 (the Act), regarding Justice Girouard's conduct, particularly the Council's report recommending his removal to the Minister of Justice (the Minister).

[2] The Council essentially argues that its reports and recommendations, as well as decisions made in the course of an inquiry by an inquiry committee, are not subject to judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (FCA). It claims that it simply is not a "federal board, commission or other tribunal" within the meaning of section 2 of that statute.

[3] For the reasons set out below, the appeal will be dismissed, without costs.

II. **FACTUAL AND PROCEDURAL BACKGROUND**

A. ***General legal framework***

[4] Subsection 99(1) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), (CA 1867) provides that 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.
In 1971, Parliament created the Council through amendments to the Act and conferred on it the power to investigate complaints against federally appointed judges.

[5] Section 63 of the Act provides two circumstances in which the Council can investigate the conduct of a federally appointed judge: at the request of the Minister of Justice or the attorney general of a province (subsection 63(1) of the Act), or following receipt of any complaint or allegation made in respect of a judge of a superior court (subsection 63(2) of the Act). The procedure differs somewhat depending on the subsection under which the process is initiated.

[6] In both cases, an inquiry committee, composed of an uneven number of members, can be called to look into the conduct of a given judge. If the committee includes members of the bar of a province appointed by the Minister, the majority of the members of the committee must be Council members (see subsection 63(3) of the Act and section 3 of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 (the By-laws)). The powers of an inquiry committee are set out in subsection 63(4) of the Act. The inquiry committee hears the evidence concerning the complaints or allegations and, under section 8 of the By-laws, submits to the Council a report in which it sets out the findings of the inquiry. This report contains findings of fact and conclusions of the committee as to whether or not a recommendation should be made for the judge's removal.

[7] The Council then examines the allegations and makes a decision on their merit. In order to perform this task, sections 10 and 11 of the By-laws provide that the Council shall be made up of at least 17 members of the Council who did not participate in the inquiry process and who are not of the same court as that of the judge who is the subject of the inquiry or investigation. It is then up to the Committee to determine whether 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. In that respect, it should be noted that the Chairperson of the Council, that is, the Chief Justice of Canada, does not participate in deliberations in matters involving the conduct of judges.

[8] Section 65 of the Act states that, after an inquiry or investigation has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister. The Council's inquiry report contains a recommendation as to whether or not the judge should be removed from office.

B. ***Factual background***

[9] Justice Girouard was appointed to the Superior Court of Quebec on September 30, 2010.

[10] On November 30, 2012, a complaint was filed with the Council after a video was sent by the Director of Criminal and Penal Prosecutions to the Honourable François Rolland, then Chief Justice of the Superior Court. According to the complaint, the video showed a transaction involving an illicit substance between the respondent Girouard, then a lawyer, and one of his clients at the time.

[11] In October 2013, the Council established a review committee to consider the complaint and have a preliminary inquiry conducted by outside counsel. The review committee concluded that, if the allegations were substantiated, they would be serious enough to warrant the removal of the judge.

[12] In February 2014, the Council constituted, in accordance with subsection 63(3) of the Act, an inquiry committee responsible for considering the complaint received. The first inquiry committee said it was unable to conclude that the exchange captured on video involved an illicit substance despite the fact that a majority of its members questioned the reliability and credibility of Justice Girouard's testimony. The committee therefore rejected all of the allegations against him. The Council subsequently accepted the recommendations of the first inquiry committee in that regard.

[13] In June 2016, the Minister and the Minister of Justice of Quebec filed a joint complaint to the Council regarding Justice Girouard's conduct in the first disciplinary proceeding. This complaint triggered the mandatory inquiry under subsection 63(1) of the Act. It also consequently led to the establishment of a new inquiry committee, as stipulated in subsection 63(3) of the Act.

[14] On November 6, 2017, the second inquiry committee submitted its report. It concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge by reason of the misconduct of which he had been found guilty during the inquiry of the first inquiry committee.

[15] On February 20, 2018, 20 of the 23 Council judges adopted the findings of the second inquiry committee and concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge. The three dissenting judges suggested that he not be removed as they were of the opinion that he did not have a fair hearing to the extent that some

of the Council members could not understand and evaluate the entire record by reason of their unilingualism.

[16] Justice Girouard applied for judicial review of the recommendation made by the majority of the Council. This proceeding was in addition to a number of other applications filed over the course of the two inquiries against various decisions made by inquiry committees and the decision of the two Ministers of Justice to file a complaint with the Council.

[17] In response, the Council filed a motion to strike the applications for judicial review in question on the ground that the Federal Court does not have jurisdiction to hear the case under sections 2 and 18 of the FCA since the Council is not a "federal board, commission or other tribunal".

III. **FEDERAL COURT DECISION**

[18] On August 29, 2018, Federal Court Justice Simon Noël dismissed the Council's motions to strike. After his analysis, he reached the conclusion that the Council and its inquiry committee are federal boards, commissions or other tribunals under section 2 of the FCA (Decision at paras. 61–111). According to him, the Council's investigative powers do not derive from the Constitution, but from the Act (at para. 81). In addition, he stated that these powers belong to the Council as an institution, not to the chief justices individually because of their status (*Ibid.*). He also rejected the idea that paragraphs 63(4)(a) and (b) of the Act grant the Council superior court status. In his opinion, the purpose of these paragraphs is only to recognize the immunity of the Council and the inquiry judges, to grant them powers to summon witnesses and compel them to give evidence and to grant to the judges subject to inquiry protection with respect to their

testimony (at para. 156). The judge also rejected the Council's claims that the Council's reports and recommendations are not reviewable decisions under section 18 of the FCA (at para. 172).

IV. **ISSUES**

[19] The following issues arise in this appeal:

1. Are the Council and its inquiry committees federal boards, commissions or other tribunals subject to the Federal Court's jurisdiction with respect to judicial review?
2. Are the Council's reports and recommendations reviewable decisions?

[20] The Council's notice of appeal and memorandum of fact and law raise another issue, that is, a reasonable apprehension of bias on the part of the judge. The Council did not mention this issue during the hearing of the appeal and did not rely on its memorandum on this matter. There was no mention of this issue by counsel for Justice Girouard or the Attorney General of Canada (AGC). In the circumstances, this Court considers this ground of appeal to be abandoned. Moreover, nothing in the appellant's written submissions rebutted the strong presumption of the judge's impartiality, as established in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 59.

[21] The two issues will be dealt with in turn.

