Federal Court  Cour fédérale

Date: 20190409

Docket: T-409-18

Citation: 2019 FC 434

[REVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 9, 2019

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

THE HONOURABLE MICHEL GIROUARD

Applicant (Respondent)

and

THE ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

THE ATTORNEY GENERAL OF QUEBEC

Third Party

and

THE CANADIAN JUDICIAL COUNCIL

Moving Party

ORDER AND REASONS

(Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106)

[1] Pursuant to rule 109 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), the Canadian Judicial Council ("CJC") seeks leave to intervene in the amended application for judicial review filed by the Honourable Michel Girouard (Justice Girouard). In this application, Justice Girouard asks this Court to set aside a report to the Minister of Justice dated February 20, 2018, recommending his removal from office, and other decisions taken in the course of the CJC's inquiry, as well as the decision of the Ministers of Justice of Canada and Quebec to file a complaint against him. An application for constitutional invalidity also accompanies the application. The CJC furthermore requests that said motion be decided on the basis of written representations submitted by the parties under rule 369(1) of the Rules.

[2] The CJC seeks leave to intervene so that it can submit [TRANSLATION] "comments" and [TRANSLATION] "explanations" on the following topics:

1. The mission and functioning of the CJC;

2. The standards of review applicable to the CJC;

3. The procedure followed for inquiries conducted under section 63 of the *Judges Act*, RSC 1985, c J-1 ("*Judges Act*");

4. The terms relevant to the exercise of the CJC's power of recommendation under section 65 of the *Judges Act*;

5. The nature and composition of items in the record on which the CJC relied in recommending the removal of Justice Girouard;

6. The process that was followed by the CJC in producing its recommendations, which it wishes to explain to the Court.

[3] To this end, the CJC plans to file an affidavit by its Executive Director and Senior General Counsel ("Mr. Sabourin"), written submissions of no more than twenty (20) pages, and oral submissions for a period of sixty (60) minutes. Mr. Sabourin's affidavit (for which no page limit was provided) would contain, among other things, [TRANSLATION] "evidence" on the following topics:

1. The processing of requests for inquiries made by the attorneys general;

2. The nature and composition of the record on which the CJC bases its recommendations to the Minister of Justice;

3. The practices relating to the translation of the elements contained in that record;

4. The principle of compartmentalization in general and, in particular, the composition of the Review Panel, the Inquiry Committee and the CJC in the case concerning the applicant;

5. The division of roles between the Inquiry Committee and the CJC;

6. The review process of the CJC: (a) the report by the Inquiry Committee and (b) the written submissions of the judge under investigation;

7. The means put in place to ensure the compliance of the inquiry and recommendation process with judicial independence, in both its personal and institutional dimensions;

8. The application of its *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*.

[4] The CJC states that it does not intend to make submissions on the reasonableness or correctness of its decisions or recommendations. With regard to the constitutional issues, the CJC states that it would limit its submissions to the impact of declarations of unconstitutionality on judicial independence and the administration of justice.

[5] Through his counsel, Justice Girouard unequivocally objects to the motion to intervene and has filed a substantive record with supporting authorities. He submits that the motion as presented does not meet the criteria set out in the case law on this subject and that it is a disguised attempt by the CJC to present new evidence to compensate for deficiencies in decisions it has made that are the subject of judicial review. Justice Girouard submits that the Court, with the participation of the parties, will be able to make an informed decision in the context of the judicial review. He states that the intervention sought, if granted, will seriously call into question the required impartiality, since in addition to the Attorney General of Canada as respondent, the CJC will become a *de facto* respondent. He adds that if the motion to intervene is granted, this will unduly prolong the dispute. Accordingly, he asks that the motion be denied.

[6] The CJC's response refutes the arguments put forward by Justice Girouard and states that the CJC is asking to intervene and not to be a party to the dispute. It adds that it has the necessary expertise to properly inform the Court and that it does not intend to submit new evidence on the merits of the case.

[7] As for the Attorney General of Canada, consent is given by letter for the CJC to intervene, provided that the submissions and affidavit are filed by April 12, 2019, so as not to delay the proper advancement of the file, as well as the hearing scheduled for late May 2019. The third party, the Attorney General of Quebec, is of the same opinion.

