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T-423-17
T-409-18

Citation: 2018 FC 865

Ottawa, Ontario, August 29, 2018

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Applicant (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

THE CANADIAN JUDICIAL COUNCIL

Moving Party

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

ORDER AND REASONS

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I. OVERVIEW

[1] Pursuant to section 221 of the *Federal Courts Rules*, SOR/98-106 (Rules), before this Court there are motions to strike the applications for judicial review filed in accordance with

section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 (FCA), by the applicant, the Honourable Justice Michel Girouard of the Superior Court of Quebec. The subjects of the underlying applications for judicial review are a report submitted by the Canadian Judicial Council (CJC) following an inquiry into the conduct of Justice Girouard recommending his removal to the Minister of Justice Canada (Minister), as well as an initial report by an Inquiry Committee (IC) of the CJC and other decisions made in the course of inquiries into Justice Girouard's conduct. The moving party in this case, the CJC, submits that the Court should allow the motions to strike the applications for judicial review on the grounds that the Federal Court has no jurisdiction to grant a remedy against the CJC or its IC. According to the CJC, it and its constituent bodies do not constitute a "federal board, commission or other tribunal" subject to review under section 2 of the FCA. The CJC also alleges that the *Judges Act*, RSC 1985, c J-1 (JA), grants the CJC the status of a superior court.

[2] For the reasons that follow, I am of the view that the motions to strike must be dismissed. The CJC, of which the IC is a part, is in fact a "federal board, commission or other tribunal" within the meaning of the definition contained in section 2 of the FCA. This means that the CJC's reports with conclusions and its recommendations, as well as the decisions made in the course of an inquiry by the IC, are subject to the judicial review mechanisms set out in section 18.1 of the FCA. Moreover, paragraphs 63(4)(a) and (b) of the JA do not grant the CJC the status of a superior court, nor do they exempt the CJC from judicial review by the Federal Court. It should be noted that, even though the CJC's report was simply a recommendation to the Minister that the judge be removed, I still consider it reviewable by the Federal Court.

[3] Finally, for the purpose of this case, I would like to point out some notable absences, including the Canadian Superior Court Judges Association, a representative of appointees who hold office during good behaviour (the record does not reveal whether such appointments still exist), and the complainant. I would have appreciated hearing their respective points of view on the issue at hand because the arguments raised have significant consequences for them.

[4] At the start of these judicial review proceedings, the Honourable Chief Justice Paul Crampton asked me to take charge of them given his involvement as a member of the first IC into Justice Girouard's conduct. Furthermore, I have been acting as case manager from the beginning, handling all of the procedural issues relating to the orderly conduct of the files. I also decided, and informed the parties, that the applications for judicial review on the merits would be considered by the Honourable Justice Paul Rouleau of the Court of Appeal for Ontario, appointed as a deputy judge under subsection 10(1.1) of the FCA.

II. PRELIMINARY REMARKS

[5] I will begin by addressing the CJC's rather peculiar argument that it and its IC, constituted to inquire into the judge's conduct, are deemed to be a superior court, thus placing them [TRANSLATION] "beyond judicial review". I also note that the CJC claims to have an [TRANSLATION] "internal appeal mechanism that safeguards procedural fairness even more robustly than final appeals to the Supreme Court, made up of nine judges; the Council is made up of at least seventeen judges, all chief justices or associate chief justices possessing indisputable expertise in matters concerning the administration of justice" (CJC's memorandum at para 102). According to this theory, the CJC considers itself not only the investigator into judicial conduct,

but also the body with the jurisdiction to hear the appeal of its own report, making it both the initial and the final authority. According to the arguments submitted by the CJC, its report and recommendation regarding Justice Girouard are final: it is not open to Justice Girouard to appeal or to apply for judicial review. This would also mean that the CJC's report and recommendation are immune from any attempt to remedy a breach of procedural fairness. It should be noted that the most recent report on Justice Girouard's conduct (dated February 2018) includes a dissent by three chief justices who state that the majority decision contains a breach of procedural fairness (see para 16).

[6] I cannot agree with the CJC's position. It is undeniable that a report recommending the removal of a judge has a serious impact on that judge, professionally and personally, and on his or her family. It is inconceivable that a single body, with no independent supervision and beyond the reach of all judicial review, may decide a person's fate on its own. Of course it is true that, in our society, the position of judge requires exemplary conduct, but is this a reason to render it subject to a single investigative body and to eliminate any possibility of recourse against the decision resulting from the inquiry? In my opinion, it is not. However prestigious and experienced a body may be, it is not immune from human error and may commit a major violation of the principles of procedural fairness that only an external tribunal, such as the Federal Court in this case, can remedy. As Justice Stratas of the Federal Court of Appeal recently recalled, such absolute power has no place within our democracy:

> In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law ... . From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law

> has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed.
>
> (*Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132 at para 23; see also *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 128 at para 78)

[7] Therefore, as per the fundamental principles of our democracy, all those who exercise public power, regardless of their status or the importance of their titles, must be subject to independent review and held accountable as appropriate. This also goes for the CJC and the chief justices who make up its membership.

III. FACTS

[8] Justice Girouard was appointed to the Superior Court of Quebec in 2010 and sat in the districts of Abitibi, Rouyn-Noranda and Témiscamingue. He has been suspended with pay since January 2013. For over five years now (the first complaint was filed in November 2012, and the CJC only rendered its report on the second complaint in February 2018), while the case has been winding its way through two full inquiries, two reports to the Minister (the first of which was submitted in April 2016) and several proceedings before the courts, the judicial complement in these districts has been considerably reduced.

[9] The event triggering this saga occurred in the fall of 2012, when the Director of Criminal and Penal Prosecutions informed the then Chief Justice of the Superior Court of Quebec, the Honourable François Rolland, that the applicant had been identified by a drug trafficker turned informant as a former client. In September 2010, a few weeks before his appointment to the

judiciary, Justice Girouard was allegedly captured on video in the process of purchasing an illicit substance. Later, on November 30, 2012, Chief Justice Rolland asked the CJC to review Justice Girouard's conduct.

[10] In October 2013, the CJC first established a review committee to consider the complaint and have a preliminary inquiry conducted by outside counsel. It was in February 2014 that the CJC constituted an inquiry committee (First Inquiry Committee) in accordance with subsection 63(4) of the JA to conduct a full inquiry into the complaint received.

[11] The First Inquiry Committee rejected all of the allegations against Justice Girouard, being unable to establish, on a balance of probabilities, that the video was proof of a transaction involving an illicit substance. However, a majority of the members of the First Inquiry Committee questioned the reliability and credibility of the version of the facts related by Justice Girouard. The majority had identified several contradictions, inconsistencies and implausibilities in the evidence regarding the transaction captured on video.

[12] The CJC accepted the conclusion of the First Inquiry Committee regarding the video. However, the CJC did not take into account the First Inquiry Committee's observations about Justice Girouard's credibility. The report was submitted to the Minister in April 2016. More than three years had elapsed since the initial complaint had been filed.

[13] In June 2016, the Minister and the Minister of Justice of Quebec filed a joint complaint with the CJC regarding Justice Girouard's conduct in the course of this disciplinary proceeding.

More specifically, this new complaint related to Justice Girouard's credibility, or lack thereof, during the inquiry. This complaint also triggered a mandatory inquiry pursuant to subsection 63(1) of the JA, and a new inquiry committee (Second Inquiry Committee) was convened.

[14] The Second Inquiry Committee examined the transcript of the hearing before the First Inquiry Committee and heard new testimony over the course of eight days of hearings. The Second Inquiry Committee concluded it appropriate to accept the findings of the majority of the First Inquiry Committee only if it was shown that they were both free from error and reasonable, and only to the extent they withstood its own assessment of the evidence deemed reliable.

[15] In its report dated November 6, 2017, the Second Inquiry Committee held 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 First Inquiry Committee, namely:

(1) He failed to cooperate with transparency and forthrightness in the First Inquiry Committee's inquiry.

(2) He failed to testify with transparency and integrity during the First Inquiry Committee's inquiry.

(3) He attempted to mislead the First Inquiry Committee by concealing the truth.

[16] In its report to the Minister dated February 20, 2018, the CJC adopted the findings of the Second Inquiry Committee to the effect that the judge's misconduct had undermined the integrity of the judicial system and struck at the heart of the public's confidence in the judiciary. On this basis, it concluded that Justice Girouard had become incapacitated and disabled from the due execution of the office of judge. However, three dissenting members opposed Justice Girouard's removal. They found that his right to a fair hearing had not been respected, as certain unilingual Anglophone members of the CJC had allegedly been unable to evaluate the entire record, which included documents available in French only.

[17] One fact jumps out: for the second report, the inquiry lasted more than 20 months. In total, the CJC spent more than five years investigating Justice Girouard, from November 2012 to February 2018.

IV. BACKGROUND

[18] Some may claim that the above-mentioned delays can be partly explained by the fact that Justice Girouard filed no fewer than 24 applications for judicial review with the Federal Court seeking, among other things, the setting aside of the decisions of the First or Second Inquiry Committee, the CJC and the Minister. However, it should be noted that the judicial proceedings resulting in an order did not interrupt the CJC inquiries.

[19] On May 4, 2017, in *Girouard v Canada (Attorney General)*, 2017 FC 449 [*Girouard*], this Court refused to allow the application for a stay of the inquiry process regarding Justice Girouard, the applicant in those proceedings. The Court also dismissed the motion to amend the

applications for judicial review and stayed the proceedings in 20 of the judicial review files. At paragraph 65 of the reasons in *Girouard*, the Court also noted that both Justice Girouard and the CJC still had their rights and remedies before the Federal Court. During the submissions before this Court with respect to the motion for a stay, the CJC and the IC, duly represented, did not challenge the Court's jurisdiction. The CJC and the IC wished for the review of Justice Girouard's conduct to continue. Now that the time has come to move forward with the judicial reviews, the CJC has decided to raise the issue of the Court's jurisdiction. It seems to me that as an institution responsible for promoting efficiency, consistency and accountability in Canada's superior courts, the CJC should not be adopting whichever stance is most convenient at the time.

[20] On May 3, 2018, the Court issued an order referring to several withdrawals made by Justice Girouard. He had begun by abandoning 16 of his applications, the grounds of which were covered by those raised in support of the subsequent application bearing file number T-409-18. He also abandoned three other applications that had become moot. The Court also ordered that files T-733-15, T-2110-15, T-423-17 and T-409-18 be consolidated. In the same spirit of consolidation, the Court was informed in the course of the proceedings and at the hearing that Justice Girouard was discontinuing proceedings raising a constitutional question before the Superior Court and would instead submit the question to the Federal Court. In the case of file T-409-18, the CJC received a request on March 2, 2018, from Justice Girouard under section 317 of the Rules seeking the transmission of his investigation file by March 22, 2018.

[21] Just prior to a case management conference held on April 19, 2018, the Registry received an email from Normand Sabourin, Director and Senior General Counsel of the CJC, addressed to

the registrar responsible for the file, informing her for the first time that the CJC did not intend to file the decision maker's record with the Court. In the same email, the CJC also informed the Court that it did not recognize its jurisdiction to hear the applications for judicial review of its decisions and that, accordingly, it would not comply with the Rules. The CJC also asked that all future communication henceforth be directed to the Right Honourable Richard Wagner, Chairperson of the CJC.

[22] On April 19, 2018, the Court issued an order instructing the CJC to comply with the Rules and file its decision maker's record, which it had originally been ordered to do by March 22, 2018.

[23] On April 30, 2018, in accordance with subsection 318(2) of the Rules, the CJC, through its counsel, informed the Chief Administrator of the Federal Court and the other parties that it opposed the request for transmission of the file on the grounds that it was not a "federal board, commission or other tribunal" within the meaning of the FCA and that, accordingly, this Court did not have the necessary jurisdiction to declare against it the remedies set out in subsection 18(1) of that statute.

[24] In an order dated May 9, 2018, the Court granted party status to the CJC for the sole purpose of debating the jurisdiction issue and ordered the latter to file this motion to strike the remaining applications for judicial review as well as a motion to determine the CJC's challenge regarding the filing of its complete record concerning Justice Girouard.

[25] On May 15, 2018, this Court ordered struck from the style of cause of the applications for judicial review the names of the "Inquiry Committee regarding the Honourable Michel Girouard" and the "Canadian Judicial Council", although their party status continued to be recognized for the purposes of this motion to strike. It should be noted that, given the CJC's failure to raise the jurisdiction issue in a timely manner, approximately two months had passed since March 22, 2018, the date by which the CJC was to have initially filed its record.

[26] As will be seen below, the issue of the Federal Court's jurisdiction has already been fully analyzed and resolved in *Douglas v Canada (Attorney General)*, 2014 FC 299 [*Douglas*], rendered by Justice Mosley on March 28, 2014. The CJC appealed Justice Mosley's decision and then withdrew its appeal, even though the appeal record was almost ready for hearing by the Federal Court of Appeal. The CJC is now back on the offensive, armed with essentially the same arguments it had raised before Justice Mosley four years ago.

V. PARTIES' SUBMISSIONS

[27] What follows is a summary of the principal arguments raised by the parties.

A. *Are the CJC and the IC federal boards, commissions or other tribunals as defined by the FCA?*

[28] The CJC claims to be beyond the jurisdiction of the Federal Court in matters of judicial review because, in its view, it does not fall within the definition of "federal board, commission or other tribunal" as set out in subsection 2(1) of the FCA. The Attorney General of Canada (AGC) and Justice Girouard oppose this claim.

[29] The CJC claims that the Court in *Douglas* did not consider the interpretation of sections 2 and 18 of the FCA in light of the unique role played by the CJC in the Canadian constitutional order. The CJC's view is that the source of its jurisdiction with respect to its role as overseer of the conduct of judges and judicial discipline is not a statute adopted by the Parliament of Canada (Parliament)—the JA—but rather section 99 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (CA 1867). The CJC considers its jurisdiction to be inherent in the principle of judicial independence. Therefore, it argues, the JA is a codification of a constitutional authority establishing the judicial branch in accordance with the separation of powers doctrine. According to the CJC, the fact that a federal statute governing the exercise of this authority exists does not change the purported constitutional nature of this jurisdiction.

[30] Moreover, the CJC states that it is made up of persons appointed under section 96 of the CA 1867. In the CJC's view, its inclusion in the definition of federal board, commission or other tribunal would have the unacceptable effect of subjecting a group of superior court judges to the Federal Court's judicial review procedures; the CJC alleges that this would be contrary to the exception set out in section 2 of the FCA. The CJC argues that if Parliament had intended to grant the Federal Court jurisdiction to oversee superior court judges, this power would have been expressly provided in the FCA, its enabling statute. The CJC adds that the definition of a federal board, commission or other tribunal must be interpreted in such a way as to exclude judges appointed under section 96 as well as those appointed under section 101 of the CA 1867 when the latter are acting as judges with the same powers as superior court judges.

[31] In response to the positions taken by the CJC, Justice Girouard notes that both the Federal Court of Appeal and the Federal Court have already ruled on the issue of the CJC's status in *Crowe v Canada (Attorney General)*, 2008 FCA 298, and *Douglas*. Indeed, writes Justice Girouard, it has already been determined that the CJC is a "federal board, commission or other tribunal" and that this Court has jurisdiction to hear applications for judicial review of the CJC's decisions. Justice Girouard therefore argues that, based on the principle of *stare decisis* and judicial comity, this Court should respect the decisions rendered on this issue. According to Justice Girouard's position, the status quo of the JA following *Douglas* is all the more indicative of Parliament's intent not to confer on the CJC a status other than that of federal board, commission or other tribunal.

[32] The AGC and Justice Girouard submit that the CJC was created by its enabling statute, the JA adopted by Parliament, and that its jurisdiction derives entirely from that statute. For the ACG and Justice Girouard, it follows that the CJC was not created by the CA 1867; its sole powers, therefore, are those conferred upon it by Parliament through the JA. The AGC and Justice Girouard argue, therefore, that Parliament could repeal or modify the role and composition of the CJC, or even the conduct review process, in accordance with the ordinary legislative mechanisms.

[33] The AGC submits that the fact that the bodies of the CJC are largely composed of judges appointed under section 96 of the CA 1867 does nothing to change their status. According to the AGC, the bodies of the CJC exist solely as statutory bodies, and not on the basis of some inherent jurisdiction arising from the judicial status of its members. The AGC points out that a

judge working within or for the CJC as an investigator is comparable to a judge appointed as a commissioner under the *Inquiries Act*, RSC 1985, c I-11 [IA], on whom Parliament confers the powers "vested in any court of record in civil cases" (s 5). The AGC notes that the CJC judges do not act as judges, but rather as members of a statutory body with a mandate that includes investigating the conduct of judges and filing a report and, if appropriate, a recommendation.