V. **PRELIMINARY ISSUES**

[22] Before dealing with the merits, there are two preliminary issues to examine. Two motions were made at the beginning of the appeal hearing. The first, filed by Justice Girouard, requests the addition to the appeal book of a copy of the application for judicial review amended with the

permission of Justice Simon Noël as the case management judge. As the other parties did not object, the motion was granted from the bench.

[23] However, there was no unanimity on the second motion. In that motion, the appellant asked the Court to grant it leave to present new evidence on a question of fact under section 351 of the *Federal Court Rules*, SOR/98-106. The evidence in question is the minutes of the annual conference of the chief justices of Canada, which took place when Parliament was considering the amendments to the Act that established the Council. The minutes reveal that during that meeting, the Honourable Justice Fauteux, then Chief Justice of Canada, apparently explained that subsection 32(4), now subsection 63(4) of the Act, was amended to prevent the possibility of the Council being subject to the Federal Court's power of review.

[24] The appellant argues that that evidence meets the criteria applicable to the admissibility of new evidence under Rule 351, as set out in *Brace v. Canada*, 2014 FCA 92 at para. 11:

> (1) *The evidence should not be admitted if, by due diligence, it could have been adduced at trial. . . .*
>
> (2) *The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial. . . .*
>
> (3) *The evidence must be credible in the sense that it is reasonably capable of belief. . . .*
>
> (4) *The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. . . .*
>
> (See also *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10.)

[25] Since all of these criteria must be met, the failure to meet one of them is enough for the motion to be dismissed.

[26] On the basis of this evidence, the appellant wants to show that the intention of Parliament, when it amended subsection 63(4) of the Act to include the expression "shall be deemed to be a superior court", was to insulate the appellant from the Federal Court's jurisdiction as concerns judicial review.

[27] Yet, as the judge aptly noted in paragraphs 138 and 140 of his reasons, a public servant from the Department of Justice who testified before the parliamentary committee during the debates regarding this amendment explained that the purpose of amending the bill to insert the phrase "shall be deemed to be a superior court" was "[t]o give the judges . . . the usual judicial protection that they would need", that is, immunity from prosecution (Standing Committee on Justice and Legal Affairs, House of Commons, *Minutes of Proceedings and Evidence*, 28th Parliament, 3rd Session, Vol. 2, No. 27 (16 June 1971) at p. 27:27). The new evidence that the appellant wishes to present contradicts this testimony. First, the appellant did not demonstrate that the minutes are authentic and accurately reflect the comments of Justice Fauteux; second, the comments attributed to Justice Fauteux would only be his opinion and can in no way be considered Parliament's intent. It is therefore difficult to say that this new evidence could "be expected to have affected the result".

[28] It should also be noted that the document in question contradicts the main argument put forward by the appellant before this Court, that is, that the Council's members derive their immunity from the Constitution. In fact, it suggests instead that in the absence of the current subsection 63(4) of the Act, the Council's decisions would indeed be subject to the supervisory authority of the Federal Court. It is therefore difficult to conclude, as required by the case law,

that if believed, the new evidence could be expected to have affected the result in favour of the appellant.

[29] In short, the criteria for the admission of the new evidence were not met. The appellant's motion will therefore be dismissed.

VI. STANDARD OF REVIEW

[30] The issue of whether the Federal Court had jurisdiction to rule on the applications for judicial review in dispute is a question of law that must be reviewed on a standard of correctness (*Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311 at para. 18 (*Mikisew FCA*), aff'd by 2018 SCC 40; *Spike Marks Inc. v. Canada (Attorney General)*, 2008 FCA 406 at para. 11, leave to appeal to the S.C.C. refused, April 30, 2009 (33023); *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8).

VII. ANALYSIS

A. *Is the Council a federal board, commission or other tribunal subject to the Federal Court's jurisdiction with respect to judicial review?*

(1) General legal framework

[31] The Federal Court's jurisdiction is not inherent; it is statutory. It follows that, in order for the Court to hear and decide a case, Parliament must have conferred on it the necessary jurisdiction (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 43 (*TeleZone*)). By adopting section 18 of the FCA, Parliament granted the Federal Court exclusive jurisdiction to review the actions taken or decisions made by a "federal board, commission or other tribunal", except for those in respect of which the Federal Court of Appeal has express jurisdiction under

section 28. Section 18.1 of the FCA sets out the scope of the remedies available on an application for judicial review by the Attorney General or by an interested party.

[32] The term "federal board, commission or other tribunal" generally means a "body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 18 (*Mikisew SCC*)). More specifically, section 2 of the FCA defines this notion as follows:

2 (1) In this Act,	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;	***office fédéral*** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

[33] With respect to this definition, the Supreme Court of Canada stated that it is "sweeping" and that it "goes well beyond what are usually thought of as 'boards and commissions'" (*Telezone* at paras. 3 and 50).

[34] To determine whether a body is a "federal board, commission or other tribunal" within the meaning of section 2 of the FCA, this Court developed a two-step test. According to

Anisman v. Canada (Border Services Agency), 2010 FCA 52 (*Anisman*), the Court must determine "what jurisdiction or power" the body seeks to exercise and then "what is the source or the origin" of that jurisdiction or power (at para. 29; Mikisew SCC at para. 109).

[35] It should also be noted that Parliament amended the definition of "federal board, commission or other tribunal" several times to explicitly exclude bodies that could otherwise be included. This is notably the case with the Senate, the House of Commons, any committee or member of either House, and the ethics commissioners of these institutions with respect to the exercise of their powers pursuant to the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (see subsection 2(2) of the FCA).

(2) **Discussion**

a) **Anisman *criteria***

[36] The Federal Court judge set out the *Anisman* test in paragraph 96 of his reasons. Examining the statutory scheme at issue in light of the criteria established in the case law, he concluded that the Council and its committees exercise powers that are investigative in nature (at para. 97), similar to those of a commissioner of inquiry under the *Inquiries Act*, R.S.C. 1985, c. I-11 (*Inquiries Act*) (at para. 83). He also found that the source of these powers can only be found in paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4) of the Act, that is, an "Act of Parliament" within the meaning of section 2 of the FCA (at para. 97).

[37] The appellant is challenging the judge's conclusions in relation to (i) the source of the powers exercised and (ii) the nature of those powers. These criticisms will be considered in turn. As the "source" of the powers is the "principal determinant" of whether a decision-maker falls

within the definition of a "federal board, commission or other tribunal", this question will be dealt with first (*Mikisew SCC* at para. 109; Donald J.M. Brown and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, (Toronto: Thomson Reuters Canada Limited, 2018) at pp. 2-50, 2-51).