I. Applicable law

Rule 109 of the *Federal Courts Rules*, SOR/98-106	**Règle 109 des *Règles des Cours fédérales*, DORS/98-106**
Intervention	**Interventions**
Leave to intervene	**Autorisation d'intervenir**
109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
Contents of notice of motion	**Avis de requête**
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.
Directions	**Directives de la Cour**
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other	**b)** le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits

matters relating to the procedure to be followed by the intervener.	d'appel et toute autre question relative à la procédure à suivre.

[8] Rule 109, which governs the intervention procedure, requires the party who requests it to explain how it intends to participate in the proceeding and how its participation will assist the determination of a factual or legal issue. This is done through an affidavit and submissions.

[9] The CJC relies on various judgments to validate its motion, but in particular *Rothmans, Benson and Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74, [1990] 1 FC 90, [1989] FCA No 707 [*Rothmans, Benson and Hedges*], which lists six (6) factors to consider:

1. Is the proposed intervener directly affected by the outcome?

2. Does there exist a justiciable issue and a veritable public interest?

3. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

4. Is the position of the proposed intervener adequately defended by one of the parties to the case?

5. Are the interests of justice better served by the intervention of the proposed third party?

6. Can the Court hear and decide the cause on its merits without the proposed intervener?

[10] The Federal Court of Appeal, in *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 [*Sport Maska*], validated the *Rothmans, Benson and Hedges* factors, stating that they are not exhaustive and that they are subject to the discretion of the judge, who may ascribe the weight he

or she wishes to any individual factor (see paragraph 41). In addition, Justice Nadon wrote the following on behalf of the Court:

> **[42]** The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. *"*[a]re the interests of justice better served by the intervention of the proposed third party?*"* is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. . . . (See *Sport Maska Inc.* at para 42, emphasis added)

[11] As the case manager, I am well acquainted with "the particular facts and circumstances of the case".

[12] First, there is an important distinction between the facts of *Rothmans, Benson and Hedges* and *Sport Maska Inc* on the one hand and those of this case on the other. In the cases cited, the organizations seeking to intervene (the Canadian Cancer Society and Reebok-CJC Hockey, respectively) each had a particular interest in the dispute that concerned them. This is not the case for the CJC, which is the author/decision-maker of the report and other decisions, and which recommended the removal from office of Justice Girouard, those decisions being the subject of the application for judicial review. Second, the amended application for judicial review includes many of the topics in respect of which the CJC wishes to intervene (see paragraphs 2-3 above). There is a dispute on the topics, and the CJC requests to submit

evidence and make written submissions and oral arguments in respect of several of them. These particular circumstances and facts are specific to the application for judicial review of this case. The Court will comment further on this in the context of the analysis.

[13] The Court must also consider and apply the teachings of the Supreme Court in *Ontario (Energy Board) v Ontario Power Generation Inc*, [2015] 3 SCR 147 [*Ontario (Energy Board)*]. In fact, the Supreme Court recognizes that the trial judge has the discretion to determine the correctness of a motion to intervene when a decision-maker is the applicant. In such a case, the judge must exercise this discretion with "principled exercise" while striving to "balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality" (see paragraph 57).

[14] There is no provision in the *Judges Act* that allows the CJC to participate in an appeal from its decisions. Therefore, the CJC requests this through a motion to intervene under rule 109 of the Rules, subject to a discretionary decision of the Court. According to *Ontario (Energy Board)*, in such a situation, the Court must consider three (3) factors:

1. Will the application for judicial review be opposed in the proceedings?

2. Or, do any of the other parties have the necessary knowledge and expertise to fully make and respond to arguments?

3. Is the CJC's role to adjudicate individual conflicts between two adversarial parties, or is it to serve a policy-making, regulatory or investigative role, or act on behalf of the public interest? (See paragraph 59.)

[15] These factors must be assessed by the Court while also referring to the factors laid down in *Rothman, Benson and Hedges*.