[34] Justice Girouard, on the other hand, submits that the judges belonging to the CJC are members in their capacity as chief justices, an administrative role, rather in their capacity as judges appointed under section 96 of the CA 1867. A judge exercising true judicial functions would not be acting as a "member" as is stated in the JA, nor could he or she appoint a "substitute", as is possible in this case, because of the personal nature of the office of judge. The CJC's response to this is that judges charged with an inquiry into a judge's conduct are exercising judicial jurisdiction: if a statute confers a power upon a judge, the judge must be presumed to exercise judicial jurisdiction, absent a provision to the contrary.

B. *Do paragraphs 63(4)(a) and (b) of the JA grant the CJC and the IC the status of a superior court, thereby placing them beyond the reach of judicial review?*

[35] The CJC submits that the deeming provision in subsection 63(4) of the JA creates a legal fiction that the CJC is deemed to be a superior court in making inquiries into the conduct of judges. While Parliament has often granted administrative tribunals some of the powers of a superior court of record, the relevant provisions rarely indicate that the tribunal is deemed to be a superior court, unlike what is indicated in subsection 63(4). According to the CJC, these decisions, deemed to be the decisions of a superior court, can only be challenged if there is an

express right of appeal to a court of appeal, since the validity of contradictory decisions of two superior courts would be impossible to determine.

[36] In response, the AGC and Justice Girouard both argue that if Parliament had wished to create a superior court, it would have done so explicitly under section 101 of the CA 1867, as it did for the Tax Court of Canada (see, in particular, section 3 of the *Tax Court of Canada Act*, RSC 1985, c T-2 (TCCA)). For the AGC and Justice Girouard, subsection 63(4) of the JA therefore simply confers upon the CJC and its inquiry committees the powers of a superior court in order to facilitate their inquiries; however, this provision does not have the effect of creating a superior court or eliminating the possibility of judicial review by the Federal Court. To this, the CJC replies that the original bill that was to become the JA already accomplished the objective of conferring on it the powers of a superior court for the purposes of carrying out its investigations. The CJC emphasizes that Parliament allegedly amended the original bill to add the broader deeming provision.

[37] However, Justice Girouard is of the view that the CJC cannot be characterized as a superior court because it has none of the constitutional attributes of the provincial superior courts. He goes on to argue that none of the superior courts created by a statute adopted by Parliament have either the inherent jurisdiction possessed solely by provincial superior courts or the superintending and reforming power over government action and lower court decisions.

[38] The AGC submits that Parliament did not choose to adopt a provision that had the effect of constituting a superior court. In the AGC's view, a provision conferring the powers of a

superior court on an administrative tribunal must be narrowly interpreted: the narrowest interpretation required to achieve the purpose of the Act should prevail. Therefore, according to Justice Girouard, subsection 63(4) of the JA must be interpreted as the "chapeau" of a provision that simply enumerates the powers and duties conferred upon the CJC and its IC to facilitate the exercise of one of their powers: that of making inquiries relating to judges (see s 60 of the JA).

(1) Legislative history and the intent of Parliament

[39] According to the CJC, the legislative history demonstrates that Parliament's intent was for the CJC to be deemed a superior court to enable it to discharge its duties independently during investigations into judicial conduct, without interference from the executive or legislative branches. According to Justice Girouard, however, the history of the JA demonstrates instead that members of the CJC do not exercise their duties in their capacity as judges. He notes that previously the judges had the status of commissioners with powers of investigation into the conduct of other judges; for Justice Girouard, the addition of the deeming provision could not have had the effect of substantially modifying the role envisioned for the "commissioners". In reply to this argument, the CJC submits that Parliament eliminated from Part II of the JA—containing subsection 63(4) setting out the CJC's powers of inquiry—any mention of the words "commission" and "commissioner". The CJC submits that this amendment must be given effect.

[40] The AGC submits that Parliament simply wished to grant the CJC and its inquiry committees immunity from prosecution through the deeming provision. For the CJC, this argument implies that the CJC and its committees would have no immunity with respect to the findings in their reports, as the findings are rendered after the inquiry. The CJC is of the view

that it already enjoys the constitutional protections guaranteed by judicial independence, which includes the freedom to express itself and render judgment without outside pressure or influence. Moreover, the CJC submits that if one accepts that the deeming provision grants judicial immunity to it and to its inquiry committees, one must accept that the provision may also bestow upon them the attributes of a superior court.

[41] The CJC also argues that the Federal Court's jurisdiction is a limited one. According to the CJC, because the Federal Court lacks the inherent jurisdiction of the provincial superior courts, it is the FCA that exhaustively establishes the scope of its jurisdiction. The CJC notes that section 18 of the FCA establishes the power of judicial review over the lower courts; however, it writes, when Parliament legislates that a court is not a lower court because it is deemed to be a superior court, it is necessary to take this statement into account when interpreting the jurisdiction over judicial review set out in section 18.

[42] With supporting documents, the AGC explained during oral argument that until 1971, there was no specific legislation applicable to the investigation of the conduct of superior court judges. The *Act respecting the Judges of Provincial Courts*, RSC 1886, c 138, and subsequent legislation did not concern superior court judges. Therefore, the first statute dealing with inquiries into the conduct of superior court judges was the first version of the JA, adopted in 1971. As we shall see, the Governor in Council invoked the IA to inquire into the conduct of judges and appointed the investigator.

(2) Is the CJC the body of appeal for the reports and conclusions of the IC?

[43] The CJC submits that judicial review is unnecessary, as its own internal procedures already include a mechanism analogous to an appeal *de novo*. It argues that, because judicial review exists to strike a balance between legislative intent and the rule of law, the intent of Parliament in the case of the removal of judges was to maintain the CJC's ultimate authority in the matter of the removal of judges while respecting the principle of separation of powers, which dictates that Parliament cannot, despite its final authority, remove a judge unilaterally.

[44] Justice Girouard disagrees with the CJC's claims in this regard. Regarding the possibility of an internal appeal, he states that in common law, appeals do not exist and that all appeals are legislative creations. In this case, he argues, the appeal regime proposed by the CJC has not been adopted by Parliament. Justice Girouard specifies that subsection 63(3) of the JA states that the IC is formed at the CJC's request; the CJC's role, he claims, is therefore not to conduct an appeal, but rather to review the report submitted by the IC.

[45] Both the AGC and Justice Girouard submit that, without judicial review, judges under inquiry by the CJC would be deprived of their right to challenge the fairness of the proceedings. The AGC and Justice Girouard are of the view that the judicial review of a recommendation by the CJC would give the Minister and Parliament assurance that the process followed by the CJC is fair and in accordance with the rule of law. They note that, if the procedures followed by the CJC were not subject to the Federal Court's superintending power, the Minister and Parliament would be forced to evaluate these elements; however, argue the AGC and Justice Girouard, they

have neither the mandate nor the expertise to review recommendations made by the CJC, and this is equally true for questions of jurisdiction or fairness as it is for questions of law. The AGC and Justice Girouard add that it cannot be the case that Parliament wished to preclude all possible remedies, especially given the seriousness of the consequences of a recommendation that the judge under inquiry be removed.

[46] According to Justice Girouard, for the Minister to be able to fulfill her constitutional role and decide to refer the issue of a judge's removal to Parliament, she must rely on an inquiry that has been conducted in accordance with the JA and the principles of procedural fairness.

C. *Are the reports and conclusions of the CJC and the IC subject to judicial review by the Federal Court?*

[47] Finally, it is the CJC's position that the recommendation that it must submit in the context of an inquiry and the subsequent report are not subject to judicial review. The CJC maintains that, although it can form an IC to conduct an inquiry, the CJC can do nothing more than recommend removal to the Minister. The CJC therefore has no power to render an enforceable decision to order a judge's removal, as this constitutional power lies exclusively with Parliament.

[48] The AGC and Justice Girouard submit that what is important in determining whether a decision is subject to judicial review is whether a person's rights are directly affected by it. Justice Girouard adds that the CJC's activities cannot be reduced to the mere filing of a recommendation, ignoring the long inquiry process leading up to such a recommendation.

Justice Girouard raises the point that the inquiry leading up to the report must respect procedural fairness, given the direct impact on the rights and interests of the judge. Moreover, he states, respect for the principles of natural justice or procedural fairness falls expressly within the scope of the Federal Court's supervisory authority under paragraph 18.1(4)(b) of the FCA.

VI. *DOUGLAS* (2014)

[49] It is important to note the following: almost all of the issues that the Court will address in this decision were analyzed and ruled upon by Justice Mosley in 2014 in *Douglas*. As an intervener with the same status as the Canadian Superior Court Judges Association, the CJC challenged the Federal Court's jurisdiction to hear applications for judicial review of the reports and decisions of the CJC and its constituent bodies. As mentioned in the previous section on the background of this case, the CJC had appealed the judgment in *Douglas* and subsequently withdrawn its appeal. Although the file between Justice Douglas, the AGC and the CJC was settled, the CJC could still have asked the Federal Court of Appeal to hear its arguments and decide the jurisdictional issue, especially given how determinative the CJC claims the issue to be. There was still a live issue between the CJC and the AGC (see *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at pp 353-63). Justice Mosley had carefully studied the merits of the CJC's and the AGC's arguments; in fact, approximately 120 of the more than 200 paragraphs of the judgement dealt with the issue of jurisdiction. Furthermore, there had been three days of hearings; needless to say, a considerable investment of resources had been made by the court and by counsel.

[50] I will simply reiterate a few of Justice Mosley's key findings. On the subject of the CJC and its constituent bodies, Justice Mosley found the following:

(1) The CJC satisfies the test for determining whether a body is a federal board, commission or other tribunal (paras 80 et seq).

(2) The CJC includes not only chief justices appointed under section 96 of the CA 1867, but also a large number of chief justices appointed under section 101 of that statute (para 83).

(3) The chief justices, when exercising functions within the CJC, are not acting in their capacity as superior court judges (paras 84-86).

(4) Parliament has amended the definition of "federal board, commission or other tribunal" on several occasions to specify exclusions (para 78).

(5) The inclusion of representatives of the bar, all lawyers, within the IC appears to indicate that the latter is not a body of the CJC that constitutes a superior court (para 110).

(6) It was open to Parliament to create the CJC as a court under section 101 of the CA 1867, but it did not do so (para 99).

(7) Judicial independence does not require that the decisions of the CJC and the IC be immune from judicial review by the Federal Court (para 114).

[51] Regarding the interpretation of subsection 63(4) of the JA and its paragraphs (a) and (b), Justice Mosley found the following:

(1) The parliamentary debates show that the purpose of the powers of inquiry conferred upon the CJC and the IC in the JA, including any mention of a "superior court", was to grant immunity to decisions or statements made in the course of the inquiry (para 103).

(2) The legislative context of subsection 63(4), namely the marginal notes and their placement, is indicative of its limited scope (paras 105 et seq).

(3) Parliament chose to grant the CJC the powers of a superior court without making it a court because, if it had intended to transform the CJC and its IC into a superior court, it would have said so directly without using the word "deemed" (para 115).

[52] On the inquiry process as a whole, Justice Mosley made the following comments:

(1) It is the responsibility of the IC to conduct inquiries into the conduct of judges; it is then for the CJC to decide whether to confirm its findings. If the CJC is correct in its assertion that its report and recommendations are subject to judicial review, but not the process leading up to their adoption, the "anomalous situation" would result that neither the beginning nor the end of the process would be excluded from review but only those parts where procedural fairness is of greatest concern (paras 108-09).

(2) Conducting inquiries is not an attribute of the jurisdiction of a superior court, as such a proceeding is inquisitorial in nature. Inquiring into the conduct of a judge is not a judicial function (paras 118 et seq).

(3) The CJC, in inquiring into the conduct of a judge, is accountable as the holder of a public power. It must account for its actions and so is not immunized against breaches of procedural fairness. It is subject to supervision. The judge being investigated is entitled to a fair hearing (paras 119-20).

(4) The supervisory power of the Federal Court is essential to the respect of judicial security of tenure. Parliament is not an institution that may be called upon to re-examine any claims the judge make regarding the inquiry undertaken by the CJC (paras 121-23).

[53] This provides only a summary. *Douglas* presents an in-depth examination of the issue of the Federal Court's jurisdiction with respect to judicial review of the CJC's process and decisions. Justice Mosley's findings on this issue are correct. In the following sections, I will refer to Justice Mosley's reasons and add observations of my own.

VII. LEGISLATIVE PROVISIONS

[54] I will refer repeatedly to section 99 of the CA 1867. It reads as follows:

***CONSTITUTION ACT, 1867,* 30 & 31 Victoria, c. 3 (U.K.)**	***LOI CONSTITUTIONNELLE DE 1867*, 30 & 31 Victoria, ch. 3 (R.U.)**

Tenure of office of Judges	**Durée des fonctions des juges**
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.	**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.

[55] Similarly, sections 2, 18 and 18.1 of the FCA will feature heavily throughout these reasons. They read as follows:

***Federal Courts Act*, RSC, 1985, c. F-7**	***Loi sur les Cours fédérales*, LRC (1985), ch. F-7**
Definitions	**Définitions**
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	***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

under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; (*office fédéral*)

termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. (*federal board, commission or other tribunal*)

[...]

[…]

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

(a) to issue an injunction, *writ of certiorari*, *writ of prohibition*, *writ of mandamus* or *writ of quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

a) décerner une injonction, un *bref de certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

[…]

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[...]

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether

[…]

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une

or not the error appears on the face of the record;	erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	**d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	**e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	**f)** a agi de toute autre façon contraire à la loi.

[56] Finally, the most important provision in this case is subsection 63(4) of the JA. It reads as follows:

***Judges Act*, RSC, 1985, c. J-1**	***Loi sur les juges*, LRC (1985), ch. J-1**
Powers of Council or Inquiry Committee	**Pouvoirs d'enquête**
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 documents and evidence as it deems requisite to the full	**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;

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.	**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.

[57] The reader will also find in the annex sections 96 and 101 of the CA 1867, section 28 of the FCA, sections 59-60, 63-65 and 69-71 of the JA and sections 2 to 13 of the *Canadian Judicial Council Inquiries and Investigations By-laws (2015)*, SOR/2015-203 (By-laws). Contrary to what it had done in *Douglas*, the CJC filed no documents, policies or other records apart from a version of the By-laws that predated 2015.

VIII. QUESTIONS OF LAW

[58] In this case, the Court must decide three principal issues:

(1) Are the CJC and the IC federal boards, commissions or other tribunals as defined by the FCA?

(2) Do paragraphs 63(4)(a) and (b) of the JA grant the CJC and the IC the status of a superior court, thereby placing them beyond the reach of judicial review?

(3) Are the reports and findings of the CJC and the IC subject to judicial review by the Federal Court?

[59] I will now analyze these issues on the merits.

IX. ANALYSIS

[60] In this section, I will address each issue separately. I will begin with the issue involving the CJC's status as a federal board, commission or other tribunal for the purposes of the FCA.

A. *Are the CJC and the IC federal boards, commissions or other tribunals as defined by the FCA?*

[61] I will deal with this issue in four parts. First, I will review the relevant legislation in order to properly identify the legislative framework in which this rather singular case is situated. Second, I will consider whether the composition of the CJC excludes it from the definition of a federal board, commission or other tribunal. Third, I will consider the test for identifying a federal board, commission or tribunal to determine whether the CJC satisfies it. Finally, I will ask myself whether the CJC flows from a source of constitutional power codified by an enactment of Parliament.

(1) Overview of the relevant legislation

[62] To properly address the issue before the Court, it is first of all necessary to review the JA and the By-laws, especially the provisions dealing with the CJC and the administration of federal judicial matters. This overview will contribute to a partial evaluation the CJC's argument that it constitutes a superior court and is therefore immune from the judicial review process set out in section 18 of the FCA.

[63] Part I of the JA deals with many subjects, all relating to the position of judges in Canada. It includes provisions relating to salaries (ss 9-24) and annuities (ss 42-48) as well as the description of a quadrennial inquiry procedure by the Judicial Compensation and Benefits Commission to review the compensation and benefits of both superior court judges and prothonotaries of the Federal Court (see s 26).

[64] This first part of the JA also includes an enumeration of the courts constituted by an enactment of Parliament under section 101 of the CA 1867, namely, the Supreme Court of Canada (Supreme Court), the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada (ss 9-11). Also included are the courts of appeal and superior courts of each Canadian province and territory created under section 96 of the CA 1867 (ss 12-22).