(i) **The source of powers**

[38] Relying on *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (*Ruffo*), the appellant argues that the powers in dispute here are "inherent" in its members' exercise of their functions. According to the appellant, the result is that these powers are constitutional and that they are therefore not conferred by or under an "Act of Parliament" within the meaning of section 2 of the FCA.

[39] These arguments do not withstand scrutiny.

[40] The judge was quite correct to conclude that the only source of the powers of the Council and its committees is the Act, notably paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4). Had the Act not been adopted by Parliament, the Council would simply not exist. Furthermore, it should be noted that it has only been in existence since 1971; before that date, judicial discipline was entrusted to *ad hoc* commissions of inquiry established by the Governor in Council. In addition, there is every reason to believe that if the roles and composition of the Council were to be modified, it would be up to Parliament and not the Council itself to make such changes through legislation. The only power granted to the Council in that respect, under subsection 61(3) of the Act, is that of making by-laws to regulate the procedure in regard to its meetings and its inquiries and investigations.

[41] As rightly noted by the respondent the AGC, the *Anisman* analysis implies that this Court must focus on the source of the powers conferred on the *body* that exercises them—in this case, the Council, not its members. In any event, even if the powers conferred on chief justices were to be taken into account, the same conclusion applies in this case.

[42] The appellant's argument that its powers are constitutional since they are inherent to the office of chief justice is based on the following passage from *Ruffo*:

> [57] . . . It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation. Therefore, the fact that there was no explicit legislation on ethics until quite recently does not mean we can doubt the continuity that marked the development of the chief judge's responsibilities in this regard. It accordingly cannot be argued that the supervisory powers conferred on the chief judge by . . . s. 96 [of the *Courts of Justice Act*, R.S.Q., c T-16 then in force] were assigned spontaneously by the legislature; in my view, they must rather be seen as the expression of a reality that is consistent with general practice and gradual developments over time.
>
> [58] This opinion is shared by the American author . . . Geyh, who asserts that the chief judge's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions . . . . I agree.
>
> [Emphasis in original.]

[43] However, to understand its real import, this excerpt from *Ruffo* should be put in its original context. Those comments were made by Justice Gonthier, on behalf of the majority, in response to the argument that the chief judge of the Court of Québec should not be allowed to lay a complaint with the Conseil de la magistrature against a judge of his court because it would go against the principles of judicial impartiality and independence. It is in this very specific context that the comments reproduced above were made and should be understood. This is clear from the paragraph that follows:

> [59] We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.
>
> [Emphasis added.]

[44] What we understand from this passage is that the only inherent power of a chief justice identified by the Supreme Court in *Ruffo* with respect to judicial discipline is that of *laying a complaint* against one of the judges under his or her supervision. There is nothing to suggest that this power should necessarily include that of holding an inquiry into such a complaint. Moreover, when chief justices act in such a way, they do so by reason of their role as coordinators of the court in their division. In other words, if this power is "inherent," it is so with respect to their functions as chief justices, which are essentially administrative functions (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 99), not their functions as judges (if that were the case, every judge would be granted this power). Nor does that decision mention that a chief justice would have such power in respect of judges other than those of his or her court. The Council's powers are not limited in this manner.

[45] In *Ruffo*, the Court never cited any "constitutional origin" for the functions of chief justices, contrary to the appellant's arguments in paragraph 44 of its memorandum. It is also interesting to note that at no point in that decision does the Court refer to section 96 of the

CA 1867. In short, the appellant reads into the Court's decision in *Ruffo* something that it does not say.

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

(ii) **The nature of powers**

[47] With regard to the second criterion, the appellant claims that the powers and jurisdiction of its members are judicial in nature. In that respect, the appellant argues that the exercise of those powers is not subject to judicial review. In support of this argument, the appellant draws this Court's attention to various passages from, notably, *Therrien (Re)*, 2001 SCC 35 (*Therrien*) and *Valente v. The Queen*, [1985] 2 S.C.R. 673 (*Valente*). It also states that the motions judge was wrong to distinguish this case from *Minister of Indian Affairs and Northern Development v. Ranville et al.* [1982] 2 S.C.R. 518 (*Ranville*) on the sole ground that the Council's powers are exercised collectively. The appellant further argues that the fact that Council members can have substitutes and the fact that lawyers can sit on inquiry committees established by the Council is in no way determinative.

[48] These arguments must be rejected.

(iii) **Inquisitorial powers**

[49] The judge was right to conclude that the power exercised by the Council "over the conduct of judges and certain public servants holding office during good behaviour is investigative in nature", that it is a "power of inquiry" (Decision at para. 97). Paragraph 60(2)(c) of the Act, from which the Council derives its jurisdiction in this case, very clearly grants it the power to "make the inquiries and the investigation of complaints or allegations described in section 63 [of the Act]". This power is circumscribed by sections 63 and 64, which are found in the section of the Act entitled "Inquiries concerning Judges". As Justice Girouard correctly notes, the subheadings for the applicable subsections ("Investigations", "Inquiries", "Powers of Council or Inquiry Committee", etc.) also speak to the nature of the powers granted to the Council and its committees (Justice Girouard's Memorandum of Fact and Law at para. 39).

[50] As the judge points out in paragraph 83 of his decision, this interpretation is also supported by a report from the Council itself in March 2014, which states that the investigative powers in question are "similar" to those of a commissioner of inquiry under the *Inquiries Act* (Canadian Judicial Council, Review of the Judicial Conduct Process of the Canadian Judicial Council: Background Paper, Ottawa, Canada, 2014, at p. 47). The report states the following:

> . . . [T]he statutory framework suggests that the [Council]'s judicial conduct review process is inquisitorial. Under the [Act], an Inquiry Committee is constituted to inquire into whether a federally appointed judge has become incapacitated or disabled in the due execution of the office of a judge. The Inquiry Committee has investigative powers under the [Act], including the power to summon witnesses and to require them to testify under oath and to produce documents, and the power to enforce the attendance of witnesses as is vested in a superior court. Those powers are similar to those of a commissioner of inquiry under the *Inquiries Act*. An Inquiry Committee has no explicit power to impose sanctions. . . . [Emphasis added; footnotes omitted.]

[51] The distinction that should be drawn between "investigative" powers and "judicial" powers was discussed in *Beno v. Canada (Commissioner and Chairperson, Commission of*

Inquiry into the Deployment of Canadian Forces to Somalia), [1997] 2 F.C. 527 (C.A.). Although made in a different context, that is, that of determining which criterion should apply when assessing allegations of bias in the exercise of either of these powers, this Court's comments in this regard remain relevant:

> . . . A public inquiry is not equivalent to a civil or criminal trial. In a trial, the judge sits as an adjudicator, and it is the responsibility of the parties alone to present the evidence. In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court. Judges determine rights as between parties; the Commission can only "inquire" and "report" . . . . Judges may impose monetary or penal sanctions; the only potential consequence of an adverse finding by the Somalia Inquiry is that reputations could be tarnished . . . . [at p. 539; references omitted.]