[16] In order to properly assess the particular facts and circumstances of the present case in light of the factors to take into consideration according to case law, the Court must use the motion for leave to intervene, the affidavit and the submissions. The record must reveal not only the objectives of the intervention, but also the content to be filed, in whole or at least in part, so that the judge can understand and circonscribe the content of the intervention, its scope and its limits.

[17] Case law has dealt with what is normally required in a motion for leave to intervene so that the judge receives a complete record containing the relevant elements for decision making. A moving party must demonstrate "what it would bring to the debate over and beyond what was already available to the Court through the parties" (*Canada (Attorney General) v Canada (Professional Institute of the Public Service)*, 2010 FCA 217 at para 4). An affidavit to be filed must not supplement, "especially after a judicial review challenging his decision had been brought, . . . the bases for decision set out in the decision letter"; and the applicant must not, through his affidavit, try to make an "after-the-fact attempt to bootstrap his decision, something that is not permitted" (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41).

[18] In *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151 [*Ishaq*] at paragraph 28, Justice Stratas listed the factors to consider when preparing a motion for leave to intervene:

> **[28]** To summarize, an applicant for intervention trying to establish that it will advance different and valuable insights and perspectives that will actually further the Court's determination of the matter ideally should:
>
> 1. identify one or more specific controlling idea(s) on which the case will turn;
>
> 2. offer, with specificity, the submission(s) it will make on the controlling idea(s), showing why it will advance the Court's appreciation of the controlling idea(s);
>
> 3. ensure that its submission(s) will not need to go beyond the evidentiary record; merely saying so is not good enough;
>
> 4. distinguish its submission(s) from those of others already before the Court, e.g., on the ground that the submission(s) have not been made, or that its perspectives, experience or expertise—specifically identified—will cast a different light on the matter.
>
> (Emphasis added.)

The Court intends to keep these statements in mind when making its decision.

[19] At this point, it is helpful to provide an overview of the major issues concerning the judicial review. The seventy-three (73) paragraphs of the CJC's report submitted to the Minister, which was signed by 23 chief justices, concludes as follows:

> **[73]** Having considered the Committee's Report and the Judge's submissions, as well as all information we deemed relevant to the issues (including the soundless video recording of 17 September 2010), we find that the Judge has been guilty of misconduct. The Judge's integrity has been fatally compromised, public confidence in the judiciary has been undermined and the Judge has become incapacitated or disabled from the due execution of his office of judge. For that reason, we recommend that the Judge be removed from office.

[20] However, three (3) chief justices dissented and concluded as follows in the eighth (8th) paragraph of their dissent:

> We dissent from the views of the majority and can not recommend the removal of Justice Girouard from office. This is as a result of the denial of his right to a fair hearing; a denial founded on Council's failure to ensure that all participants in the decision-making process could understand and consider the complete record. In the absence of a fair hearing the majority opinion should not stand and these proceedings should be discontinued.

[21] On this subject, the majority stated the following:

> **[69]** The dissenting members express the view that the Judge "was entitled to the informed views of all the members of Council tasked with deliberating on his future."
>
> **[70]** We agree with that statement but draw a different conclusion than that of the dissenting members. We are of the view that the Judge did in fact benefit from the informed, independent and thoughtful views of all members who deliberated in this matter and recommend that he be removed from office.
>
> **[71]** The dissenting members also express the view that "all members were entitled to consider the same information." In our respectful view, all members had available in both official languages the same relevant aspects of the proceedings before the Committee: either through the detailed summaries of the evidence contained in the Report and the Judge's written representations or through the excerpts from the transcript quoted in the Judge's submissions.
>
> **[72]** As the members who recommend the removal of the Judge, we are satisfied that we had access to all materials necessary to permit us to deliberate in this matter in a fully informed, independent and thoughtful manner.

[22] The amended application for judicial review raises a number of questions of law and of fact that go to the heart of the conclusions of both the majority and the dissenting judges,

including the constitutional issues regarding the statutory disciplinary process, and the jurisdiction of the CJC in this regard.