[65] Part II of the JA, entitled “Canadian Judicial Council”, contains a description the Council’s constitution and operation. The CJC includes the Chief Justice of Canada or his or her replacement, who acts as chairperson, and the chief justice and any senior associate chief justice and associate chief justice of each superior court or any branch or division thereof, (ss 59(1)(a) and (b)). It also includes the senior judges of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice (s 59(1)(c)), as well as the Chief Justice of the Court Martial Appeal Court of Canada (paragraph 59(1)(d)). Therefore, the CJC comprises not only chief justices appointed pursuant to section 96 of the CA 1867, but also all chief justices appointed pursuant to section 101 of the same statute.

[66] It is also set out in the JA that each member of the CJC may appoint a substitute member chosen from among the judges of that member's court (s 59(4)). The Chief Justice of Canada may select not only from among sitting judges of the Supreme Court of Canada, but also from among retired judges of that Court. It is therefore possible for a former judge to become a member of the CJC to sit as chairperson in the absence of the Chief Justice of Canada.

[67] Note also that Parliament has given the CJC a dual mandate: (1) to improve the efficiency and quality of judicial service in the superior courts; and (2) to promote uniformity in the administration of justice in these courts (s 60(1) of the JA). The responsibility of inquiring into the conduct of judges falls within the purview of this mandate at two levels and is carried out though a power of inquiry set out under the heading, "Powers of Council" (s 60(2)). It should further be noted that the CJC's mandate in subsection 60(1) of the JA includes no express mention of regulating or monitoring the conduct of judges or of supervising judicial ethics.

[68] The power of inquiry is not limited to the judges of superior courts, but applies also to other persons appointed pursuant to an enactment of Parliament to hold office during good behaviour (see s 69(1) of the JA). The CJC therefore has the power to investigate not only superior court judges, but also other persons appointed to hold office during good behaviour, should such persons exist today. In any case, it is clear that, as set out in the JA, the power at issue does not apply exclusively to judges.

[69] Moreover, the power to investigate judges is described in the legislation. It is initiated by the filing of a complaint or a request for an inquiry directed against a judge of a superior court.

The Minister or the attorney general of a province may also make such a request for removal for any reason: age or infirmity; having been guilty of misconduct; having failed in the due execution of the office; having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of the office (ss 63(1), 65(2) of the JA). This request for an inquiry requires the CJC to commence one. The CJC may also inquire into a judge's conduct following the filing of a complaint or allegation provided that it is supported by evidence (s 63(2)).

[70] If it chooses to commence an inquiry, the CJC selects the members who will make up the IC. The CJC recruits from among its members described above; however, the Minister may also designate barristers or advocates of at least ten years' standing at the bar of any province (see s 63(3) of the JA). It is common for the CJC to constitute an IC composed of two or three chief justices and one to two barristers or advocates. The By-laws indicate that the majority of members must be from the CJC (see s 3(1) of the By-laws).

[71] For the purpose of conducting an inquiry, the CJC or the IC is deemed to be a superior court with the power to summon witnesses, require them to give evidence on oath or solemn affirmation, and require them to produce documents. In particular, the JA stipulates that the CJC or IC has the powers vested in any superior court of the province in which the inquiry or investigation is being conducted (s 63(4) of the JA). Subsection 63(4) of the JA will be analyzed later in these reasons, as it is a cornerstone of the CJC's position.

[72] Moreover, the hearings may be held in private. However, hearings may be held in public if the Minister "requires" it (s 63(6) of the JA).

[73] The IC is required to inform the judge under inquiry about the subject-matter of the inquiry and the time and place of any hearing and to afford the judge an opportunity, in person or by counsel, to be heard, to cross-examine witnesses and adduce evidence on his or her own behalf (s 64 of the JA). The CJC may also, for the purpose of the inquiry, engage the services of counsel to assist it (s 62 of the JA).

[74] The JA does not accord any status to the Minister of Justice or the attorney general who files the complaint or to the complainant who signed the complaint or allegations. It is the IC and the initial Review Panel that define the allegations and proceed with an independent inquiry. More specifically, it is the IC that chooses the witnesses and identifies and produces such documents and evidence as it deems "requisite to the full investigation of the matter" (see s 63(4)(a) of the JA). The judge under inquiry may cross-examine, adduce evidence and make the appropriate submissions. Counsel for the IC may also make any submissions he or she considers appropriate.

[75] Next, the IC submits a report to the CJC, and a copy is provided to the judge under inquiry for comment (see s 8 of the By-laws). The judge may make a written submission to the CJC regarding the report (s 9(1) of the By-laws). The CJC then considers the report and any submissions made by the judge (s 11 of the By-laws). The CJC may also seek clarification from the IC or refer all or part of the matter back to it with directions (s 12 of the By-laws). Finally, as

long as a majority of the CJC members reach a finding, the CJC reports its conclusions to the Minister as to whether it recommends that the judge be removed from office (s 65 of the JA; s 13 of the By-laws).

[76] Additionally, the JA and the By-laws contain neither a provision providing for an appeal of the CJC's report nor a privative clause. It should also be noted that the report submitted to the Minister sets out the CJC's conclusions. However, it is not a judgment. The final authority to remove a judge from office rests with the House of Commons, the Senate and the Governor in Council (s 71 of the JA).

[77] Part III of the JA deals with the administration of federal judicial affairs. It creates the position of Commissioner for Federal Judicial Affairs (Commissioner), who is appointed by the Governor in Council, upon recommendation by the Minister, after consultation with the CJC or with the committee named by the CJC for the purpose of evaluating the candidates. The Commissioner has the rank and status of a deputy head of the Department of Justice and acts under the authority of the Minister. However, the Commissioner and his or her office are separate from the Department of Justice (ss 72, 73, 74 of the JA). The Commissioner, under the authority of the Minister, performs the duties and functions assigned in Part I: salaries, annuities, adjustments, insurance, travel allowances, incidental expenditures, etc. Moreover, the Commissioner is responsible for establishing the CJC's budget and making administrative arrangements for the CJC's requirements with respect to staffing, services, premises and equipment. This must be done while taking into account that these delegated duties and functions do not form part of the duties and functions assigned to the Minister by the *Department of*

Justice Act, RSC 1985, c J-2 (s 74(2) of the JA). The CJC noted in its submissions that there are internal policies and procedures to ensure that everything is done independently of the Department of Justice.

[78] This overview of the JA and By-laws leads me to make the following observations: (1) there is a list of superior courts in Part I of the JA (in which the CJC does not appear); (2) the members of the CJC and its IC are judges of courts created under sections 96 and 101 of the CA 1867, as well as barristers and advocates of a Canadian bar; (3) the chairperson of the CJC may, in fact, be a retired judge appointed as a substitute for the Chief Justice of Canada; (4) the CJC's mission is to improve the operation of the judiciary and promote justice; and (5) the CJC may inquire into the conduct of judges, and it is granted special powers for this purpose. These observations will be relevant to the analysis that follows.

(2) Does the CJC's membership exclude it from the definition of a federal board, commission or other tribunal?

[79] First, nowhere in the legislation, including the CA 1867, can I find any connection, reference or comment that would allow me to accept the CJC'S argument to the effect that it is not a federal board, commission or other tribunal because it is partially constituted of a group of individuals appointed pursuant to section 96 of the CA 1867. Indeed, despite the inclusion of the phrase "deemed to be a superior court" in subsection 63(4) of the JA—on which the CJC relies very heavily—the overview of the legislation and the observations arising from it clearly demonstrate the opposite.

[80] Let us begin with the wording of the statute. According to the FCA, a "federal board, commission or other tribunal" is defined as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament ... other than 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*". In the French version, the word "conseil" is not only an integral part of the definition of "office fédéral" set out in the FCA, it is the very first word. That being said, the English version makes no reference to the word "council".

[81] As for the CJC, it is made up of chief justices appointed by the Governor in Council under either section 96 or section 101 of the CA 1867. In addition, the CJC is granted a power of inquiry into the conduct of judges by the JA, which, it should be recalled, is not a constitutional statute. This indicates that the power belongs to the CJC as an institution, rather than to the chief justices individually on the basis of their status as judges. This fits well with the CJC's own description of its powers of inquiry. In a report submitted by the CJC in March 2014, it states that the JA grants powers of inquiry to "[t]he full CJC itself" and, further down, that "the full CJC must report its conclusions to the Minister of Justice and may recommend that a judge be removed from office" [emphasis added] (Canada, *Review of the Judicial Council Conduct Process of the Canadian Judicial Council: Background Paper*, Ottawa, Canadian Judicial Council, 2014 [CJC Report] at p 47). It is therefore the CJC, as a body or institution, that reports to the Minister; the judges are simply members of that institution (see s 63(4) of the JA).

[82] Finally, there is no basis on which I am able to present this power of inquiry as an attribute of the powers of superior court judges appointed under section 96 of the CA 1867. It is

simply not the case. On the contrary, the CJC's power of inquiry is the same as the one set out in the IA. Just like a commissioner appointed under the IA, the CJC and its members constitute a "federal board, commission or other tribunal". This strikes me as evident: it is not in their capacity as judges that the members of the CJC sit. It is the CJC's enabling act that authorizes it to submit a report and recommendations to the Minister. Nobody in this context is rendering judgments as is done in the superior courts.

[83] The CJC's position that it not only has superior jurisdiction, but that it is a superior court (as indicated by its memorandum of fact and law at paragraph 7) is all the more surprising given an analysis contained in the CJC Report. In its own report, the CJC writes that the investigative powers granted to the CJC "are similar to those of a commissioner of inquiry under the *Inquiries Act*" (CJC Report at p 47; see also ss 4-5 of the IA). This also follows from the following passage in the CJC Report: "the CJC's judicial conduct review process is inquisitorial" and "investigative" [emphasis added] (CJC Report at pp 14, 47). In agreement with the Federal Court of Appeal's findings in *Gagliano v Gomery*, 2011 FCA 217 [*Gagliano*], the CJC Report describes the members of the CJC, the "actors involved in the judicial conduct review process", as "investigators [who] may be allowed to participate more actively in the presentation of the evidence than would be permissible in judicial or quasi-judicial settings" (CJC Report at p 18; see also *Gagliano* at para 22). As noted by the Federal Court of Appeal, the role of an investigator differs from the role of an adjudicator (*Gagliano* at para 21). This investigative power granted to the members of the CJC certainly does not arise from section 96 of the CA 1867, nor is it grounded in the role played by a judge in a court of law, where he or she presides over an adversarial process.

[84] It also bears noting that judges sit on the CJC 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 Justice Gonthier of the Supreme Court wrote in *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 [*Ruffo*], chief justices are given their judicial ethics role through provincial and territorial legislation rather than through constitutional texts (*Ruffo* at para 52). It is therefore this duty to promote respect for judicial ethics that authorizes them to sit on the CJC. This observation by Justice Gonthier can equally be applied to the JA insofar as it confers upon the CJC the power to investigate judicial conduct.

[85] In addition, the administrative nature of the role of the chief justices sitting on the CJC is demonstrated by their status as "member", granted by subsection 59(4) of the JA and their ability to appoint a substitute. Indeed, the administrative appointment to the office of "chief justice" is not equivalent to an appointment to the position of superior court judge, which is made by the Governor General under section 96 of the CA 1867. A chief justice is generally appointed by the Governor General in Council (see the *Courts of Justice Act*, CQLR c T-16, ss 6, 22; FCA, ss 5, 5.1). We already know that each member of the CJC may appoint a substitute, and that the Chief Justice of Canada may even choose one from among the former judges of the Supreme Court.

[86] This represents a significant contrast: a judge exercising genuine judicial functions cannot appoint a "substitute", as he or she may do when sitting as a member of the CJC, because of the personal nature of the judge's office. In the words of Luc Huppé, currently a judge of the Court of Québec, [TRANSLATION] "the authority vested in the judge is attached to his or her person; it is *intuitu personae*. Judges are selected on the basis of their personal characteristics"

(Luc Huppé, *Le régime juridique du pouvoir judiciaire*, Montréal, Wilson & Lafleur, 2000 at p 84). Therefore, the [TRANSLATION] "personal nature of the judge's office means that its exercise cannot be delegated" [emphasis added] (Huppé at p 84).

[87] This conclusion conflicts with the CJC's claims to the effect that the decision in *Minister of Indian Affairs and Northern Development v Ranville et al.*, [1982] 2 SCR 518 [*Ranville*], supports its position that its investigative power is equivalent to that of a judge appointed under section 96 of the CA 1867. Clearly, I do not share the CJC's opinion regarding the principles that may be drawn from *Ranville*. The provision at issue in that decision, subsection 9(4) of the *Indian Act*, RSC 1970, c I-6, stated that 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 exercise all of the powers of a commissioner under Part I of the *Inquiries Act*" (*Ranville* at p 522). Thus, the judges appointed were required to investigate and render their decisions themselves. However, in this case, it is not the chief justices who investigate, but rather the CJC and its IC as a body. Justice Dickson, then a puisne judge and writing for the majority, considered the matter as follows at pages 524 and 525 of *Ranville*:

> The introduction of the concept of *persona designata* has the effect of cutting down the exclusionary language of s. 2(*g*) of the *Federal Court Act* and, as the Chief Justice has noted in *Herman* is responsible for the futile "interpretative exercises" into which the courts have been dragged. In attempting to catch s. 96 judges under the first part of the s. 2(*g*) definition by characterizing them as *persona designata* counsel are distorting the plain meaning of the section and obscuring its purpose. As I stated in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 (at p. 509):
>
> > A judge does not become a *persona designata* merely through the exercise of powers conferred by a statute other than the provincial *Judicature Act* or

> its counterpart. Given its widest sweep, s. 28 could make subject to review by the Federal Court of Appeal, decisions or orders of provincial federally-appointed judges, pursuant to such federal enactments as the *Criminal Code*, the *Divorce Act* or the *Bills of Exchange Act*. That could not have been intended.
>
> It would seem to have been the will of Parliament, in enacting the concluding words of the relevant paragraph of s. 2 of the *Federal Court Act*, that ordinarily the acts of federally-appointed provincial judges, pursuant to authority given to them by federal statutes, will not be subject to supervision by the Federal Court of Appeal.
>
> [Emphasis added.]

[88] Of course, in this case, the chief justices do not become *persona designata* to carry out their duties when participating in the power to investigate judicial conduct, a notion that the Supreme Court has confined to "the most exceptional circumstances" (*Ranville* at p 525). In any case, relying on the notion of *persona designata* as described in *Ranville* points to a false characterization of what is at issue before this Court: this case is not about judges presiding over proceedings as individuals assuming a somewhat judicial role or as *personae designatae*. Instead, we are dealing with members of a single collectivity who, acting together as an institution, submit a report and conclusions. Within the CJC, the judges and other members become part of this collective identity when undertaking an inquiry. The identity of the CJC is separate from that of its components.

[89] In other words, it is the CJC and the IC in particular that have the investigative powers, not the chief justices individually. There must be a quorum of 17 chief justices, and decisions are made on a majority basis. Moreover, the investigative power goes beyond the recognized

functions of a superior court. It also bears repeating that the IC investigates the conduct of a judge: with the Review Panel, it decides on the allegations, the witnesses and the documents to be produced, it hears the judge whose conduct is subject to review, and it receives the judge's evidence and submissions. According to the legislation, the Minister of Justice of Canada and the attorney general of the complainant's province are not recognized as parties to the inquiry. After reviewing the IC's report, the CJC next reports its conclusions and submits a recommendation; at no time does the CJC render a decision regarding the potential removal of the judge under inquiry. With this in mind, I can only conclude that the power to investigate and the power to submit a report belong to the CJC and not to the chief justices individually. This is contrary to the situation in *Ranville*.

[90] All of the elements of the analysis above point inexorably to one conclusion: the chief justices and their substitutes (including former judges), as well as judges appointed under section 101 of the CA 1867 and members of the bar of at least ten years' standing, sit on the CJC and the IC as members of the council, a federal institution, on which they exercise investigative functions. In the 2014 CJC Report, the CJC itself describes the members of the CJC and the IC as "actors involved in the judicial conduct review process" and "investigators". In such a case, section 96 of the CA 1867 does not apply.