[52] In that case, the report of the Commission of Inquiry into the Deployment of Canadian Forces in Somalia, chaired by Justice Létourneau, was considered reviewable.

[53] These statements were reiterated by this Court in *Gagliano v. Gomery*, 2011 FCA 217. As stated by the Court, "contrary to commissioners whose primary and essential function is to seek out, find and gather evidence", a judge "only weigh[s] the evidence the parties already have in hand and have submitted to the court to be assessed" (at para. 23). In that case, the Court implicitly found that the report issued by Commissioner Gomery at the conclusion of the Commission of Inquiry into the Sponsorship Program and Advertising Activities was reviewable by the Federal Court pursuant to its power of judicial review.

[54] These comments are consistent with those of Justice Gonthier in *Ruffo* as to the nature of the proceedings before an inquiry committee established under a previous version of the *Courts of Justice Act*, C.Q.L.R. c. T-16 (CJA), which are worth reproducing here:

> [72] . . . [T]he Comité's mandate is to ensure compliance with judicial ethics . . . . For this purpose, it must inquire into the facts to decide whether the *Code of Ethics* has been breached and recommend the measures that are best able to remedy the situation. . . . [T]he 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.
>
> [73] 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. Any idea of prosecution is thus structurally excluded. . . . [T]he Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.
>
> [Emphasis added.]

[55] In addition, Justice Girouard is right to point out that if the powers of the Council and of its committees were actually judicial in nature, Parliament would not have had to confer on them, in subsection 63(4) of the Act, the powers and immunities enjoyed by superior courts. The members, if they acted as judges, would *de facto* have had these powers and immunities (Justice Girouard's Memorandum of Fact and Law at para. 44). What is more, the fact that Council members can appoint substitutes (subsection 59(4) of the Act; Decision at para. 86) and that the Minister of Justice can require that an inquiry or investigation be held in public (subsection 63(6) of the Act) is at odds with the idea that they act as judges. The appellant merely stating that the possibility of appointing a substitute is not determinative, without specifying its reasoning (Appellant's Memorandum of Fact and Law at para. 66) is not enough to establish that the judge erred.

[56] In light of the foregoing, the arguments put forth by the appellant do not show that the judge was mistaken in concluding, as he did, that the role given to the Council by the Act is

dissimilar to the role that a judge can play in a court of law. It follows that the appellant's position that its members' powers are "judicial in nature" and that, as such, the exercise of such powers is not subject to judicial review must be rejected.

[57] Before ending this discussion, however, it is appropriate to look briefly at the appellant's arguments based on the Supreme Court's decisions in *Therrien*, *Valente* and *Ranville*.

(iv) **Judicial inquiry**

[58] The appellant also relies upon the following passage from the Supreme Court's decision in *Therrien* to support its position that its members exercise "judicial" functions:

> [39] . . . [T]he procedure for removal of a judge established by the *Courts of Justice Act* is part of the more general context of the constitutional requirements relating to judicial independence. The fact that the report of the Court of Appeal is judicial and is in the nature of a decision is one of the conditions that ensure the constitutionality of the process for removal of judges provided by the *C.J.A.*. . . To satisfy [the] guarantee [of security of tenure] as regards the removal of provincial court judges, the following two criteria must be met: (1) the removal must be for cause, which must be specific and be related to the judge's capacity to perform his or her judicial functions; and (2) there must be a judicial inquiry to establish that such cause exists, at which the judge affected must be afforded an opportunity to be heard . . . . For the province of Quebec, this judicial forum is the Court of Appeal.
>
> [Emphasis in original; references omitted.]

[59] Citing the decision of the Court of Queen's Bench of Alberta in *R. v. Campbell*, [1995] 2 W.W.R. 469 (*Campbell*), the appellant submits that the Court used the term "judicial inquiry" in *Therrien* and *Valente* to indicate the need for an inquiry leading to a judge's removal to be conducted by judges in order to ensure the judicial independence enshrined in paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. According to the appellant, the result is

that the powers exercised by these magistrates are necessarily "judicial in nature". This argument is not convincing.

[60] It should first be noted that the decision in *Campbell*, cited by the appellant in support of its position that the term "judicial inquiry" necessarily means a proceeding conducted by judges, was overturned by the Supreme Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)*, [1997] 3 S.C.R. 3 (*Reference*). The Supreme Court concluded that, to the extent that the issue dealt with in the passages cited by the appellant, that is, the constitutionality of the provisions governing the removal of judges, was not even before the judge, he could under no circumstances proceed "on his own motion to consider the constitutionality of these provisions, let alone make declarations of invalidity" (at paras. 263–264). This comment undermines not only the authority of the decision in *Campbell*, but also the decision by the Court of Appeal of Quebec in *Québec (Conseil de la magistrature) c. Québec (Commission d'accès à l'information)*, [2000] R.J.Q. 638 (QCCA) to the extent that it relies, in paragraphs 96–97 of its reasons, on *Campbell*.

[61] That said, even assuming that the judge in *Campbell* was right to conclude that by "judicial inquiry" the Supreme Court meant a proceeding conducted by judges, that has no bearing here. There are two reasons for this.

[62] First, it should be noted that Justice Le Dain's comments on the need for a "judicial inquiry" were made in the context of a discussion on the process for removing provincial court judges, not superior court judges. This is of great importance to the extent that the process for superior court judges is the only one subject to the requirement, set out in section 99 of the

CA 1867, that the removal be by the Governor General on address of the Senate and House of Commons. This condition ensures that superior court judges enjoy, writes Justice Le Dain in *Valente*, "what is generally regarded as the highest degree of security of tenure" possible (at p. 695). Yet, it is precisely the absence of this protection in the provincial removal process that, in the opinion of the judge in *Campbell*, justified a "judicial inquiry". According to him:

> The emphasis of Le Dain, J.'s, remarks in these passages is upon the judicial inquiry as a significant protection of security of tenure when the executive government is given the power of removal. The inquiry is viewed as a substitute for the protection which for superior court judges is found in s. 100 of the Constitution Act, 1867, pursuant to which such a judge may be removed only upon joint address of the Houses of Parliament. . . . If that issue is not to be considered in the "solemn, cumbersome and publicly visible" process of a proceeding in the Legislative Assembly, and instead final decision is to be taken by a nonjudicial body . . . it is not surprising that the inquiry that Le Dain, J., regarded as a substitute restraint should be a "judicial inquiry". By this he must have intended an inquiry conducted by persons who themselves enjoy security of tenure as judges . . . .
>
> [Emphasis added.]