[23] As stated above, the CJC's report is in fact the result of an inquiry into the conduct of a judge following a request for an inquiry by the Ministers of Justice of Canada and Quebec. The CJC found that the judge's behaviour was reprehensible and justified a recommendation to remove him from office. It thus took a position against the interests of the judge. Consequently, the CJC must not, through the motion to intervene, be seen as justifying its decision or attempting to supplement it by means of new evidence or justifying submissions. To do so would not be in the public interest and would taint the entire disciplinary process established by Parliament in the *Judges Act*.

[24] In addition, it should be noted that the application for judicial review in the CJC's report also involves the Attorney General of Canada as respondent, whose mission is, among other things, to ensure that the Court will be presented with all the facts and law needed to make an informed decision. In this case, the Attorney General of Quebec is also involved as third party.

II. Analysis

[25] For the purposes of the analysis, I intend to address the issues as follows: first, it is important to have an overview of the amended application for judicial review. Second, since as part of the assessment of a motion for leave to intervene, a judge must have a good understanding of what is submitted to him or her in order to make the appropriate decisions, I will study and analyze the affidavit of Mr. Sabourin in support of the motion. After all, it is on

the basis of this evidence that I must make a decision. Once this is done, I will address the three (3) criteria developed by the Supreme Court in *Ontario (Energy Board)* to determine whether the intervention as requested meets those criteria. I will end the analysis by doing the same, but this time using the criteria from *Rothmans, Benson and Hedges*, for the purposes of rule 109 of the Rules, the objective being to make a determination as to the merits of the CJC's motion for leave to intervene. But before all that, I would like to comment on the moving party, the CJC.

[26] I acknowledge at the outset that the CJC is a special body with a special purpose, and that it is a group composed of chief justices and associate chief justices and is chaired by the Chief Justice of Canada. This in itself gives the CJC a distinctive and notable status. The CJC, both collectively and through each of its members, has unique experience. When investigating the conduct of judges in response to a complaint, it has the confidence of those who are under investigation and the public. It also has an extraordinary knowledge and understanding of such matters. It certainly has a lot to communicate, but it is important that in doing so, it does not tarnish its impartiality, so essential to its statutory mission. That said, for the judge to accept its motion for leave to intervene, the CJC must demonstrate (1) what pertinent information it would have to communicate and (2) what benefit the Court would derive from this knowledge to make an informed decision. Merely saying so is not enough.

A. ***Application for judicial review***

[27] The amended application for judicial review is in itself unusual. It calls into question the report of the CJC, the decisions of the Inquiry Committee and the decision of the Ministers of

Justice of Canada and Quebec dated June 14, 2016, requesting an inquiry into the conduct of Justice Girouard. In addition, there are several constitutional issues with respect to the inquiry process concerning judges established under the *Judges Act*, procedural fairness, and the language rights of the applicant. Finally, federal jurisdiction in this area is called into question, considering the provincial jurisdiction under subsection 92(14) of the *Constitution Act, 1867*.

[28] This case has history. It has been in progress since 2015 and has been the subject of several interlocutory decisions; it has also required the parties' collaboration at all times. The fall of 2018 was devoted to preparing the CJC's record, and it fully participated in that. The record was eventually perfected, subject to an appeal filed by Justice Girouard which relates to one of the decisions. With respect to the amended application for judicial review, it was agreed to by the Attorney General of Canada on January 11, 2019, and was filed in the record on January 25, 2019. It was on February 12, 2019, by order, that the schedule was finalized with the consent of all parties. Justice Girouard then filed his application on March 8, 2019.

B. ***CJC's motion***

[29] On March 18, 2019, the CJC asked to intervene, although the issues of the amended application for judicial review had been known since January 2019. Given the objectives and scope of the intervention requested by the CJC and the hearing scheduled for late May 2019, it would have been very helpful for the Court had the motion for intervention been filed earlier. In addition, taking into account what is sought by intervening, it is feared that the schedule will be disrupted. Allow me to explain.

[30] The affidavit of Mr. Sabourin in support of the motion for leave to intervene is indicative of what the affidavit to be filed would be if leave were granted.

[31] Mr. Sabourin states that the CJC must be able to [TRANSLATION] "explain" to the Court [TRANSLATION] "the process that was followed by the CJC in arriving at its recommendations" and [TRANSLATION] "submit comments and explanations" to the Court on the topics listed in paragraph 2 of these reasons.