[91] Conversely, the FCA does apply in this case, despite the CJC's claims that it is excluded from the definition of a federal board, commission or other tribunal. Among the bodies excluded by section 2 of the FCA are the Tax Court of Canada and its judges, any body constituted or established by or under a law of a province or any person or persons appointed under or in

accordance with a law of a province or under section 96 of the CA 1867. Had Parliament wished to exclude the CJC from the definition of a federal board, commission or other tribunal, it would have done so, as it did with the Tax Court of Canada. I can only adopt in full Justice Mosley's reasons, as he expressed them in *Douglas*, where he wrote the following:

> **[82]** ... Neither the CJC nor its Inquiry Committees are among the persons or bodies expressly excluded from the scope of the definition in section 2 of the *Federal Courts Act*. The individual members of those bodies do not carry out their assigned function as judges appointed under s 96 of the *Constitution Act, 1867* . . . and do not therefore fall within the specific exclusion of s 96 judges in the definition. The fact that the CJC bodies are comprised of persons who are, for the most part, s 96 judges does not alter the status of these bodies. They exist as statutory entities solely because they were created by the *Judges Act* and not because of any inherent jurisdiction related to the judicial status of the members.
>
> [Emphasis added.]

[92] Like Justice Mosley, I find that the CJC, the IC and their members do not constitute a group whose authority and jurisdiction are grounded in section 96 of the CA 1867. Therefore, the CJC does not fall within the exceptions set out in section 2 of the FCA.

(3) What is the test for determining whether a body is a federal board, commission or other tribunal, and do the CJC and the IC satisfy this test?

[93] A brief review of the legislative and jurisprudential history of the FCA also supports my conclusion that the CJC is not excluded from the list of federal institutions subject to judicial review by this Court.

[94] Since the early 1970s, section 18 of the FCA has given the Federal Court exclusive superintending and reforming power over federal public bodies. Historically, this power belonged to the provincial superior courts. Before this statute was adopted, administrative tribunals across Canada were subject to multiple supervision, with a lack of consistent jurisprudence and application. The then Minister of Justice Canada, the Right Honourable John Turner (who later became Prime Minister), sponsored the legislation. Within this new court, the "Federal Court of Canada", established pursuant to section 101 of the CA 1867 and made up of a Trial Division and Appeal Division, he centralized jurisdiction over the judicial review of federal institutions. The objective of the FCA was to avoid inconsistency in the case law in this area, increase the accountability of the federal public administration and promote access to justice. As Minister Turner stated during parliamentary debates on Bill C-192, *An Act respecting the Federal Court of Canada*:

> Bill C-192 respecting the Federal Court of Canada ... is designed to effect very substantial changes in the administration of justice in this country at the federal level. In so far as court reorganization is concerned, the bill represents the first significant reorganization of the Federal Trial Court since it was first established in 1875. ...
>
> In addition to the fundamental change in court structure that I have mentioned, the bill proposes what I consider to be an important administrative law change in relation to the superintendence of federal boards, commissions and tribunals. For many years federal boards, commissions and tribunals have been subject to the diverse jurisdictions and practices of the various superior provincial courts in this country. For this reason federal boards, commissions and tribunals can be supervised to a much greater extent than can their provincial counterparts since provincial boards, commissions and tribunals of similar nature can be supervised only be their own provincial courts.
>
> This multiple supervision, with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. ...

The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions. ...

We as legislators must surely be certain that when we set up a statutory body to administer the fine legal principles in accordance with defined procedures, or in accordance with the rule of law and natural justice as interpreted by the courts, the jurisdiction we have created and conferred will be exercised properly and for the proper benefit of those for whom it was established.

The remedies in this bill are wide enough to go beyond that type of privity clause. This bill sets out the reviewing power quite clearly. Where the principles of natural justice are not applied, where hearings are not granted, where each party does not have an opportunity to make his case, where the board has exceeded its jurisdiction or gone beyond the scope or ambit of the statute which gave birth to the tribunal or the administrative scope with which it was charged, where the board refused to exercise its jurisdiction, where the board has misinterpreted the law, whether the error in law appears or not on the record of that decision, the decision of the board can be set aside. It will not be open to the board to avoid declaring its reasons. The boards will have to declare their reasons. If they do not, that will not forestall the court from looking behind the reasons to ascertain why the decision has been made. ...

The bill will also operate to increase the jurisdiction which has traditionally been exercised by the Exchequer Court of Canada. ...

It is a complicated piece of legislation that involves fundamental changes in structure, fundamental extensions in jurisdiction, and makes what I believe is a very important advance in the public administrative law of this country. ...

Again, I believe that this is a further step toward balancing the rights between the citizen and the state, providing some sort of recourse against bigness, remoteness, alienation, distance from the decision-making power. I believe it will give the average citizen the power to enforce his rights against the government and against the structures that government sets up.

[Emphasis added.]

(*House of Commons Debates*, 28th Parl, 2nd Sess, vol 5 (25 March 1970) at pp 5469-74 (John Turner); *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*] at paras 49-50)

[95] The debates surrounding the Federal Court Bill were held the year before those involving the Judges Bill in 1971 (*Judges Act*, RSC 1970, c 159; *An Act to amend the Judges Act*, SC 1970-71-72, c 55 (2nd Supp), s 10 adding the new subsection 30(1) to the *Judges Act*). The first version of the *Federal Court Act* came into effect on June 1, 1971. This was also the case for section 28 of the FCA, which gave the Appeal Division, which has since become the Federal Court of Appeal, judicial review jurisdiction over a specific list of federal institutions and agencies. Parliament designated by statute which agencies were to fall under section 28 of the FCA. Parliament's choices remain in effect. It should also be noted that section 28 contains an exhaustive list of federal boards, commissions or other tribunals, while section 18 covers, with some exceptions, all of the federal institutions and agencies otherwise found in the definition of a federal board, commission or other tribunal in section 2 of the FCA.

[96] Therefore, the definition of federal board, commission or other tribunal is broad enough to include all of the federal institutions and agencies not excluded by section 28 of the FCA (see *Howarth v National Parole Board*, [1976] 1 SCR 453 at pp 471-72; *TeleZone* at paras 3, 50). As Justice Mosley correctly pointed out in *Douglas*, to fall within the definition of "federal board, commission or other tribunal", a body need only exercise or purport to exercise jurisdiction or powers conferred under an Act of Parliament or under an order made pursuant to a Crown prerogative (*Douglas* at para 80). Furthermore, the Federal Court of Appeal established a two-step enquiry to determine whether a body is a federal board, commission or other tribunal for the purpose of the FCA (*Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*] at paras 29-31). In the words of Justice Nadon, it must first be determined <u>what jurisdiction or power</u> the body or person seeks to exercise, and then it must be determined what is the <u>source</u> of

the jurisdiction or power, the latter being the primary determinant of whether the body falls in the definition [emphasis added] (*Anisman* at paras 29-30).

[97] In this case, applying the test established in *Anisman*, the power that the CJC exercises over the conduct of judges and certain public servants holding office during good behaviour is investigative in nature; it is a power of inquiry. And the source of this investigative power can be found in paragraphs 60(2)(c) and (d) and subsections 63(1) and (4) of the JA, an Act of Parliament. Note also that this power is held by the CJC, a body created by subsection 59(1) of this same Act of Parliament. The CJC claims that the fact that it is not expressly listed in section 2 of the FCA demonstrates that it is excluded. However, that argument does not take into account the interaction between sections 2, 18 and 28 of the FCA. Section 28 enumerates the institutions subject to the jurisdiction of the Federal Court of Appeal, while section 18 includes all the other institutions, except those mentioned in section 2 as exceptions. Justice Mosley has stated the matter clearly: "[i]t is indisputable that the CJC and its Inquiry Committees are creatures of a federal statute, the *Judges Act*, and the source of their authority is clearly that federal legislation" [emphasis added] (*Douglas* at para 82). It would be difficult if not impossible to draw any other conclusion. The JA is clear on this point.

[98] The CJC claims that it is impossible for a mere Federal Court judge to review the reports and recommendations of the CJC, which is composed of chief justices. With respect for the honourable chief justices, this is what Parliament intended. Nobody is above the law or immune from error and, aside from the Supreme Court, there is no judicial or quasi-judicial institution that has the final word without the possibility of an appeal or some other remedy.

[99] It is also possible for superior court judges to find their decisions subject to an application for judicial review. This was the case for Justice Létourneau, a former judge of the Federal Court of Appeal, some of whose comments in his capacity as Commissioner of the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia were the subject of an application for judicial review filed with a judge of the Federal Court Trial Division (see *Beno v Canada (Somalia Inquiry)*, [1997] 1 FC 911 (FCTD), rev'd [1997] 2 FC 527 (FCA)). The former judge of the Federal Court of Appeal therefore had a Federal Court judge reviewing his comments and rendering a decision on them.

[100] Even though it is possible for a judge of the Federal Court to conduct a judicial review of decisions made by the CJC, which is chaired by the Chief Justice of Canada, it is nevertheless important to remember that in the course of such a review, the Federal Court owes a certain amount of deference to the decision maker, as appropriate in the circumstances. In *Taylor v Canada (Attorney General)*, 2001 FCT 1247 [*Taylor*], aff'd 2003 FCA 55, Justice Blanchard noted that that given the nature of the CJC, the judicial review of its reports calls for deference:

> **24** Although the *Judges Act* does not contain a full privative clause and does not directly address the intended standard of review, the absence of any appeal procedure in the Act lends support to the argument that that the legislator intended that the decision in question be left exclusively and finally to the Council, that is to say, the decision to "recommend" or not that a judge be removed from office. Sections 63 and 65 ... of the Act provide the framework for the Council's mandate to conduct investigations and inquiries and make recommendations to the Minister. Section 71 of the Act preserves the authority of Parliament to decide whether a judge should be removed from office. This limitation of the powers conferred upon the Council by the *Judges Act* is of necessity consistent with the constitutional recognition and entrenchment of judicial independence as set out in section 99 of the *Constitution Act, 1867* ... . The constitutional and statutory regimes are structured in a manner that recognize the fundamental importance

> of the independence of the judiciary as an essential part of the fabric of our free and democratic society.
>
> [Emphasis added.]

[101] The judge conducting a judicial review owes an appropriate level of deference to the CJC and its members given the nature of the institution. The Federal Court has had to resolve many disputes among the CJC, its members and the judges subject to an inquiry: *Taylor*; *Gratton v Canadian Judicial Council*, [1994] 2 FC 769 (FCTD) [*Gratton*]; *Cosgrove v Canadian Judicial Council*, 2005 CF 1454, rev'd by 2007 FCA 103; *Cosgrove v Canada (Attorney General)*, 2008 FC 941; *Akladyous c Canadian Judicial Council*, 2008 FC 50; *Slansky v Canada (Attorney General)*, 2011 FC 1467, aff'd 2013 FCA 199.

[102] The CJC's most recent position, which is currently before this Court and is similar in most respects to the position presented to the Court in *Douglas*, has not always been shared by the CJC's various ICs. As Justice Mosley recently noted, in *Gratton* in 1994, the IC concluded that it was not a court and that the provisions of section 63 of the JA did not have the effect of transforming the CJC or its IC into a superior court (*Douglas* at para 116; *Decision of the Inquiry Committee under Subsections 63(2) and 63(3) of the Judges Act in Relation to Mr. Justice F.L. Gratton of the Ontario Court of Justice (General Division)* (Febuary 1994), Ottawa (CJC) [*Gratton CJC*] at pp 21-38). I will let the words of the IC at page 22 of the Gratton CJC decision speak for themselves:

> We do not agree that section 63(4) of the *Judges Act* has the effect of making this Inquiry Committee into a superior court. While it may be "deemed" to be a superior court ..., an inquiry committee does not have the essential characteristics of a superior court. Parliament did not say that an inquiry committee is a court. The language of "deeming" suggests that Parliament is using a legal

> "fiction" in order to provide the committee with certain powers or characteristics. But this does not transform an inquiry committee into a court.
>
> If Parliament had intended to make an inquiry committee a superior court, it would not have listed the powers of an inquiry committee: to summon witnesses, to require testimony on oath or on solemn affirmation, to compel production of documents, to enforce the attendance of witnesses. A superior court has all of these powers.
>
> An inquiry committee does not adjudicate disputes between the parties. It does not render a legally enforceable decision. It merely carries out an investigation. Nor does it have the jurisdiction of a superior court. An inquiry committee is authorized to deal with only the specific matter which is referred to it. In all of these circumstances, this Inquiry Committee is not a superior court . ...
>
> [Emphasis added.]

[103] It was the same in *Flahiff*, in which the IC adopted the statements of the *Gratton* IC, while specifying that the purpose of section 63 was simply to give the CJC or the IC the powers necessary to conduct an inquiry (see *Douglas* at paras 116-18; *Decision of Inquiry Committee Established by the Canadian Judicial Council to Conduct a Public Inquiry Concerning Mr. Justice Robert Flahiff* (April 9, 1999), Montréal (CJC) at p 9).

[104] Before proceeding to the final question, I find that, on the basis of the legislative overview, the composition of the CJC and the test for identifying a federal board, commission or other tribunal, the CJC and the IC are indeed federal boards, commissions or other tribunals within the definition of the FCA.

(4) Does the CJC have a source of constitutional power codified by an enactment of Parliament?

[105] I disagree with the CJC's position that the JA is the codification of a constitutional power establishing the judiciary in accordance with the principle of the separation of powers. According to the CJC's argument, the principle of judicial independence, itself rooted in the Constitution, has the effect of placing it beyond the reach of judicial review by other members of the judiciary, that is, the Federal Court. On the contrary, I am of the view that the possibility of review by a judge only increases judicial independence by preventing interference from the other branches of government. It is the judicial rather than the executive power that is in the forefront of judicial review. This will be the case when the issue of breach of procedural fairness raised by the three dissenting chief justices in the CJC's final report is considered at the judicial review hearing.

[106] It will be worthwhile to provide some additional background information. Before the 18th century, English monarchs could appoint judges *durante bene placito regis*, or "at the King's pleasure", as the King could remove a judge at will, without any impediments (see Canada, *Alternative Models of Court Administration*, Ottawa, Canadian Judicial Council, 2006 at p 33). In order to, among other things, withdraw this broad power from the Crown, the Parliament of the United Kingdom, known before 1707 as the English Parliament, abolished the "at pleasure" appointment of judges in the *Act of Settlement* of 1701, 12 & 13 Will 3, c 2 (*Act of Settlement*) (see also *Ell v Alberta*, 2003 SCC 35 at para 19). Since the *Act of Settlement*, judges can only be removed on a joint address by both Houses of Parliament, and even then only if they fail to perform their duties in accordance with the principle of *quamdiu se bene gesserint*, a Latin expression meaning "during good behaviour". Therefore, the principle of security of tenure is

fundamental to judicial independence and accountability (see Michael Birks, *The Gentlemen of the Law*, London, Stevens & Sons, 1960 at p 5; *Act of Settlement*, s III, para 7; *Valente v The Queen*, [1985] 2 SCR 673 at paras 29-32). Thus, section 99 of the CA 1867 constitutionalizes the principle of security of tenure as set out in the *Act of Settlement*. As per section 99 of the CA 1867, "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".

[107] It should be noted here that nobody is challenging the fact that the concept of judicial independence finds its source in the Constitution. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at paragraph 83, the Supreme Court is clear about the sources of this principle:

> Notwithstanding the presence of s. 11(*d*) of the *Charter*, and ss. 96-100 of the *Constitution Act, 1867*, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement of 1701*, is recognized and affirmed by the preamble to the *Constitution Act, 1867*. The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle in the institutional apparatus which they create or contemplate": *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, *per* Rand J.

[108] Moreover, unwritten principles like judicial independence may, in some cases, give rise to substantive legal obligations with "full legal force". For example, they may be used by a court of competent jurisdiction to strike down a piece of legislation. As the Supreme Court explains in *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*] at paragraph 54:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". ...

[109] In the unlikely event that Parliament were to adopt legislation that would render judicial conduct inquiries partial, unfair or biased, it would be possible to invoke these constitutional principles to strike out the offending provisions. However, the issue before this Court is not whether the mechanism created by Parliament to investigate judicial ethics violates the fundamental principle of judicial independence. Rather, it is whether judicial review might interfere with the independence of the judges sitting on the CJC.