[63] If that reasoning were to be accepted, the requirement of a "judicial inquiry" would quite simply not apply to the present dispute, which pertains to the process for removing superior court judges and is subject to section 99 of the CA 1867. The provision makes no mention of a "judicial inquiry", and the term should not be added. It is also interesting to note that, if it were otherwise, the presence of non-judges on the Council's inquiry committees could be problematic.

[64] Second, even if the process leading to the removal of a superior court judge also had to be conducted by judges, this would not necessarily mean that they act in their capacity as judges when they sit on the Council. There is, in fact, nothing incongruous in a body formed in whole or in part of judges being subject to the power of judicial review. As the intervener Justice Smith notes, this is notably the case with the Specific Claims Tribunal (*Specific Claims Tribunal Act*,

S.C. 2008, c. 22, s. 6(2)) and the Public Servants Disclosure Protection Tribunal (*Public Servants Disclosure Protection Act*, S.C. 2005, c. 46, s. 20.7(1)).

[65] What is more, one might wonder whether the judge's interpretation of the term "judicial inquiry" in *Campbell* is the correct one. One might in fact think, in light of the decisions cited by the Court in *Therrien*, that the court simply meant for this term to refer to the procedural requirements that must be met in the process leading to the removal of a judge. This is clear from the excerpt from *Valente* to which the paragraph cited above refers:

> [As part of the Act's removal process, t]he judge must be given an opportunity to be heard, in person or by counsel, and to cross-examine witnesses and adduce evidence. . . . [The provisions concerning security of tenure of provincial court judges provide that] a provincial judge may be removed before the age of retirement only for cause. There is also provision for a judicial inquiry into whether there is cause at which the judge affected is afforded a full opportunity to be heard. . . .
>
> . . .
>
> In sum, . . . [the provision] reflects what may be reasonably perceived as the essentials of security of tenure . . . : that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure . . . is a tenure . . . that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.
>
> [*Valente* at pp. 695, 696 and 698; emphasis added.]

[66] A similar conclusion emerges from a reading of paragraph 115 of *Reference*, which is also mentioned in the passage from *Therrien* cited above. It reiterates the requirement, set out in *Valente*, for a "judicial inquiry at which the judge affected is given a full opportunity to be heard".

[67] It goes without saying that the mere fact that procedural safeguards are required in a specific process does not mean that the process necessarily results from the exercise by the decision-maker of a judicial power immune from a review under section 18.1 of the FCA. Quite the contrary. It appears that all of the federal boards, commissions or other tribunals referred to in section 2 of the FCA are required, in making their decision, to consider procedural fairness, albeit to varying degrees on a case-by-case basis (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[68] In short, the Court's reference in *Therrien* to the notion of "judicial inquiry" does not lead to the conclusion that the Council's members exercise "judicial" functions.

(v) ***Ranville*** **decision**

[69] The appellant also relies on the following passage from *Ranville* (at p. 527) to support its position that the Council's members exercise a function that is "judicial in nature":

> . . . [W]henever a statutory power is conferred upon a s. 96 [of the CA 1867] judge or officer of a court, the power should be deemed exercisable in an official capacity as representing the court, unless there is express provision to the contrary.

[70] The judge was right to distinguish *Ranville* from the case at hand on the ground that the powers granted to the judge in that case were personally vested in him, whereas those conferred on the Council are conferred on it as an institution. The enabling provision in *Ranville*, that is, subsection 9(4) of the former *Indian Act*, R.S.C. 1970, c. I-6, provided that:

9 (4) The judge of the Supreme Court, Superior Court, county or district court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may	9 (4) Le juge de la Cour suprême, de la Cour supérieure, de la cour de comté ou de district, selon le cas, doit enquêter sur la justesse de la décision du registraire, et, à ces fins, peut

exercise all of the powers of a commissioner under Part I of the Inquiries Act; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.	exercer tous les pouvoirs d'un commissaire en vertu de la Partie I de la *Loi sur les enquêtes*. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.
[Emphasis added.]	[Soulignements ajoutés.]

[71] The powers granted by section 63 of the Act are, conversely, granted to the committee and the Council:

63 (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).	63 (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général 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).
(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.	(2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.
(3) The Council may . . . constitute an Inquiry Committee.	(3) Le Conseil peut constituer un comité d'enquête […].
(4) The Council or an Inquiry Committee in making an inquiry . . . shall have	(4) Le Conseil ou le comité […] a le pouvoir de :
(a) power to summon before it any person or witness and to require him or her to give evidence . . . and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and	a) citer devant lui des témoins, les obliger à déposer […] et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence . . .	b) contraindre les témoins à comparaître et à déposer, […]
(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.	(5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci.
[Emphasis added.]	[Soulignements ajoutés.]

[72] In the same way, section 65 of the Act confers on the Council the power to make recommendations:

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.
(2) Where, in the opinion of the Council, the judge . . . has become incapacitated or disabled from the due execution of the office of judge . . . the Council, in its report to the Minister . . . , may recommend that the judge be removed from office.	(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 […]
[Emphasis added.]	[Soulignements ajoutés.]

[73] The judge was therefore right to conclude that "the power to investigate and . . . submit a report belong[s] to the [Council] and not to the chief justices individually" and that this sets the present case apart from the decision in *Ranville* (Decision at para. 89; *Canada (Attorney*

General) v. Canada (Commissioner of the Inquiry on the Blood System), [1997] 2 F.C. 36 (FCA) at pp. 51–52). In the words of the judge, we are dealing with "members of a single collectivity who, acting together as an institution, submit a report and conclusions. Within the [Council], the judges and other members become part of this collective identity when undertaking an inquiry. The identity of the [Council] is [therefore] separate from that of its components" (para. 88; *Douglas v. Canada*, 2014 FC 299 at para. 84 (*Douglas*)).

[74] It is also interesting to note, as the judge does in paragraph 81 of his reasons, that this interpretation is consistent with the Council's report dated March 2014, which states that the Act grants investigative powers to "[t]he full [Council] itself" and, further down, that "the full [Council] must report its conclusions to the Minister of Justice and may recommend that a judge be removed from office" [emphasis added by the judge] (at p. 47).

b) ***Exception relating to section 96 of the CA 1867***

(i) **Composition of the Council**

[75] The appellant argues in the alternative that the judge erred in failing to take into account the exclusion from the definition of federal board, commission or other tribunal in section 2 of the FCA of "any such person or persons ("*personne ou . . . groupe de personnes*" in the French version) appointed under . . . section 96 of the [CA 1867]". According to the appellant, the fact that the majority of its members represent provincial superior courts would make it a "*groupe*" under this exception. The appellant states that there is nothing to suggest that such a group must *only* be composed of persons appointed under section 96 to be excluded.