[32] All of those topics relate to the amended application for judicial review and are all part of one or another of the issues raised. As stated in point 5, the CJC intends to submit comments and explanations on the nature and composition of Justice Girouard's record, even though the preparation of this record was the concern of the parties in the fall of 2018.

[33] In addition, the CJC proposes to [TRANSLATION] "file evidence" with respect to eight (8) topics such as requests for investigation from the attorneys general, Justice Girouard's record which led to the recommendation to dismiss given to the Minister of Justice, the translation practices for Justice Girouard's record, the inquiry process, the CJC review process, etc. (see paragraph 5 of these reasons for the complete list).

[34] If leave is granted, Mr. Sabourin proposes that the affidavit contain explanations and comments as well as new evidence on the vast majority of topics arising from the amended application for judicial review. Furthermore, the affidavit in support of the application for leave to intervene gives no example, insight, or statement as to what the explanations, comments and new evidence for all those topics would be. This information was however required for the Court

to better understand and assess this application for leave. Such examples would have been useful because the Court has no indication as to the content of the explanations and comments to be submitted in evidence and no knowledge of the content of the new evidence to be filed. In the present situation, all that the Court knows is the objectives of and grounds for the motion for intervention. Nothing has been provided as to the content. It appears that the factors laid down by Justice Stratas in *Ishaq* at paragraph 25, in particular factors 2 and 3, have not been met. However, for three (3) specific topics, the affidavit explains the reason for the intervention with respect to them. The Court considers these three (3) topics to be exceptional, and they will be treated differently at the end.

[35] For a better understanding of the matter, I have inserted below a table that illustrates the multitude of topics involved in the intervention, the means of intervening, and whether the information has been disclosed or not as regards the content of the proposed intervention.

Table 1

AFFIDAVIT	**MEANS**	**INTERVENTION TOPICS**	**CONTENT: DETAILS, EXAMPLES, ETC.**
Para 17	Submit explanations on:	1. The inquiry process followed to arrive at the recommendation.*	None
Para 18	Submit comments and explanations on the following topics:	2. The mission and functioning of the CJC.**	Explanations in paragraphs 7, 8 and 9
		3. The standard of review applicable to the CJC.	None
		4. The inquiry process under section 63 of the *Judges*	Explanations in paragraphs 11, 12,

AFFIDAVIT	**MEANS**	**INTERVENTION TOPICS**	**CONTENT: DETAILS, EXAMPLES, ETC.**
		Act.**	13 and 14
		5. The relevant means of exercising its power of recommendation under section 65 of the *Judges Act*.**	None
		6. The nature and composition of Justice Girouard's record.* (see also 7)	None
Para 19	Intends to file evidence on:	7. The nature and composition of Justice Girouard's record.* (see also 6)	None
		8. Practices relating to the translation of Justice Girouard's record.* (see also 6)	None
		9. The principle of compartmentalization in general and, in particular, the composition of the Review Panel, the Inquiry Committee and the CJC in the case of Justice Girouard*(see also 4)	None
		10. The division of roles between the Inquiry Committee and the CJC.** (see also 4)	None
		11. The process by which the Council reviewed the report of the Inquiry Committee and the written submissions of the judge.*	None

AFFIDAVIT	MEANS	INTERVENTION TOPICS	CONTENT: DETAILS, EXAMPLES, ETC.
		(see also 4 and 6)	
		12. The means put in place to ensure the compliance of the inquiry and recommendation process with judicial independence, both in general and in the case of Justice Girouard* (see also 6)	None
		13. The processing of inquiries requested by the attorneys general.**	None
		14. The application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees.***	Explanations in paragraphs 11, 12, 13 and 14

* 7 Topics of intervention in Justice Girouard's application for judicial review that are personal in nature.

** 7 Topics of intervention in Justice Girouard's application for judicial review that are general in nature.

[36] At the very end, the affidavit informs us that the CJC will work with the Attorney General of Canada to ensure that there is no duplication of their respective submissions. Although this commitment appears legitimate, it concerns me. What will they share and why? Is there a danger of duplication, that is, could the CJC assume a role that would normally fall to the Attorney General of Canada? Why is the Court not involved in such an undertaking? Given the current state of affairs, I have no idea what they want to share or what subjects could be

duplicated. As Justice Stratas wrote in describing the third factor, “merely saying so is not good enough” (*Ishaq* at para 28, points 3 and 4).