[110] The CJC's contention that this is the case does not hold water. Although judicial independence is described as "the cornerstone of the common law duty of procedural fairness" (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 32; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at para 81; *R v Lippé*, [1991] 2 SCR 114 at p 139), making judicial review available as a remedy to the judge who is the subject of an inquiry is not incompatible with the principle of judicial independence. I cannot imagine a situation in which an application for judicial review filed by a judge whose removal is being considered could violate judicial independence. Having recourse to judicial review before an

independent court of justice for the review of a removal recommendation can only increase judicial independence, as the reviewing court can ensure that the removal recommendation is not fatally flawed and that is has been made in accordance with the standards of natural justice and procedural fairness. As we will see in the sections that follow, Minister Turner said that he wished to maintain the permanent separation of the powers of the executive and the judiciary as discussed by the Judges Bill creating the CJC. By subjecting the CJC's report and recommendation to judicial review by the Federal Court, the permanent separation of the powers of the judiciary and the executive remains unaffected, as the issue remains squarely with the judiciary.

[111] In light of the four-part analysis in this section, the CJC and the IC are federal boards, commissions or other tribunals falling within the purview of section 18 of the FCA.

B. *Do paragraphs 63(4)(a) and (b) of the JA grant the CJC and the IC the status of a superior court, thereby placing them beyond the reach of judicial review?*

[112] In this section, I will give special consideration to section 63 of the JA, with reference to the parliamentary debates of June 1971 surrounding its adoption, but also with reference to its wording. This will help to determine the scope of this provision and whether the CJC is correct in its assertion that it constitutes a superior court.

[113] Let's first recall that the CJC is claiming that judges responsible for a judicial conduct review are exercising judicial jurisdiction. According to the CJC, its decisions are deemed to be those of a superior court and can only be challenged if there exists a right of appeal, as it would

otherwise be impossible to determine which of two contradictory decisions (in this case the CJC decision and a contradictory decision by the Federal Court) would take precedence over the other, both having been rendered by superior courts equal in status.

(1) The judiciary and courts of superior jurisdiction

[114] Before analyzing the above argument, I will note here a general principle to the effect that Parliament cannot completely insulate a tribunal from the superintending power of the superior courts; this "would be to attempt to constitute a tribunal as a superior court" (*Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at para 16; *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220).

[115] The issue, therefore, is the following: is the CJC a true superior court or is it a lower tribunal with certain powers of a superior court for investigative purposes? Again, I must highlight the fact that Part I of the JA enumerates the courts constituted by an enactment of Parliament under section 101 of the CA 1867 as well as the courts of appeal and superior courts of each Canadian province and territory under section 96 of the CA 1867. I note also that all of the courts mentioned in the JA are recognized as superior courts of record (see e.g. the TCCA, s 3; FCA, ss 3, 4). Moreover, the *Interpretation Act*, RSC 1985, c I-21, defines the term "superior court" in subsection 35(1) as follows:

> *Superior court* means
>
> > (a) in the Province of Newfoundland and Labrador, the Supreme Court,
> >
> > (a.1) in the Province of Ontario, the Court of Appeal for Ontario and the Superior Court of Justice,

> (b) in the Province of Quebec, the Court of Appeal and the Superior Court in and for the Province,
>
> (c) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Appeal for the Province and the Court of Queen's Bench for the Province,
>
> (d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal and the Supreme Court of the Province, and
>
> (e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice,
>
> and includes the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada; (*juridiction supérieure* ou *cour supérieure*)

[116] There is one glaring omission. Nowhere is the CJC listed as a superior court.

[117] However, because the above list is not necessarily exhaustive, I will consider the attributes and qualities of a superior court. First, a superior court constituted under section 96 of the CA 1867 is the "cornerstone of the Canadian judicial system" (*Noël v Société d'énergie de la Baie James*, 2001 SCC 39 [*Noël*] at para 27); its powers cannot be totally removed or transferred to another body. As the Supreme Court explained in *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 [*MacMillan Bloedel*], none of the statutory courts established under section 101 of the CA 1867 "has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law" (*MacMillan Bloedel* at paras 29, 37). The superior courts also have broad jurisdiction to engage in surveillance of the lower tribunals and ensure the legality of state decision making (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 13). Finally, they possess residual common law jurisdiction. Justice Bastarache, writing on behalf of the Supreme Court, stated the following:

> **35** In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in *Brotherhood*, *supra*, at para. 7, it is a "residual jurisdiction". In a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court.
>
> (*Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 35)
>
> [Emphasis added.]

[118] On the subject of the inherent jurisdiction of the superior courts, the Supreme Court further states at paragraph 30 of *MacMillan Bloedel* (citing I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 *Current Legal Problems* 23 at p 25) that it gives power exercised "by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court" while preventing the abuse of its process. Notably, its powers include that of ensuring that its orders are enforced through the contempt power. Such powers are intrinsic to the very existence of a superior court; otherwise, it could not fulfill itself as a court of law. That said, the contempt power may be exercised by a lower court. However, this power must be conferred on it explicitly (*MacMillan Bloedel* at para 31). Significantly, judicial review of lower tribunals and administrative bodies is among the powers considered essential (*Noël* at para 27; *MacMillan Bloedel* at para 34).

[119] Having established what a superior court is and what entrenched powers are conferred on it, the question remains: how to define the judiciary more generally? The Supreme Court provides an answer to that as well. In *Re Residential Tenancies Act*, [1981] 1 SCR 714 [*Re Residential Tenancies Act, 1979*], Justice Dickson, as he then was, wrote that "the hallmark of a judicial power is a lis between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality" (*Re Residential Tenancies Act, 1979* at p 743). Thus, in Justice Dickson's view, a decision emanating from the judicial body adjudicating the dispute "deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole" (*Re Residential Tenancies Act, 1979* at p 743). In other words, a court is a place where justice is administered. More specifically, it is where an impartial judge or quorum of judges makes a judicial determination regarding an issue presented to it. Normally, a court renders a decision on a dispute between two parties; it receives oral testimony and documentary evidence from these parties. The parties, who are in an adversarial relationship with one another, may test the evidence submitted and cross-examine the witnesses of the opposing party if necessary. Furthermore, the judge acts as an impartial master of the hearing by offering to the parties the fairness required for just and equitable proceedings. The judge then decides any objections raised, hears the parties' submissions and takes the matter under advisement. Finally, the judge provides a reasoned decision and signs a judgment. A court of appeal may subsequently have this judgment brought before it, receive written submissions from each party and make whatever determinations are required in the circumstances.

[120] We have inherited this adversarial system from the British courts, in which the judge plays the role of an impartial, even passive, adjudicator between the plaintiff and the defendant. The English Canadian common law judge plays a role quite different from that of the magistrate in the inquisitorial system of civil law jurisdictions, in which he or she plays the role of independent fact finder. On this point, Chief Justice McLachlin has already raised a sharp contrast between the role of the investigator and that of the decision maker presiding over an adversarial process in our legal system. She made the following comments in *Charkaoui*:

> **43** The ... concern is that the judge may be seen to function more as an investigator than as an independent and impartial adjudicator. The law is clear that the principles of fundamental justice are breached if a judge is reduced to an executive, investigative function. At the same time, the mere fact that a judge is required to assist in an investigative activity does not deprive the judge of the requisite independence. ...
>
> **50** There are two types of judicial systems, and they ensure that the full case is placed before the judge in two different ways. In inquisitorial systems, as in Continental Europe, the judge takes charge of the gathering of evidence in an independent and impartial way. By contrast, an adversarial system, which is the norm in Canada, relies on the parties — who are entitled to disclosure of the case to meet, and to full participation in open proceedings — to produce the relevant evidence. The designated judge under the *IRPA* does not possess the full and independent powers to gather evidence that exist in the inquisitorial process. At the same time, the named person is not given the disclosure and the right to participate in the proceedings that characterize the adversarial process. The result is a concern that the designated judge, despite his or her best efforts to get all the relevant evidence, may be obliged — perhaps unknowingly — to make the required decision based on only part of the relevant evidence. As Hugessen J. has noted, the adversarial system provides "the real warranty that the outcome of what we do is going to be fair and just" (p. 385); without it, the judge may feel "a little bit like a fig leaf" (Proceedings of the March 2002 Conference, at p. 386).

[121] Again, this prompts the following question: how is the CJC's and IC's power to investigate judicial conduct similar to the powers of a superior court, or to the powers of the judiciary more broadly? Bearing in mind Chief Justice McLachlin's teachings in *Charkaoui*, based on the CJC Report, the process for reviewing judicial conduct is inquisitorial in nature and involves powers similar to those of a commission of inquiry under the IA. Such commissions are tasked with finding the truth by examining and seriously testing any evidence relevant to its mandate. It must therefore be concluded that, according to the CJC's very own statements in its 2014 report, the CJC and the IC possess only a statutory jurisdiction enabling them to inquire into the conduct of a judge in the course of an investigative process, with the judge who is subject to the inquiry having two opportunities to defend him- or herself through written submissions: (1) during the consideration of the complaint by the IC (By-laws, s 5(2)); and (2) after receipt by the CJC of the IC's report and before deliberation (By-laws, s 9(1)).

[122] At risk of repeating myself, it is impossible to consider the investigative function of the CJC equivalent to the function of a superior court. Naturally, the experience of the CJC members, mainly chief justices, is a necessary criterion contributing to their expertise in matters of judicial ethics, but this does not make the CJC a superior court. Several other facts point me toward the same conclusion. First, the fact that the Minister may, by way of an order under subsection 63(6) of the JA, require the IC to hold a public hearing rather than a private hearing indicates that the IC is not the master of its own proceedings, but is subordinate to the Minister's orders in this regard. Such a scenario would be inconceivable for a superior court. Second, the legislation contains neither a right of appeal nor a privative clause. Knowing that the FCA provides an application for judicial review as a remedy, one must assume that Parliament was

aware that this remedy was available. Moreover, the observation that the CJC's recommendation is not in itself an order or a decision—despite the potentially serious consequences for the judge who is the subject of the inquiry—is telling; even more telling is the fact that the CJC lacks the power to have it recognized or enforced.

[123] The CJC and its IC argue that they are comparable to a superior court, yet they possess none of the functions of a superior court. In conclusion, the investigative jurisdiction of the CJC and the IC cannot be compared to the jurisdiction and functions of a superior court. They are institutions with different roles. As we will see below, it is difficult to conceive that in 1971, when Parliament added a reference to superior courts to the JA, it intended to institutionalize the CJC and the IC as a superior court.

[124] I will now undertake a more literal analysis of the provision at issue.

(2) Analysis of sections dealing with "inquiries concerning judges" in the JA

[125] In this section, I will begin by setting out a few principles of legal interpretation before conducting an overview of the legislative history of the provisions and any hints as to Parliament's intent. After establishing this background, I will conduct a literal analysis of the provisions at issue. Finally, I will address the ancillary question of whether the power to investigate judicial conduct includes an internal mechanism for appealing the reports of the IC that may be analogous to an appeal *de novo*.

(a) *Principles of interpretation*

[126] First, I will set out some of the principles of statutory interpretation that will guide our analysis of the relevant provisions. In her book *Sullivan on the Construction of Statutes*, Professor Sullivan sets forth the classic three-pronged method of interpretation: (1) the ordinary meaning approach using the text of the statute as the primary source; (2) the contextual approach as originally described by Elmer A. Driedger and refined by the Supreme Court in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 (see also *British Columbia v Philip Morris International, Inc*, 2018 SCC 36 at para 17); and (3) the purposive approach in order to consider the practical idea behind the enactment of both the relevant section and the statute as a whole, as well as the real world effects of the Court's interpretation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at para 2.1).

[127] At the same time, at paragraphs 68 to 71 of *X (Re)*, 2014 FCA 249, the Federal Court of Appeal summarized the preferred approach to statutory interpretation:

> **[68]** The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at paragraph 29.

[69] The Supreme Court restated this principle in *Canada Trustco Mortgage v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[70] This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

[71] Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

[128] However, as expressed by the Federal Court of Appeal, Professor Sullivan and Professor Pierre-André Côté in his book *The Interpretation of Legislation in Canada*, the ordinary meaning approach is not sufficient on its own. Côté and Sullivan are in agreement, rather, that context is critical and that interpretation is legitimate even when the ordinary meaning appears clear. Professor Côté states that

> ... we want to note our profound disagreement with the idea that interpretation is legitimate or appropriate only when the text is obscure. This idea is based on the view, incorrect, that the meaning of a legal rule is identical with its literal legislative wording. The role of the interpreter is to establish the meaning of rules, not texts, with textual meaning at most the starting point of a process which necessarily takes into account extra-textual elements. The *prima facie* meaning of a text must be construed in the light of the other indicia relevant to interpretation. A competent interpreter asks whether the rule so construed can be reconciled with the other rules and principles of the legal system: Is this meaning consistent with the objectives of the statute and the provision? Is this meaning coherent with the history of the text? Do the consequences of construing the rule solely in terms of the literal rule justify revisiting the interpretation? and so on.
>
> (Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at pp 268-69)

[129] These are the guiding principles of statutory interpretation. I will now look to the legislative history for clues as to Parliament's intent.

(b) *Legislative history and the intent of Parliament*

[130] The current version of the JA had its beginnings in Bill C-243, introduced by Minister Turner for first reading on April 28, 1971. Bill C-243 included, among others, provisions

regarding the salaries and annuities of judges and the creation of the position of supernumerary judge. Notably, it proposed the creation of the brand new CJC.

[131] The historical and political context of the JA is relevant to the interpretation of the deeming provision. At the time, Parliament had just enacted the *Federal Court Act* in 1970, which came into effect on June 12, 1971. On April 26, 1971, Prime Minister Pierre E. Trudeau announced that the government would be introducing amendments to the JA to "increase judicial salaries significantly" in order, among other reasons, "to facilitate the appointment to the bench of younger candidates who may have family responsibilities" (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 5 (26 April 1971) at p 5211 (Pierre E. Trudeau)). On May 3, 1971, in response to a question for the Minister of Justice raising a concern about judicial independence and the possibility that a judge could be fired on the CJC's "recommendation", Minister Turner specified that "the purpose of the Canadian judicial commission is to ensure that the separation of powers as between the executive and the judiciary is properly maintained" (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 5 (3 May 1971) at p 5433 (John Turner)).

[132] Bill C-243 changed the landscape. In 1886, supervisory power over the conduct of county judges was conferred by statute on one or more Supreme Court judges, or one or more judges of a superior court of any Canadian province. These were called "commissioners", and they had the same powers to summon and compel to attend as a superior court of the province in which the inquiry was conducted. These powers are analogous with those set out in paragraphs 63(4)(a) and (b) of the JA currently in force. Before the amendments brought by Bill C-243, the IA was used for conducting investigations with respect to superior court judges.

[133] The inquiry into the conduct of the Honourable Leo Landreville, then a judge of the Supreme Court of Ontario, is a good example. In fact, the Landreville affair was one of the triggers for the amendments to the new legislation. In 1966, the Governor in Council appointed, pursuant to the *Inquiries Act*, RSC 1952, c 154, Justice Ivan Rand, a former Supreme Court judge, to inquire into questionable securities transactions by Justice Landreville. In his report, Justice Rand recommended Justice Landreville's removal. However, the report was challenged, and legal proceedings were launched alleging a violation of procedural fairness (see William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville*, Toronto, University of Toronto Press, 1996; *Landreville v R (No 2)*, [1977] 2 FC 726 (FCTD); *Landreville v R (No 3)*, [1981] 1 FC 15 (FCTD)). In June 1967, Prime Minister Lester B. Pearson made a joint address to both Houses of Parliament asking for Justice Landreville's removal, but the latter resigned before a decision could be reached.

[134] It was in the wake of this experience with Justice Landreville's investigation file and the resulting legal proceedings that Minister Turner and Cabinet decided to rethink the judicial conduct investigation procedure. After consultations with the Conference of Chief Justices (the CJC's predecessor), the ten provincial attorneys general and the Canadian Bar Association, Bill C-243 was introduced in the House of Commons in April 1971 (see *House of Commons Debates*, 28th Parl, 3rd Sess, vol 5 (3 May 1971) at p 5433 (John Turner)).

[135] On June 14, 1971, the debates in the House of Commons during the second reading of Bill C-243, particularly the comments of the Parliamentary Secretary to the Minister of Justice, Albert Béchard (replacing the Minister of Justice, who was occupied at the time with the

Constitutional Conference of Victoria), as well as the concerns of the members of Parliament, shed considerable light on the foundations of the JA and its subsection 63(4) (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 7 (14 June 1971) at pp 6665 et seq (Albert Béchard, Eldon M. Woolliams, Stanley Knowles, et al.)). The following general conclusions may be drawn:

(1) The main purpose of the bill was to raise the salaries of superior court judges to attract the best candidates.

(2) Another concern was to provide judges and their families with greater financial security by modifying the pension plan for judges.

(3) One objective was to recognize judicial experience by creating the position of supernumerary judge while reducing the judicial workload.