[76] These arguments must be rejected.

[77] The judge was correct in concluding, in paragraph 84 of his reasons, that judges sit on the Council in their capacity as chief justices, a role that is "administrative in nature", rather than as judges drawing their powers from section 96 of the CA 1867. As discussed earlier, the Council's jurisdiction and powers concerning judicial ethics are conferred on it by the Act. They do not derive from its members' status as judges, both when they sit on an inquiry committee and when they reach a finding on the report of such an inquiry committee.

[78] Moreover, the Council is not composed exclusively of superior court judges within the meaning of section 96 of the CA 1867. Some of its members, in particular the chief justices of the Federal Court, the Federal Court of Appeal and the Tax Court of Canada (paragraph 59(1)(b) of the Act), as well as the Chief Justice of the Court Martial Appeal Court of Canada (paragraph 59(1)(d) of the Act), were instead appointed to courts constituted pursuant to section 101 of the CA 1867. What is more, the Chief Justice of Canada, who is also appointed pursuant to section 101 of the CA 1867, may appoint a current or former member of the Supreme Court of Canada to act as a substitute member of the Council (subsection 59(4) of the Act); the result is that a person who had served on a court constituted under section 101 of the CA 1867 and had never been appointed under section 96 of the CA 1867 may act as a member of the Council. Moreover, under subsection 63(3) of the Act, the Council's inquiry committees can be composed in part of lawyers who are members of the Bar (*Douglas* at para. 110).

[79] The appellant's claim that the words "*un groupe de personnes nommées aux termes . . . de l'article 96 de la [L.C. 1867]*" in the French version of section 2 of the FCA can mean a group composed *majoritairement* (mostly) of judges appointed in this manner cannot be accepted. Accepting this position would be adding the word "*majoritairement*" to the language

of the exception in dispute, which would be contrary to the rules of statutory interpretation (*Murphy v. Welsh; Stoddard v. Watson*, [1993] 2 S.C.R. 1069 at p. 1078; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011), at pp. 293–294). The text of the provision is clear. There is no implicit intention on the part of Parliament to justify the addition of such a term. The judge was therefore right to conclude that the word "*groupe*" implies a notion of exclusivity.

[80] It is also correct to state, as does Justice Girouard (Justice Girouard's Memorandum of Fact and Law at para. 84), that Parliament had ample opportunity to add the Council to the list of bodies and institutions excluded from the definition of "federal board, commission or other tribunal" in subsection 2(2) of the FCA, like the House of Commons, the Senate, the Senate Ethics Officer and, in some cases, the Conflict of Interest and Ethics Commissioner. Yet, it did not do so.

(ii) **The deeming provision**

[81] The appellant also relies on subsection 63(4) of the Act, which states the following, to support its position:

63 (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	63 (4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :
(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	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

documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and	qu'il estime nécessaires à une enquête approfondie;
(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.	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.
[Underline added.]	[Soulignements ajoutés.]

[82] According to the appellant, neither the English nor the French version of this subsection "rule out the possibility" that the Council and its inquiry committees are excluded from the definition of "federal board, commission or other tribunal" (Appellant's Memorandum of Fact and Law at para. 113). If the Council and its committees are deemed to be superior courts, according to the appellant, they are necessarily deemed to have "all the attributes" of such a court (at para. 116). Also, the fact that the Council is not mentioned in subsection 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, is apparently irrelevant.

[83] In this Court's opinion, the Federal Court judge came to the well-founded conclusion that the appellant's interpretation of this provision could not be accepted.

[84] As rightly pointed out by the respondent the AGC, it is not enough, when relying on a textual argument, to state that a particular interpretation is "possible". Rather, it must be demonstrated that the interpretation is reflected in the language of the statute and is consistent with the context and purpose of the statute (AGC's Memorandum of Fact and Law at para. 52).

The appellant did not demonstrate this in the case at hand. In fact, as stated by the respondent the AGC, such an analysis seems instead to point in the opposite direction.

[85] ***Text***. The text of subsection 63(4) of the Act has always limited the use of the term "superior court" to provisions concerning the Council's power of inquiry (in this respect, see also subsection 32(4) of *An Act to amend the Judges Act*, S.C. 1970-71-72, c. 55 (2nd Supp.)). It is also significant that Parliament used the phrase "shall be deemed" instead of the verbs "to have" or "to be" in this subsection. These textual indications resulted in two of the Council's inquiry committees rejecting the idea that they are superior courts (*Douglas* at para. 116). This militates in favour of the position taken by the judge that this provision is limited in scope and that it simply enumerates the powers and functions of the Council and the inquiry committee (Decision at para. 147).

[86] The Court of Appeal of Quebec adopted a similar interpretation of subsection 8(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), which states that the Competition Tribunal has, in several respects, "all such powers, rights and privileges as are vested in a superior court of record" (*Canada (Procureur général) c. Alex Couture Inc.*, [1991] R.J.Q. 2534 (QCCA)). According to Justice Rousseau-Houle, writing for a unanimous Court, the mere fact that the Tribunal was vested with the powers of a superior court [TRANSLATION] "does not change the Tribunal's status by granting it all the powers of a superior court" (at p. 62).

[87] If Parliament's intention was to grant the Council all the attributes of a superior court, without exception, it could have done so more explicitly. First, it would have been possible to make the Council a superior court within the meaning of section 101 of the CA 1867. This was

the approach adopted for the Court Martial Appeal Court (*National Defence Act*, R.S.C. 1985, c. N-5, s. 236(1)) and the federal courts (FCA at s. 3–4). Second, Parliament could have adopted a specific exclusion provision. A good example of such a provision can be found in subsection 58(3) of the *Canada Labour Code*, R.S.C. 1985, c. L-2, which provides, in in the clearest possible terms, that an arbitrator appointed pursuant to a collective agreement or an arbitration board "is not a federal board, commission or other tribunal within the meaning of [the FCA]".

[88] ***Context.*** In an attempt to determine Parliament's intention, the wording of the provision must also be examined in its specific statutory context. This exercise further supports the interpretation adopted by the judge rather than that proposed by the appellant.