(4) It proposed the creation of the CJC for the purpose of formalizing the unofficial existence of the conference of the country's 22 chief justices, assigning to it, among others, the mandate of providing judicial training and the power to investigate judicial conduct.

(5) Another purpose was to ensure judicial independence by specifying that judicial conduct and any inquiries into judicial conduct would fall under the powers of the CJC rather than the executive branch, while ensuring that the ultimate power of removal rested with the two Houses of Parliament.

(6) In order to preserve the final removal power, the CJC and the IC were given only investigative powers resulting in a report and conclusions (recommendation) to be

> presented to the Minister of Justice, who, along with Cabinet, would have the ultimate responsibility of making a joint address to Parliament asking for the removal, if appropriate.

[136] Moreover, in his principal remarks (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 7 (14 June 1971) at pp 6664-67 (Albert Béchard)), the Parliamentary Secretary referred to the "new *Federal Court Act*" as an example of "the evolution of an older institution", necessary "to keep our judicial system in step with the changes in our society and the changing role of law in that society". He specified that the CJC was being created as the "national forum" for the judiciary for the purpose of bringing about "greater efficiency and uniformity in judicial services and to improve their quality". The CJC was to be granted, among others, the power to carry out investigations into the conduct of judges to ensure judicial independence and to have "the judiciary become, to some extent, a self-disciplining body". He added that the legislative and executive branches "should not ordinarily intervene in the management or control of the judiciary", except for Parliament's involvement during the presentation of an address.

[137] The members of Parliament called upon to comment and propose amendments unanimously supported the objectives designed to ensure judicial independence and the importance of granting the CJC the power to investigate judicial conduct, as well as the goal of maintaining the constitutional power to remove a judge in the hands of the two Houses of Parliament. However, it was suggested that non-judges be able to participate in judicial conduct inquiries (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 7 (14 June 1971) at p 6674 (John Gilbert)). It was even proposed that the system of inquiry and ultimate removal include an appeal

process, since, "[i]f a judge is wrongly treated, there is no remedy" provided for in the bill (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 7 (14 June 1971) at p 6686 (Robert McCleave)).

[138] The bill was submitted to the Standing Committee on Justice and Legal Affairs for consideration over the course of two sessions on June 16 and 22, 1971. One of the amendments discussed by the Committee was section 31 of Bill C-243 (subsection 63(4) of the current Act), in which it was added that the CJC and the IC "shall be deemed to be a superior court and shall have…" (in French: "sensées être des cours supérieures et ont") (see House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 28th Parl, 3rd Sess (16 June 1971) at p 27:27 (Mr. Marceau)). The explanation for this governmental amendment was provided by a public servant within the Department of Justice, a certain Mr. McIntosh, in response to the question of a member: "That is just for the record. Is that it?" (in French: "l'amendement est-il fait "pour l'enregistrement, est-ce exact?"). To this, Mr. McIntosh replied, at p 27:27:

To give the judges in the case of hearing of an inquiry or having an investigation the usual judicial protection that they would need.	D'accorder aux juges lors d'une audience concernant une enquête en effectuant une investigation, la protection judiciaire normale dont il aurait besoin.

[139] The CJC submits that the amendment was drafted in response to [TRANSLATION] "concerns" expressed by members of Parliament to the effect that the CJC and the IC should be deemed to be superior courts (see the CJC's memorandum at para 96). However, having read the debates in both the House of Commons and the Standing Committee on Justice and Legal

Affairs, I was unable to find any trace of these [TRANSLATION] “concerns”. However, I was able to identify certain qualms regarding the fact that the judge subject to an inquiry would have no “right of appeal” and that, accordingly, the judge would have no remedy against unfair treatment (see House of Commons Debates, 28th Parl, 3rd Sess, vol 7 (14 June 1971) at p 6686 (Robert McCleave); House of Commons, Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, 28th Parl, 3rd Sess (16 June 1971) at p 27:25 (Mr. McCleave)).

[140] As seen above, during the debates regarding this amendment, the public servant from the Department of Justice 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”. Therefore, to claim that it was added for the purpose of turning the CJC and the IC into an actual superior court ignores what is made apparent by the parliamentary debate. The objective was simply to ensure that the investigative body would protect judges. If the intent had been to turn this investigative body into a superior court, Parliament would have said so explicitly.

[141] Furthermore, even if one were to accept the fact that the CJC is a judicial conduct review body not subject to any form of remedy whatsoever and that its reports and conclusions are final (read not subject to appeal), as the CJC claims, it is clear that the objective of providing judges with “the usual judicial protection” would not be met at all. Is it conceivable that Parliament wished to make the investigative body a superior court in full knowledge that the “protection” given to judges would not include any remedies? One cannot on the one hand offer protection to the judges subject to inquiry while on the other hand providing no means for challenging the

reports and conclusions. This is certainly not providing the "judicial protection" contemplated by Parliament.

[142] I also agree with Justice Mosley's statement in his reasons that the amendment was made to grant immunity to the investigating judges for the decisions they render and to protect the judges subject to inquiry with respect to the statements made in the course of the proceedings. This last point is consistent with the intent to give the judge concerned the necessary "judicial protection". I also note another important point in his decision, namely, his observation that this was the type of fine-tuning that commonly occurs to clarify an existing legislative provision (see *Douglas* at paras 101, 103).

[143] The principle of independence also comes across clearly as the basis for the amendments. Minister Turner and his Parliamentary Secretary, in assigning an investigative role to the CJC and the IC, wished for judicial conduct to be overseen by a majority of representatives of the judiciary rather than members of the executive or legislative branches of government. The purpose was to shore up judicial independence by ensuring that judicial discipline was handled by the judicial branch, while allowing for the participation of non-judges, as long as a majority of members came from the bench.

[144] The case currently before this Court is a perfect example. After the first inquiry, the IC recommended that the judge be removed, but the report was not unanimous. After studying the report and the judge's submissions, the CJC decided not to recommend the judge's removal to the Minister, preferring to side with the minority decision in the report, and it was this decision

that was accepted by the Minister. Together with Quebec's Minister of Justice, she nevertheless asked the CJC to launch a second inquiry into Justice Girouard's conduct on the basis of the majority's comments in the same report. Therefore, the judiciary itself has the full responsibility for judicial conduct inquiries. The executive branch does not decide of its own accord to investigate. It may ask for an inquiry, then receive the inquiry report and conclusion and decide, if appropriate, to ask Parliament to render a decision. This case provides a good illustration of Minister Turner's statements regarding one of the raisons d'être of the CJC, namely, "to ensure that the separation of powers as between the executive and the judiciary is properly maintained" (*House of Commons Debates*, 28th Parl, 3rd Sess, vol 5 (3 May 1971) at p 5433 (John Turner)).

[145] This brings us to the literal analysis of the provisions.

(c) *Literal interpretation of the sections at issue*

[146] We have seen above that the phrase "shall be deemed to be a superior court and shall have" (in French: "réputé constituer une juridiction supérieure") was inserted to give the inquiring judges the usual immunity in similar circumstances. It was also mentioned that the "judicial protection" extended to the testimony of the judges subject to inquiry. This reflects the intent of Parliament.

[147] However, bearing in mind what it refers to as [TRANSLATION] "ambiguities" arising from both the internal structure of subsection 63(4) of the JA and a comparison of the French and English versions of the text, the CJC submits that the provision must be interpreted as creating a true superior court with all the powers of a superior court, particularly the power to summon

witnesses and compel them to give evidence. On the other hand, the AGC and Justice Girouard suggest, in agreement with Justice Mosley's finding at paragraph 107 of *Douglas*, that this provision is limited in scope and that it simply enumerates the specific powers and functions of the CJC and the IC.

[148] Here it is worth recalling that, to identify the true meaning of this subsection of the JA, one must read the words of the text as a whole while taking into account the scheme of the Act, the object of the Act, and the grammatical and ordinary sense of the words. It goes without saying that the modern approach to statutory interpretation is the appropriate approach to take in this case: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26).

[149] It has already been established that the CJC and the IC are investigators with the power to conduct inquiries into a complaint or allegation directed against a judge. This investigative power is not the same as that of a superior court. In conferring upon them this investigative role, the JA grants the CJC and the IC a status similar to that of a superior court, not to designate them as a superior court, but rather to ensure that they have the powers of inquiry that the role requires.

[150] I will pause here to point out that, in his decision, Justice Mosley observed that the investigative powers appeared to be more closely connected to the IC than to the CJC. I agree. He also notes that subsection 63(4) of the JA does not apply to the final stage of the judicial

conduct proceedings. He adds that section 65 gives the CJC the power to present a report with conclusions to the Minister (*Douglas* at para 108). Similarly, section 12 of the By-laws indicates that the CJC may request clarification from the IC or even a supplementary inquiry.

[151] I will now turn to the vocabulary of subsection 63(4) of the JA. The verb "réputé" in French literally means "tenir pour, considérer comme" and the word "deemed" in English means [TRANSLATION] "to judge, to reckon, to consider" (see *Nouveau Petit Robert de la langue française 2009* (Paris: Le Robert, 2008) *sub verbo* "réputer"; *Larousse Chambers, Grand dictionnaire français-anglais / anglais-français* (Paris: Larousse, 2003) *sub verbo* "deem"). This being the case, I am of the view that if Parliament had wished to give the CJC and IC the status of a true superior court, it would have done so expressly by using the verb "to have". Such a formulation might appear as follows: "the CJC or the IC established to conduct the inquiry is a superior court and has all the powers of such a court". Conversely, it would not have needed to enumerate the specific powers set out in paragraphs 63(4)(a) and (b) of the JA. Parliament therefore chose to add "deemed" (in French: "réputé être") because it did not want only to bestow the powers of inquiry associated with a superior court, but also to extend judicial protection to the judges subject to inquiry and to those conducting the inquiries. Justice Mosley reaches the same finding in *Douglas*; once again, I fully adopt his reasons at paragraphs 102 and 103.

[152] The CJC suggests that the French and English versions of subsection 63(4) of the JA are to be interpreted differently. It claims that the semi-colon in the French version of subsection 63(4) [TRANSLATION] "ends a clause that reads as a clear, general statement", which is

not found in the English text. The CJC treats the semi-colon as a full stop for the purpose of making the following idea stand out on its own: [TRANSLATION] "The Council or the Committee formed to conduct the inquiry is deemed to be a superior court".

[153] With respect, I cannot accept this argument. First, as noted by the AGC, the revised statutes are not new law, being merely a consolidation under section 4 of the *Revised Statutes of Canada, 1985 Act*, RSC 1985, c 40 (3rd Supp). Therefore, one could—indeed should—consider the wording of subsection 63(4) of the JA as it was prior to the consolidation and not after the addition of the semi-colon. However, I intend to take into account the semi-colon because, in any case, it has no impact on my interpretation of the section. Indeed, it is inaccurate to state that a semi-colon [TRANSLATION] "ends a clause". A semi-colon does not end a sentence. It is simply a pause shorter than that created by a period and longer than that created by a comma (see *Bescherelle : L'orthographe pour tous* (Montréal: Hurtubise, 1998) at para 240). Thus, the semi-colon added during the consolidation of 1985 does nothing to change the interpretation of subsection 63(4) of the JA. The provision has no general part; it has only a very specific scope, that of granting the IC the powers necessary to inquire into the conduct of a superior court judge.

[154] Accordingly, the CJC's statements regarding the English wording have more weight, except where they interpret subsection 63(4) of the JA as having a broad scope. The English text of the provision has no punctuation, employing instead the coordinating conjunction "and shall have". It reads as follows: "shall be deemed to be a superior court and shall have (a) power to summon ... ; and (b) the same power to enforce the attendance". In fact, as proposed by the CJC,

the expression “shall have” may mean [TRANSLATION] “in particular”, which necessarily implies a limiting effect (CJC’s memorandum at para 88). I agree.

[155] I also observe that the marginal notes of subsection 63(4), “Powers of Council or Inquiry Committee” (in French: “Pouvoirs d’enquête”), do nothing more than announce what the text of the subsection is generally about. The title used does not support the CJC’s position. The marginal notes were an integral part of the bill that was being considered in 1971 (see *Corbett v R*, [1997] 1 FC 386 (FCA) at para 13). However, I agree that such notes are not determinative (*Imperial Oil Ltd v Canada*, 2006 SCC 46 at para 57), and I will treat them as being of secondary importance. The fact remains, though, that they are useful to the extent that, as Justice Mosley stated in paragraph 106 of *Douglas*, they add further support to my conclusion.

[156] I therefore find there is no ambiguity between the French and English versions. I will also reiterate that the reference to a superior court was inserted (1) to recognize the immunity of the inquiring judges and the CJC; (2) to grant the judges subject to inquiry all the necessary protection in the course of their testimony; and (3) to grant specifically for the inquiries a superior court’s powers to summon witnesses and require them to give evidence, to produce documents, etc.

(d) *Does the power to investigate judges include an internal appeal mechanism for the reports and conclusions of the IC that is analogous to an appeal de novo?*

[157] As previously mentioned, the CJC’s position is that judicial oversight is unnecessary, as the procedure established by the By-laws includes a mechanism internal to the CJC that is

analogous to an appeal *de novo* (CJC's memorandum at paras 100-10). The CJC submits that it established a [TRANSLATION] "specific process" granting the judge [TRANSLATION] "a procedural protection" allowing him or her [TRANSLATION] "to make to the Committee submissions supported by evidence". The CJC submits that this procedure is even more robust than final appeals to the Supreme Court. The CJC considers this to be the highest level recourse that may be offered to a judge who is subject to an inquiry.

[158] I disagree. The Supreme Court is the court of last resort and plays a critical role in our country's constitutional architecture. Nobody is beyond the reach of its absolute jurisdiction. As the Supreme Court has explained in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21:

> **[84]** In addition, the elevation in the Court's status empowered it to exercise a "'unifying jurisdiction' over the provincial courts": *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 318; *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 S.C.R. 546, at p. 556. The Supreme Court became the keystone to Canada's unified court system. It "acts as the exclusive ultimate appellate court in the country" (*Secession Reference*, at para. 9). In fulfilling this role, the Court is not restricted to the powers of the lower courts from which an appeal is made. Rather, the Court may exercise the powers necessary to enable it "to discharge its role at the apex of the Canadian judicial system, as the court of last resort for all Canadians": *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404, per Dickson J.; *Hunt*, at p. 319. ...
>
> **[87]** As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court's position within the architecture of the Constitution.
>
> [Emphasis added.]

[159] Contrary to the CJC's submissions, I can find nothing in the JA or the By-laws about an option to submit new evidence or for the judge to have an oral hearing. However, in theory as well as in practice, an appeal *de novo* means that the case may be presented again with testimonial or other evidence and with the assistance of new submissions. Furthermore, this type of appeal occurs in the context of an adversarial two-party system, which is quite simply not the case here. The CJC has a statutory obligation to submit the inquiry report after having reviewed it while taking into account the written submissions of the judge subject to the inquiry. However, no provision is made for a new hearing with new evidence. Therefore it is not a [TRANSLATION] "specific procedure" for an appeal *de novo*. Moreover, as noted by Justice Girouard, appeals do not exist in the common law; all appeals are the creatures of statute (*R v Meltzer*, [1989] 1 SCR 1764 at p 1773). In this case, the appeal regime proposed by the CJC was clearly not adopted by Parliament. The role of the CJC is not to conduct an appeal, but rather to review the report of the IC.

[160] In our judicial order, in which the rule of law plays a fundamental role, a lack of judicial review or of a right of appeal constitutes a breach of procedural fairness. As the AGC has observed in this case, without judicial review, a judge subject to an inquiry by the CJC would be deprived of his or her right to challenge the fairness and lawfulness of the proceedings. I refer the reader to Justice Mosley's decision in *Douglas*, in which he writes the following:

> [**121**] Before a judge can be removed from office, he or she is entitled to a fair hearing: *Valente v The Queen*, [1985] 2 SCR 673 at p 696. This fair hearing is essential not only as a matter of administrative law, but as a component of the constitutional requirement for judicial security of tenure. The supervisory jurisdiction of this Court over the Council and its Inquiry Committee serves an important function in the public interest of ensuring that the judicial conduct proceedings have been fair and

> in accordance with the law. That function is entirely consistent with Parliament's intent as reflected in the legislation.
>
> [**122**] As submitted by the Attorney General, the efficacy of the design created by Parliament in 1971 would be compromised if judicial review were unavailable. The outcome of the Council and Inquiry Committee's work is a report with recommendations to the Minister of Justice. Absent the availability of judicial review, the Minister, and ultimately Parliament, would be required to assess whether the process that had led to the report was conducted within the Council's statutory authority, and was procedurally fair and free of errors of law. These questions are distinct from the merits of any recommendation that a judge be removed from office, which is the role that is reserved to the Governor General and Parliament under s 99 of the *Constitution Act, 1867*, with respect to s 96 judges, and is enshrined as well as in the *Supreme Court Act*, RSC 1985, c S-26, the *Federal Courts Act*, RSC 1985, c F-7 and the *Tax Court of Canada Act*, RSC 1985, c T-2 for judges appointed under s 101.
>
> [**123**] The CJC's position is that, if judicial review is not available, the judge will have an avenue of appeal to the Minister and Parliament. While this is true with respect to the merits of any recommendation to remove the judge, the Minister and Parliament are wholly ill-equipped to adjudicate the potentially wide array of legal arguments that may be raised in respect of the judicial conduct proceedings. A judge who is subject to the CJC and Inquiry Committee's investigation or inquiry would be deprived of the opportunity to test the fairness and legality of the proceedings in a court of law. That the judge may "appeal" the outcome to the Minister of Justice and, ultimately, to Parliament is not an answer if those bodies lack the capacity to assess those issues.

[161] Also, in the *Secession Reference*, the Supreme Court reiterated that the rule of law and constitutionalism are among the underlying principles animating the Constitution and that they therefore transcend all of our institutions:

> **72**. The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is

> inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[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, as alleged by Justice Girouard in his application for judicial review in this case and also according to the dissenting views of three chief justices, 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 CJC provides the Minister, and ultimately the two Houses of Parliament, that the process is consistent with the underlying constitutional principles. If the CJC 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 CJC as it did.

[163] To conclude, I cannot accept the CJC's argument to the effect that an alleged appeal *de novo* obviates the need for judicial review. Neither the JA nor the By-laws include any of the characteristics of an appeal *de novo*, and, furthermore, such a proposal would undermine the rule of law, "a fundamental postulate of our constitutional structure" (*Roncarelli v Duplessis*, [1959] SCR 121 at p 142; *Secession Reference* at paras 70-78).

[164] To summarize the analysis of subsection 63(4) of the JA, my interpretation is that the CJC and the IC have the jurisdiction they require to inquire into the conduct of judges in a way that maintains judicial independence. To achieve this, the inquiry, report and conclusions had to be placed in the hands of an institution with a majority of members from the judicial sector. For this purpose, the CJC and the IC were given the investigative powers of a superior court. If the intention had been to give the CJC and the IC the status of a superior court, this would have been done expressly by creating this status through section 101 of the CA 1867. Furthermore, if Parliament had intended to create a new court with final authority and with no possibility of appeal or any other remedy, it would have stated this expressly.

C. *Are the CJC's and the IC's reports and conclusions subject to the judicial review power of the Federal Court?*

[165] The CJC submits that the report and removal recommendation are not decisions within the meaning of section 18.1 of the FCA, but mere recommendations with [TRANSLATION] "no direct impact on the rights and interest of the Honourable Justice Girouard", the final decision with respect to removal belonging to Parliament. Conversely, Justice Girouard and the AGC explain that the inquiry itself has a major impact on the judge being investigated, and the reports,

as well as the conclusions they contain, have serious consequences for that judge's career. The reports and recommendations are therefore decisions that are reviewable by the Court.

[166] First of all, I am surprised that the CJC would attempt to assert such a position. The CJC itself explained that a finding issued by it 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. The precise wording contained in the 2014 CJC Report is the following: "[a]lthough the end-result of an Inquiry Committee or the full CJC may be no more than a recommendation for removal based on the finding that a judge has become incapacitated or disabled from the due execution of judicial office, such a finding is essentially 'capital punishment' for the career of a judge" (CJC Report at p 47). It was also stated that the reputational consequences of an inquiry report might be "considerable", therefore requiring a high degree of procedural fairness (CJC Report at p 13).

[167] We have already noted that the actors in the judicial conduct review process, which is itself "investigative", are "investigators" rather than "decision makers", and that these investigators may participate more actively in the presentation of the evidence than would be permissible "in judicial or quasi-judicial settings" (CJC Report at pp 17, 47).

[168] It is true that the final decision regarding the removal of a judge rests with Parliament. However, this is not possible without having the CJC submit its inquiry report and its recommendation, if appropriate. It should be recalled that after an inquiry by the CJC and its IC and the submission of the report, the Minister must follow up on the report and the

recommendation, except in exceptional circumstances and only after all the legal remedies have been exhausted. She may not re-investigate, nor may she do nothing. Therefore, without the inquiry by the CJC and its IC, the Minister may not ask Parliament to remove a judge. That being the case, the report and its conclusions have a major impact on the rights and interests of the judge. The CJC is correct in calling it "capital punishment" for that judge's career.

[169] Moreover, the fact that a decision takes the form of a "recommendation" does not make it unreviewable. The Supreme Court held in *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 [*Thomson*], in which it had to determine whether a recommendation constituted a decision, that "in order to interpret 'recommendations' ... , the ... *Act* must be read as a whole in order to ascertain its aim and object" (*Thomson* at p 398). That is equally applicable to this case. Taking into account the principle of security of tenure, the judicial conduct review process granted to the CJC by statute, and the importance of the report and recommendation to the Minister, Cabinet and Parliament, one can only conclude that the report and recommendation are essential to the judicial removal process. They are determinative at the very end.

[170] Furthermore, according to the case law of the Federal Court and Federal Court of Appeal, judicial review under section 18.1 of the FCA is not strictly limited to decisions or orders. It also applies to the reports of federal boards, commissions or other tribunals, as noted by Justice Stone of the Federal Court of Appeal in *Morneault v Canada (Attorney General)*, [2001] 1 FC 30 (FCA), an appeal from a judgment allowing an application for review of the findings made in the report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia:

> [**42**] [...] Judicial review under section 18.1 is not limited to a "decision or order". This is clear from subsection 18.1(1) which enables the Attorney General of Canada and "anyone directly affected by the matter" to seek judicial review. It is plain from the section as a whole that, while a decision or order is a "matter" that may be reviewed, a "matter" other than a decision or order may also be reviewed. This Court's decision in *Krause v. Canada*, 1999 CanLII 9338 (FCA), [1999] 2 F.C. 476 (C.A.) illustrates the point. It was there held that an application for judicial review pursuant to section 18.1 for a remedy by way of *mandamus*, prohibition and declaration provided for in section 18 [as am. by S.C. 1990, c. 8, s. 4] of the Act, were "matters" over which the Court had jurisdiction and that the Court could grant appropriate relief pursuant to paragraphs 18.1(3)(*a*) and 18.1(3)(*b*). See also *Sweet v. Canada* (1999), 249 N.R. 17 (F.C.A.); *Devinat v. Canada (Immigration and Refugee Board)*, 1999 CanLII 9386 (FCA), [2000] 2 F.C. 212 (C.A.).

[171] The same is true in the cases involving judicial review of the Commission of Inquiry into the Sponsorship Program and Advertising Activities: *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 981, aff'd 2011 FCA 217; *Chrétien v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, aff'd 2010 FCA 283; *Pelletier v Canada (Attorney General)*, 2008 FC 803, aff'd 2010 FCA 189. All of these decisions of the Federal Court, as well as those of the Federal Court of Appeal, involve reports of commissions of inquiry rather than decisions or orders. A judicial conduct inquiry resulting in a report is no exception. It has considerable consequences for a judge's career, and also for that judge's family and loved ones. The recent example of former Justice Robin Camp makes this abundantly clear (see *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (March 8, 2017), Ottawa (CJC)). He resigned following the publication of the report, and the Law Society of Alberta did not readmit him as a lawyer until very recently.

[172] I therefore cannot accept the CJC's argument. However, I share its opinion that an inquiry report by the CJC amounts to "capital punishment" for a judge's career. Therefore, the CJC's report, conclusions and recommendations regarding Justice Girouard constitute a decision for the purposes of section 18.1 of the FCA.

X. Comments and conclusion

A. *Comments*

[173] It is with mixed feelings that I conclude my review of the issue raised by the CJC of the Federal Court's jurisdiction. Certainly, there is the satisfaction of having fully grappled with the issues in the interest not only of the parties, but also of those stakeholders who were not represented, such as persons appointed to hold office during good behaviour and the complainant(s). My findings will be analyzed on appellate review. However, I cannot close this file without commenting on the attitude of the CJC toward the Court and the parties. Three orders had to be issued to persuade the CJC to demonstrate a degree of respect for the Court. I note first that Mr. Sabourin, Executive Director of the CJC, simply sent the registrar an email informing her that the CJC was challenging the Court's jurisdiction and specifying that all correspondence was to be addressed to the Right Honourable Richard Wagner, Chairperson of the CJC: an unprecedented act in such proceedings. Mr. Caza then wrote to the administrator explaining the CJC's position and citing a Rule of the Court. It is easy to interpret a rule literally as a basis for justifying conduct, but when the party doing this is made up of chief justices, there are grounds for concern. At issue was the requirement to file the decision maker's record under section 317 of the Rules upon the filing of an application for judicial review. Basic judicial

comity would have dictated first sending the Court a simple "Without Prejudice" letter explaining that the CJC was challenging the Court's jurisdiction and seeking a hearing on this point. The CJC's conduct delayed the proceedings by two months.

[174] I must also mention that there was a good opportunity to bring the issue of the Court's jurisdiction closer to resolution in 2014. The CJC had appealed the decision on jurisdiction reached in *Douglas*, but it later withdrew its appeal. The issue that the CJC raises again in 2018 is largely the same; it has generated enormous expenses and required the use of further judicial resources, and it has also delayed the judicial review proceedings. Justice Mosley presided over a hearing that lasted about three days. He devoted more than 120 paragraphs of his reasons to the jurisdictional issue. This issue could have been settled by the Federal Court of Appeal as early as 2015.

[175] There is more. The CJC's record was filed late, and the Court granted it an extension of time to file. Within 24 hours of filing the record, Mr. Sabourin, Director of the CJC, made the following public statements in *The Lawyer's Daily*, an English-language publication aimed at lawyers, in which he is quoted verbatim:

> [T]he council has decided to press the judicial review question in court "because it's a very long-standing issue that needs to be resolved. I think everyone would agree that Parliament never contemplated in 1971 [when the CJC was created] that the Federal Court would be intervening in the process of an inquiry into a judge's conduct, and I don't think Parliament intended that the Federal Courts have the authority to review the decisions of the council. So there is a legislative void, so to speak.
>
> "And when you look at the *Federal Courts Act* that defines what is a federal office or a federal tribunal I think that the council does not fit in that definition, number one because it's composed of

> s. 96 judges and the *Federal Courts Act* excludes s. 96 judges, and number two because, perhaps more importantly, council is exercising really a constitutional responsibility [overseeing conduct of federal judges] — something which the government has acknowledged. And as a constitutional responsibility, [it] is not interpreting 'a law of Canada' [reviewable by the Federal Court.] It is interpreting a constitutional issue as to whether or not a judge should be removed from office. So on these two fronts we think that the Federal Court does not have jurisdiction."
>
> (Cristin Schmitz, "Ottawa delays removing, replacing sidelined judge as taxpayers continue to foot massive litigation costs" *The Lawyer's Daily* (May 25, 2018) online: <www.thelawyersdaily.ca/articles/6592> (Justice Girouard's evidence))

[176] It should be noted that the Executive Director of the CJC, an institution that claims to be a superior court, is pleading the Council's cause in a public forum.

[177] The publication of such an article the day after the filing of the CJC's record does not appear to be merely coincidental. The article refers to the CJC's memorandum and certain parts of its content. The Minister's office was also contacted, and it explained that, among other things, out of respect for the judiciary, the Minister would not be offering any comments about the situation. The journalist added that counsel for Justice Girouard could not be reached at press time.

[178] The main thrust of the article is to blame the Minister for not yet having asked Parliament to vote of the removal of the judge, without regard for the proceedings before the Court. However, no reference is made to the three orders rendered by the Court against the CJC and stating that the proceedings were being delayed by the CJC. It should also be noted that the

CJC's inquiries into Justice Girouard's conduct lasted for about five years. I would add that the second inquiry lasted approximately 20 months. The article is silent on this point.

[179] That is not all. The CJC's reply memorandum is most unusual. It criticizes the Minister for supporting the Federal Court's jurisdiction in this case in its role as party called upon to comment on the legislation. However, as seen above, the AGC had held the same position in *Douglas* in 2014. This is nothing new for those who have been following the issue.

[180] I must add that on the Friday preceding the hearing on the jurisdictional issue, a new article appeared in *The Lawyer's Daily* (Cristin Schmitz, "Chief Justice Wagner calls for judicial discipline reforms as Ottawa drags heels on removing sidelined judge" [emphasis added] *The Lawyer's Daily* (June 22, 2018) online: <www.thelawyersdaily.ca/articles/6806>). The article refers to comments made by the Chairperson of the CJC to the effect that it was "not satisfactory" for the administration of justice in the districts of Abitibi, Rouyn-Noranda and Témiscamingue that Ottawa had failed for four months to address the CJC's recommendation that Justice Girouard be removed. It also refers to meetings that had taken place between the CJC and the Minister.

[181] All of this leads me to question whether the CJC was pressuring the Minister to proceed with Justice Girouard's removal without regard for the judicial proceedings that are legitimately before this Court. I made a few preliminary remarks about this at the beginning of the hearing of June 27, 2018.

[182] Each of the parties was given an opportunity to respond to my concerns. One of Justice Girouard's counsel criticized Mr. Sabourin for presenting an inaccurate version of the facts in the article of May 25, 2018, for the purpose of unduly influencing public opinion. As for the meetings referred to in the article of June 22, 2018, Mr. Tremblay indicated that he was aware of discussions between the CJC and the Minister relating to potential reforms in the area of judicial ethics. He specified that he was prepared to believe that his client's file was not discussed in his absence and that he took it for granted that only the reform had been discussed during the meetings mentioned in the article in question.

[183] The CJC has since confirmed through its counsel that that Justice Girouard's file [TRANSLATION] "has been and will be pleaded only by counsel for the Council and the same will be true before the Federal Court" (emphasis added) (CJC's written submissions dated June 27, 2018). In the absence of evidence to the contrary, I must accept this response at face value. I therefore presume that the Girouard file was not discussed during the meetings and that the CJC will henceforth limit itself to making its case before the courts.

B. *Conclusion*

[184] The CJC's position that it can be characterized as a superior court has no basis. Paragraphs 63(4)(a) and (b) of the JA grant the CJC and the IC the powers of a superior court so that it may summon witnesses and require them to give evidence, compel them to testify and produce documents, etc., and thus be equipped to perform a "full investigation". The investigative powers are those of the province in which the inquiry or investigation is being conducted. The phrase "deemed to be a superior court" was inserted to provide immunity to the

CJC and its members in conducting the inquiry, but also to provide the necessary protection to the testimony of the judge subject to the inquiry. As mentioned in the parliamentary debates, this was done to provide the judicial protection that the judges would need.

[185] The report to the Minister with its conclusions and recommendations regarding removal amounts to, as acknowledged by the CJC, “capital punishment”. A report that can have such a devastating impact on a judge’s career and family is subject to judicial review.

[186] For all these reasons, I dismiss the motions to strike. There will be no award as to costs.