[89] Subsection 63(4) is in Part II of the Act, in the section entitled "Inquiries concerning Judges". It follows the provisions that deal with inquiries, investigations and the constitution of an inquiry committee, and is accompanied by the marginal note "Powers of Council or Inquiry Committee". Justice Mosley noted the following in that respect in *Douglas*:

> [107] The location of the deeming clause also indicates that it was intended to have a limited scope. The clause does not appear as a general stand-alone statement about the Council or its Committees, but is contained in the fourth subsection of the enactment that deals specifically with inquiries and investigations into the conduct of judges. It forms the "chapeau" of the provision that enumerates the specific powers, duties and functions with which the Council and the Committees have been provided to facilitate their inquiries and investigations.

[90] The context of the Act therefore militates against the appellant's position here.

[91] ***Purpose.*** There is no dispute that subsection 63(4) of the Act is a deeming provision. According to the Supreme Court in *R. v. Verrette*, [1978] 2 S.C.R. 838, a deeming provision is "a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is" (at p. 845; emphasis added).

[92] The appellant argues that a statutory fiction established by a deeming provision cannot be rebutted. The appellant is not wrong. However, this is not the issue. As author Sullivan points out, "[t]he difficulty that arises in interpreting legal fictions is determining not the force of the fiction, but its scope" (Ruth Sullivan, *Sullivan on the construction of statutes*, 6th ed., (Markham, Ontario: LexisNexis, 2014), at para. §4.108).

[93] It is on the basis of Parliament's purpose in adopting this provision that the scope of the statutory fiction must be assessed. As this Court noted in *Sero v. Canada*, 2004 FCA 6, leave to appeal to the S.C.C. refused, July 8, 2004 (30206), "the statutory fiction resulting from a deeming rule generally applies only for the purposes of the statute that creates it" (at para. 41; see, to the same effect, *Re Diamond and Ontario Municipal Board*, [1962] O.J. No. 554 (ONCA) at para. 10; *Douglas* at para. 113). In the case at hand, there is every indication that it is strictly for the purposes of inquiry or investigation that the Act provides that the Council and its committees are "deemed" to be a superior court. This section must not be interpreted in a manner that transforms the Council into a superior court or grants it all the attributes of a superior court.

(iii) **External evidence**

[94] As stated earlier, and as indicated by the judge in paragraphs 138 and 140 of his reasons, it is clear from parliamentary debates regarding the adoption of this provision that the provision was intended "[t]o give the judges in the case of hearing of an inquiry or having an investigation the usual judicial protection that they would need" (Standing Committee on Justice and Legal Affairs, House of Commons, *Minutes of Proceedings and Evidence*, 28th Parliament, 3rd Session, Vol. 2, No. 27 (16 June 1971) at p. 27:27). Aside from the new evidence, which has not been accepted, the appellant has not filed any excerpts before the Court suggesting that Parliament's intention was instead to grant the Council all the attributes of a superior court.

[95] Otherwise, the appellant emphasizes the need for members sitting on the Council and on the inquiry committees to have "immunity from prosecution". It is not in dispute that they enjoy this protection. However, there is a big difference between immunity from prosecution, for members personally, and immunity from the judicial review of decisions made in the exercise of a statutory power. The appellant erred by confusing these two notions in its arguments (Appellant's Memorandum of Fact and Law at paras. 118–120).

[96] ***Conclusion***. In brief, subsection 63(4) of the Act has a limited scope, that is, to establish the Council's powers and give judges the usual protection that they need during an inquiry or investigation. It does not grant it all the attributes of a superior court.

c) *Independence, efficiency and the rule of law*

[97] Ultimately, the appellant argues that subjecting its decisions to judicial review by the Federal Court could undermine the independence of its members and that this raises the possibility that the Council might no longer be the only body that could rule on the removal of a judge. The appellant also contests the judge's finding that its decisions must be subject to judicial review to uphold the rule of law and argues that the efficiency of the process is at risk of being negatively affected.

[98] These arguments are far from convincing.

[99] First, the appellant is wrong in stating that subjecting its decisions to judicial review undermines judicial independence. The appellant's claims in that regard are based on the assumption, dismissed above, that the Council's members act as judges when they sit on the Council and that, consequently, they exercise a judicial function. If we put aside this erroneous premise and if we see the Council for what it is, that is, an administrative decision-maker exercising powers conferred on it by an ordinary statute, it is not surprising that the legality of its decisions can be reviewed by the Federal Court on judicial review.

[100] The appellant is therefore wrong to rely on, in support of its position, the passage from *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 that states that compelling a judge to explain before a civil body "how and why the judge arrived at a particular judicial conclusion" (at p. 830) would go against "the most sacrosanct core of judicial independence" (at p. 831). While this passage highlights the importance of judicial independence, it does not, however, support the Council's

broad interpretation of it. That decision merely establishes that a judge cannot be required to account for his or her judgment before a government body. As noted by Justice Mosley in *Douglas*, "it does not state that judicial review of inquiries into the conduct of a superior court judge is incompatible with judicial independence" (at para. 97).

[101] What is more, subjecting the Council's decisions to judicial review does not undermine judicial independence, it can only increase it. In that regard, the judge's reasoning in paragraph 162 of the reviewed decision is worth reproducing:

> [162] For the Minister and the Cabinet to be able to fulfill their constitutional role of deciding whether to submit the issue of the removal of a judge to Parliament under section 99 of the CA 1867, their authority to do so must be grounded in a process that is consistent with the Constitution. As mentioned above, natural justice and procedural fairness, principles stemming from the rule of law, ensure that judicial independence is maintained in the course of an inquiry. If there is a violation of procedural fairness, . . . the Minister cannot act on the basis of a potentially flawed report without running the risk of acting in an unconstitutional manner. Judicial review of a recommendation by the [Council] provides the Minister, and ultimately the two Houses of Parliament, that the process is consistent with the underlying constitutional principles. If the [Council] were not subject to the superintending power of this Court, the Minister and Parliament would be forced to evaluate these legal issues, thereby overlapping with the judicial sector and threatening the separation of powers. It was precisely this situation that Parliament wished to avoid in establishing the [Council] as it did.

[102] In other words, for the removal of a judge to be valid, the judge must have had the benefit of a fair hearing. This fair hearing is "a component of the constitutional requirement for judicial security of tenure" (*Douglas* at para. 121). In this context, the supervisory jurisdiction of the Federal Court over the Council and its inquiry committees "serves an important function in the public interest of ensuring that the judicial conduct proceedings have been fair and in accordance with the law" (*Ibid.*). The Court's role is therefore entirely consistent with the principle of

judicial independence (*Slansky v. Canada (Attorney General)*, 2013 FCA 199 at para. 143 (*Slansky*), leave to appeal to the S.C.C. refused, February 13, 2014 (35606)).

[103] Similarly, the possibility of reviewing the legality of the Council's decisions plays a role in upholding the rule of law. As noted by Justice Stratas, dissenting on another point, in *Slansky*, immunizing the Council from any review would go against the principle that "all holders of public power should be accountable for their exercises of power" (at para. 313). It is by allowing "the courts [to] supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority", that judicial review ensures that the rule of law is respected (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28).

[104] The Council's concern that it will no longer be, as a result of being subject to the Federal Court's power of judicial review, the only body able to rule on the removal of a judge is unfounded. The issue of whether a superior court judge should be removed is, and will remain, within the jurisdiction of the Council and, ultimately, of the Senate and the House of Commons. The sole task of the Federal Court, on judicial review, will be to verify the legality of the decisions made by the Council and respect for procedural fairness. In doing so, it has to accord the Council all the deference that its status as a specialized decision-maker requires (Decision at paras. 100–101, citing *Taylor v. Canada (Attorney General)*, [2002] 3 F.C. 91, at para. 24, aff'd by 2003 FCA 55 (*Taylor FCA*), leave to appeal to the S.C.C. refused, September 25, 2003 (29678)).

[105] Lastly, the appellant's arguments regarding the impact that subjecting its decisions to judicial review would have on the efficiency of the disciplinary process must also be rejected.

The mere fact that delays can result from judicial review of a decision or recommendation made by the Council cannot, in and of itself, be sufficient grounds to make them immune from the Federal Court's jurisdiction in that regard. As noted by the respondent the AGC in his memorandum (AGC's Memorandum of Fact and Law at para. 41), if judicial review of the Council's decisions poses problems, the solution to these problems will have to come from Parliament, by way of legislative amendments, and not from the courts. It should be self-evident, particularly for chief justices sitting together on the Council, that a concern for the efficiency of the disciplinary process should not override legality and procedural fairness. This is all the more true in the case of a proceeding that may result in "capital punishment" for the judge in question (Decision at para. 166). To hold otherwise would go against the safeguards one has the right to expect when a judge must decide a dispute between a litigant and the government power.

[106] In addition, the excerpts from the parliamentary debates cited by the appellant regarding the absence of a right of appeal with respect to the Council's decisions do not support the inference that Parliament necessarily intended to insulate these decisions from judicial review. As noted by Justice Mosley in *Douglas*, nowhere is it stated that the intent of Parliament was to oust the jurisdiction of the newly created Federal Court (at para. 101).

d) ***Conclusion***

[107] In addition to the foregoing, it should be noted that the judicial conduct process administered by the Council in accordance with the power conferred on it by the Act has been the subject of several judicial review proceedings before the Federal Court and the Federal Court of Appeal; yet, except in *Douglas*, the Council has never adopted the position that its decisions and those of its committees were not reviewable under section 18 of the FCA (see, in particular,

Gratton v. Canadian Judicial Council, [1994] 2 F.C. 769; *Taylor FCA*; *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, leave to appeal to the S.C.C. refused, November 29, 2007 (32032); *Cosgrove v. Canada (Attorney General)*, 2008 FC 941; *Akladyous v. Canadian Judicial Council*, 2008 FC 50; *Slansky FCA*).

[108] In short, it is clear that the Council and its inquiry committees are included in the definition of "federal board, commission or other tribunal" in section 2 of the FCA. They are the creation of an Act of Parliament, that is, the Act, and neither the Council nor its committees is among the persons or bodies expressly excluded from the scope of the definition. While some members of the Council are judges appointed under section 96 of the CA 1867, they do not exercise a judicial function when they sit on the Council; they therefore do not fall within the express exclusion set out in section 2 of the FCA. The bodies of the Council exist solely because they were created by the Act, and not because of some inherent jurisdiction related to the judicial status of some of its members. For these reasons, this ground of appeal must be dismissed and the contested decision upheld.

B. ***Are the Council's reports and recommendations reviewable decisions?***

[109] The appellant halfheartedly affirms that the Council's recommendations do not carry the same degree of finality as a legal decision in that the Council's recommendations have no binding effect (Appellant's Memorandum of Fact and Law at para. 101). Insofar as this statement seems to be an attempt to resurrect the position raised before the judge that the Council's recommendations regarding removal are not "decision[s]" or "order[s]" within the meaning of section 18 of the FCA and that they would therefore not be subject to judicial review, there are a number of comments to be made in this regard.

[110] This alternative argument involves the general principle that an application for judicial review cannot be brought where the conduct attacked fails to affect legal rights, impose legal obligations or cause prejudicial effects (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 at paras. 28–29, leave to appeal to the S.C.C. refused, May 2, 2019 (38455); *Sganos v. Canada (Attorney General)*, 2018 FCA 84 at para. 6; *Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347 at para. 29).

[111] The judge disposed of this argument in paragraphs 165 to 172 of his reasons. He held, notably in light of the report published by the Council itself in March 2014, that a finding that "a judge has become incapacitated or disabled from the due execution of his or her office amounts to 'capital punishment' for that judge's career" (Decision at para. 166). Insofar as the Minister of Justice cannot, under the Act, ask Parliament to remove a judge without an inquiry by the Council and its inquiry committee, as the judge notes, "the report and its conclusions have a major impact on the rights and interests of the judge" under investigation (at para. 168). He also stated that the mere fact that the decision takes the form of a recommendation is not determinative (at para. 169), especially since the case law clearly acknowledges that a matter other than a decision or order may be reviewed under section 18.1 of the FCA (at para. 170).

[112] We are in full agreement with the judge's findings in this regard. The appellant has in no way shown how the judge erred in making such findings. This ground of appeal must therefore be rejected.

VIII. **CONCLUSION**

[113] For the reasons set out above, the appeal will be dismissed without costs.

"J.D. Denis Pelletier"
J.A.

"Yves de Montigny"
J.A.

"Mary J.L. Gleason"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL OF AN ORDER RENDERED BY THE HONOURABLE SIMON NOËL, OF THE FEDERAL COURT, DATED AUGUST 29, 2018, DOCKET NO. T-733-15, T-2110-15, T-423-17 AND T-409-18 (2018 FC 865)

DOCKET:	A-269-18
STYLE OF CAUSE:	CANADIAN JUDICIAL COUNCIL v. THE HONOURABLE MICHEL GIROUARD, THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF QUEBEC AND THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION, THE HONOURABLE PATRICK SMITH
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 3, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	PELLETIER J.A. DE MONTIGNY J.A. GLEASON J.A.
DATED:	MAY 16, 2019

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