[187] I am issuing a further order with today’s date in which I deny the application for a stay of proceedings brought by the CJC, order the latter to file certain documents and lists of documents within 20 days, and ask all of the parties to submit a timetable to the Court within 30 days so that all of the applications for judicial review may be heard as soon as possible.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. The following motions to strike are dismissed:

    (a) **THE MOTION TO STRIKE** the application for judicial review of the decision of the First Inquiry Committee contained in the notice of application bearing file number T-733-15;

    (b) **THE MOTION TO STRIKE** the application for judicial review of the decision of the First Inquiry Committee contained in the notice of application bearing file number T-2110-15;

    (c) **THE MOTION TO STRIKE** the application for judicial review of the decision of the Second Inquiry Committee contained in the notice of application bearing file number T-423-17;

    (d) **THE MOTION TO STRIKE** the application for judicial review of the decision of the CJC contained in the notice of application bearing file number T-409-18; and

2. No costs are awarded.

"Simon Noël"

Judge

ANNEX "I"

***Constitution Act, 1867*, 30 & 31 Victoria, c 3 (U.K.)**	***Loi constitutionnelle de 1867*, 30 & 31 Victoria, ch 3 (R.U.)**
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 Brunswick.	**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 Nouveau-Brunswick.
[…]	[…]
General Court of Appeal, etc.	**Cour générale d'appel, etc.**
101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101.** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.
***Federal Courts Act*, RSC, 1985, c F-7**	***Loi sur les Cours fédérales*, LRC (1985), ch F-7**
[…]	[…]
Judicial review	**Contrôle judiciaire**
28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	**28 (1)** La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants:
(a) the Board of Arbitration established by the *Canada Agricultural Products Act*;	**a)** le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;
(b) the Review Tribunal established by the *Canada Agricultural Products Act*;	**b)** la commission de révision constituée par cette loi;
(b.1) the Conflict of Interest and Ethics	**b.1)** le commissaire aux conflits d'intérêts et à

Commissioner appointed under section 81 of the *Parliament of Canada Act*;

l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

(d) [Repealed, 2012, c. 19, s. 272]

d) [Abrogé, 2012, ch. 19, art. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

(f) the National Energy Board established by the *National Energy Board Act*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

i) la Commission des relations de travail et de l'emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral*;

(i.1) adjudicators as defined in subsection 2(1)

i.1) les arbitres de grief, au sens du paragraphe

of the *Federal Public Sector Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

[…]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

[…]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par *la Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

***Judges Act*, RSC, 1985, c J-1**

PART II

Canadian Judicial Council

Interpretation

Definition of Minister

Constitution of the Council

Council established

59 (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

(a) the Chief Justice of Canada, who shall be the chairman of the Council;

(b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;

(c) the senior judges, as defined in subsection 22(3), of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice; and

(d) the Chief Justice of the Court Martial Appeal Court of Canada.

[…]

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

***Loi sur les juges*, LRC (1985), ch J-1**

PARTIE II

Conseil canadien de la magistrature

Définition

Définition de ministre

Constitution et fonctionnement du Conseil

Constitution

59 (1) Est constitué le Conseil canadien de la magistrature, composé :

a) du juge en chef du Canada, qui en est le président;

b) des juges en chef, juges en chef associés et juges en chef adjoints des juridictions supérieures ou de leurs sections ou chambres;

c) des juges principaux — au sens du paragraphe 22(3) — des cours suprêmes du Yukon et des Territoires du Nord-Ouest et de la Cour de justice du Nunavut;

d) du juge en chef de la Cour d'appel de la cour martiale du Canada.

[…]

Choix d'un suppléant

(4) Chaque membre du Conseil peut nommer au Conseil un suppléant choisi parmi les juges du tribunal dont il fait partie; le suppléant fait partie du Conseil pendant la période pour laquelle il est nommé. Le juge en chef du Canada peut choisir son suppléant parmi les juges actuels ou anciens de la Cour suprême du Canada.

Objects of Council

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

Mission du Conseil

60 (1) Le Conseil a pour mission d'améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l'uniformité dans l'administration de la justice devant ces tribunaux.

Powers of Council

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

(a) establish conferences of chief justices and associate chief justices;

(b) establish seminars for the continuing education of judges;

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

(d) make the inquiries described in section 69.

[…]

Pouvoirs

(2) Dans le cadre de sa mission, le Conseil a le pouvoir :

a) d'organiser des conférences des juges en chef et juges en chef adjoints;

b) d'organiser des colloques en vue du perfectionnement des juges;

c) de procéder aux enquêtes visées à l'article 63;

d) de tenir les enquêtes visées à l'article 69.

[…]

Inquiries concerning Judges

Inquiries

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

Enquêtes sur les juges

Enquêtes obligatoires

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).

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

Constitution d'un comité d'enquête

(3) Le Conseil peut constituer un comité

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.

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

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) 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

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) 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.

Prohibition of information relating to inquiry, etc.

(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.

Protection des renseignements

(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.

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

Publicité de l'enquête

(6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à *huis clos*.

Notice of hearing

64 A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

Avis de l'audition

64 Le juge en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

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, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

[…]

[…]

Inquiries concerning Other Persons

Enquêtes sur les titulaires de poste

Further inquiries

Enquêtes

69 (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

69 (1) Sur demande du ministre, le Conseil enquête aussi sur les cas de révocation — pour les motifs énoncés au paragraphe 65(2) — des titulaires de poste nommés à titre inamovible aux termes d'une loi fédérale, à l'exception des :

(a) a judge of a superior court or a prothonotary of the Federal Court, or

a) juges des juridictions supérieures ou des protonotaires de la Cour fédérale;

(b) a person to whom section 48 of the *Parliament of Canada Act* applies,

b) personnes visées par l'article 48 de *la Loi sur le Parlement du Canada.*

should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Applicable provisions

Dispositions applicables

(2) Subsections 63(3) to (6), sections 64 and 65 and subsection 66(2) apply, with such modifications as the circumstances require, to inquiries under this section.

(2) Les paragraphes 63(3) à (6), les articles 64 et 65 et le paragraphe 66(2) s'appliquent, compte tenu des adaptations nécessaires, aux enquêtes prévues au présent article.

Removal from office

Révocation

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

(3) Au vu du rapport d'enquête prévu au paragraphe 65(1), le gouverneur en conseil peut, par décret, révoquer — s'il dispose déjà par ailleurs d'un tel pouvoir de révocation — le titulaire en cause sur recommandation du ministre, sauf si la révocation nécessite une adresse du Sénat ou de la Chambre des communes ou une adresse conjointe de ces deux chambres.

Report to Parliament

Rapport au Parlement

Orders and reports to be laid before Parliament

Dépôt des décrets

70 Any order of the Governor in Council made pursuant to subsection 69(3) and all reports

70 Les décrets de révocation pris en application du paragraphe 69(3), accompagnés

and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.

Removal by Parliament or Governor in Council

Powers, rights or duties not affected

71 Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge, a prothonotary of the Federal Court or any other person in relation to whom an inquiry may be conducted under any of those sections.

***Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203**

Establishment and Powers of a Judicial Conduct Review Panel

Establishment of Judicial Conduct Review Panel

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

Designation of members

(2) The senior member designates the

des rapports et éléments de preuve à l'appui, sont déposés devant le Parlement dans les quinze jours qui suivent leur prise ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs de l'une ou l'autre chambre.

Révocation par le Parlement ou le gouverneur en conseil

Maintien du pouvoir de révocation

71 Les articles 63 à 70 n'ont pas pour effet de porter atteinte aux attributions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière de révocation des juges, des protonotaires de la Cour fédérale ou des autres titulaires de poste susceptibles de faire l'objet des enquêtes qui y sont prévues.

***Règlement administratif du Conseil canadien de la magistrature sur les enquêtes (2015)*, DORS/2015-203**

Constitution et pouvoirs du comité d'examen de la conduite judiciaire

Constitution du comité d'examen de la conduite judiciaire

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 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.

Nomination des membres

(2) Le doyen nomme les membres du comité

members of the Judicial Conduct Review Panel.

Composition of Judicial Conduct Review Panel

(3) The Judicial Conduct Review Panel is to be composed of five persons of which three are members of the Council, one is a puisne judge and one is a person who is neither a judge nor a member of the bar of a province.

Serious matter

(4) The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.

Matter sent back to Chairperson or Vice-Chairperson

(5) If the Judicial Conduct Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Chairperson or Vice-Chairperson of the Judicial Conduct Committee for them to make a decision on the most appropriate way to resolve it.

Complainant informed

(6) If the Judicial Conduct Review Panel decides that an Inquiry Committee is to be constituted, the Council's Executive Director must inform the complainant, if any, by letter.

Decision, reasons and statement of issues

(7) The Judicial Conduct Review Panel must prepare written reasons and a statement of issues to be considered by the Inquiry Committee. The Council's Executive Director must send a copy of the Judicial Conduct Review Panel's decision, reasons and statement of issues to

d'examen de la conduite judiciaire.

Composition du comité

(3) Le comité d'examen de la conduite judiciaire est composé de cinq personnes, soit trois membres du Conseil, un juge puîné et une personne qui n'est ni juge ni membre du barreau d'une province.

Affaire suffisamment grave

(4) Le comité d'examen de la conduite judiciaire ne peut décider de constituer un comité d'enquête que s'il conclut que l'affaire pourrait s'avérer suffisamment grave pour justifier la révocation du juge.

Affaire renvoyée au président ou au vice-président

(5) S'il décide qu'un comité d'enquête ne doit pas être constitué, le comité d'examen de la conduite judiciaire renvoie l'affaire au président ou au vice-président du comité sur la conduite des juges pour que ce dernier décide de la manière la plus appropriée de la régler.

Plaignant informé

(6) Si le comité d'examen sur la conduite judiciaire décide qu'un comité d'enquête doit être constitué, le directeur exécutif du Conseil en informe le plaignant par lettre.

Décision, motifs et énoncé des questions

(7) Le comité d'examen de la conduite judiciaire rédige alors ses motifs et les questions devant être examinées par le comité d'enquête. Le directeur exécutif du Conseil envoie une copie de la décision, des motifs et de l'énoncé des questions aux destinataires suivants :

(a) the judge and their Chief Justice;

(b) the Minister; and

(c) the Inquiry Committee, once it is constituted.

a) le juge et son juge en chef;

b) le ministre;

c) le comité d'enquête, une fois constitué.

Notice inviting Minister to designate members

(8) The Council's Executive Director must also send a notice to the Minister inviting that Minister to designate members of the bar of a province to the Inquiry Committee in accordance with subsection 63(3) of the Act.

Avis au ministre — adjonction de membres

(8) Le directeur exécutif du Conseil envoie aussi au ministre un avis l'invitant à adjoindre des membres du barreau d'une province au comité d'enquête aux termes du paragraphe 63(3) de la Loi.

Designating Members to Inquiry Committee

Nomination des membres du comité d'enquête

Designation of members

3 (1) An Inquiry Committee constituted in accordance with subsection 63(3) of the Act is composed of an uneven number of members designated by the senior member, the majority of whom are from the Council.

Composition

3 (1) Le comité d'enquête constitué en vertu du paragraphe 63(3) de la Loi se compose d'un nombre impair de membres nommés par le doyen, dont la majorité proviennent du Conseil.

Additional members

(2) If the Minister does not designate any members within 60 days after the day on which the notice is received under paragraph 2(8), the senior member may designate additional Council members to the Inquiry Committee to complete its composition.

Membres additionnels

(2) Si le ministre n'adjoint aucun membre au comité d'enquête dans les soixante jours suivant la réception de l'avis visé au paragraphe 2(8), le doyen peut nommer d'autres membres du Conseil au comité d'enquête pour en compléter la composition.

Senior member chooses chair

(3) The senior member also designates one of the members of the Inquiry Committee to chair the Committee.

Président désigné par le doyen

(3) Le doyen désigne un président parmi les membres du comité d'enquête.

Persons not eligible to be members

(4) The following persons are not eligible to be members of the Inquiry Committee:

Admissibilité

(4) Ne peuvent être membres du comité d'enquête :

(a) the Chairperson or Vice-Chairperson of the

a) le président ou le vice-président du comité

Judicial Conduct Committee who referred the matter to the Judicial Conduct Review Panel;

(b) a member of the same court as that of the judge who is the subject of the inquiry or investigation; and

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

sur la conduite des juges qui a déféré l'affaire au comité d'examen de la conduite judiciaire;

b) les juges de la même juridiction que le juge en cause;

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.

Legal Counsel and Advisors

Persons to advise and assist

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

Avocats et conseillers

Conseils et assistance

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.

Inquiry Committee Proceedings

Complaint or allegation

5 (1) The Inquiry Committee may consider any complaint or allegation pertaining to the judge that is brought to its attention. In so doing, it must take into account the Judicial Conduct Review Panel's written reasons and statement of issues.

Sufficient notice to respond

(2) The Inquiry Committee must inform the judge of all complaints or allegations pertaining to the judge and must give them sufficient time to respond fully to them.

Comments from judge

(3) The Inquiry Committee may set a time limit to receive comments from the judge that is reasonable in the circumstances, it must notify the judge of that time limit, and, if any comments are received within that time limit, it must consider them.

Procédure du comité d'enquête

Plainte ou accusation

5 (1) Le comité d'enquête peut examiner toute plainte ou accusation formulée contre le juge qui est portée à son attention. Il tient alors compte des motifs écrits et de l'énoncé des questions du comité d'examen de la conduite judiciaire.

Délai suffisant pour répondre

(2) Le comité d'enquête informe le juge des plaintes ou accusations formulées contre lui et lui accorde un délai suffisant pour lui permettre de formuler une réponse complète.

Observations du juge

(3) Le comité d'enquête peut fixer un délai raisonnable, selon les circonstances, pour la réception des observations du juge. Il en informe le juge et examine toute observation reçue dans ce délai.

Public or private hearing

6 (1) Subject to subsection 63(6) of the Act, hearings of the Inquiry Committee must be conducted in public unless, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

Audience publique ou à *huis clos*

6 (1) Sous réserve du paragraphe 63(6) de la Loi, le comité d'enquête délibère en public, sauf s'il décide que l'intérêt public et la bonne administration de la justice exigent le huis clos total ou partiel.

Prohibition of publication if not in public interest

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest and may take any measures that it considers necessary to protect the identity of persons, including persons who have received assurances of confidentiality as part of the consideration of a complaint or allegation made in respect of the judge.

Interdiction de publication dans l'intérêt public

(2) Le comité d'enquête peut interdire la publication de tout renseignement ou document qui lui est présenté s'il décide qu'elle ne sert pas l'intérêt public et peut prendre toute mesure qu'il juge nécessaire pour protéger l'identité des personnes, y compris celles à qui une garantie de confidentialité a été accordée dans le cadre de l'examen de la plainte ou de l'accusation visant le juge.

Principle of fairness

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

Principe de l'équité

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

Inquiry Committee Report

Report of findings and conclusions

Rapport du comité d'enquête

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

(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

Rapport remis au juge et avis au plaignant

(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

report.

Hearing conducted in public

(3) If the hearing was conducted in public, the report must be made available to the public and a copy provided to the complainant, if any.

Judge's Response to Inquiry Committee Report

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.

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.

Deliberations of Council Concerning Removal of Judges from office

Senior member chairs meetings

10 (1) The senior member who is available to participate in deliberations concerning the removal from office of a judge is to chair any meetings of Council related to those deliberations.

Quorum

(2) A quorum of 17 members of the Council is required when it meets to deliberate the removal from office of a judge.

Quorum — death, incapacity, resignation or retirement

(3) In the event of the death, incapacity, resignation or retirement of a member during the deliberations, the remaining members

a établi son rapport.

Audience publique

(3) Le rapport de toute audience publique est mis à la disposition du public et une copie en est remise au plaignant.

Réponse du juge au rapport du comité d'enquête

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.

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.

Délibérations du conseil concernant la révocation des juges

Le doyen préside les réunions

10 (1) Le doyen des membres disponibles pour participer aux délibérations concernant la révocation d'un juge préside les réunions du Conseil qui y sont consacrées.

Quorum

(2) Le quorum pour toute réunion délibératoire du Conseil concernant la révocation d'un juge est de dix-sept membres.

Quorum — Décès, incapacité, démission ou retraite

(3) En cas de décès, d'incapacité, de démission ou de retraite d'un membre pendant les délibérations, le quorum est formé par le reste

constitute a quorum.

Vote in event of tie

(4) During the deliberations of the Council concerning the removal from office of a judge, the member chairing the meeting may vote in respect of a report of the Council's conclusions on the matter only in the event of a tie.

Deliberations

(5) Deliberations of the Council concerning the removal from office of a judge may also be held by audio-conference or by video conference.

Consideration of Inquiry Committee Report by Council

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.

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.

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 Committee with directions.

des membres.

Vote en cas d'égalité des voix

(4) Lors des réunions délibératoires du Conseil concernant la révocation d'un juge, le président de la réunion ne peut participer au vote sur le rapport énonçant les conclusions du Conseil à l'égard de l'affaire qu'en cas d'égalité des voix.

Réunions délibératoires

(5) Les réunions délibératoires du Conseil concernant la révocation d'un juge peuvent également être tenues par audioconférence ou vidéoconférence.

Examen du rapport du comité d'enquête par le conseil

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.

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.

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 communiquant des directives.

Council Report

Report of conclusions to Minister

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.

Rapport du conseil

Rapport des conclusions du Conseil

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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-733-15, T-2110-15, T-423-17 AND T-409-18
STYLE OF CAUSE:	THE HONOURABLE MICHEL GIROUARD v THE ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 27, 2018
ORDER AND REASONS:	SIMON NOËL J.
DATED:	AUGUST 29, 2018

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