[37] Before closing on this subject, I must note that Mr. Sabourin, on behalf of the CJC, specifies that he does not intend to make submissions on the reasonableness or correctness of the decisions or recommendations. With regard to constitutional questions, he states that the CJC would limit its submissions to the impact of declarations of unconstitutionality on judicial independence and the administration of justice. This statement is important for the purposes of the judicial review application, but it must also be placed in the context of the entire affidavit as written. I note that this commitment is limited to submissions and that nothing is said about the evidence to be filed or the impact it may have on the dispute itself. Again, merely saying so does not help the Court. He needs to build on his record to give the Court a better idea of the content of the intervention.

[38] Taking into account the motion for leave to intervene, other comments are necessary:

1. The impression that arises from reading the motion record is that the CJC intends to intervene to explain, make representations and/or present evidence with respect to the overwhelming majority of the issues in the application for judicial review. Although it is stated that the CJC will not comment on or defend its decision, the extent of its involvement as an intervener as described suggests a strong possibility that the explanations, the comments and the filing of evidence will have a direct or indirect impact on the decisions under consideration in the application for judicial review;

2. The motion record as presented is limited to giving the reasons for the intervention and the topics to be covered by it, without giving any specific and informative indication of what those explanations, comments and new evidence will be. This does not satisfy me that the motion to intervene is justified, except with regard to three (3) subjects which will be discussed later. I would add that the CJC could have at least provided examples of those explanations, comments and evidence, which it did not do. A judge placed in such circumstances can hardly grant a motion for intervention without at least knowing in broad terms what will constitute the content of the intervention. In short, the judge cannot act blindly;

3. If the Court granted the intervention as presented, it would be possible for an objective person seeing such a result to think that the CJC is necessarily defending its report and its decisions and that the impartiality required in such circumstances would therefore be undermined;

4. In the context of an application for judicial review, when making the appropriate determinations, it is customary and traditional to take into account the decision as written and the decision-maker's record. By its motion for leave to intervene, as formulated, the CJC could find itself in a privileged position where its role would rather be that of a party than an intervener, which in our judicial system is unacceptable;

5. Moreover, all these new elements could prejudice the application for judicial review and the rights of Justice Girouard, since the CJC would disclose facts, explanations and comments previously unknown to Justice Girouard and he would not be totally in a

position to challenge these new elements, except through a reply; as such, he could not fully defend himself. A reply, as we know, has its limits;

6. Finally, if the Court granted the intervention as formulated, the explanations, comments and evidence presented could jeopardize the schedule set out in the order of February 12, 2019, as well as the hearing to be held at the end of May 2019.

C. *The three (3) criteria of Ontario (Energy Board)*

[39] At this point, I will apply the criteria set out in *Ontario (Energy Board)*, taking into account the particularities of the CJC and its motion for leave to intervene.

(1) **Will the application for judicial review be opposed in the proceedings?**

[40] A simple answer is yes. As recognized in judicial review applications, the Attorney General of Canada intervenes as a respondent. This case is no exception, and the Attorney General of Canada has been acting as respondent since 2015. It has participated in all the stages. As for the CJC, the Court has granted it party status only when the Court had to decide the question of the jurisdiction of federal courts raised by the CJC and the content of its record. There is no legislative provision in the *Judges Act* enabling the CJC to participate in the dispute. That is why it is filing its motion for leave to intervene under rule 109 of the Rules.

(2) **Do any of the parties have the necessary knowledge and expertise to fully make and respond to arguments?**

[41] The Attorney General of Canada has the knowledge, skills and assets to respond to the amended application for judicial review. Indeed, he consented to the amended application, and at no time did he inform the Court that he did not have the competence or knowledge to assume his responsibilities. He consented to the motion for leave to intervene by letter, as long as the schedule is respected. I have already recognized that the CJC is a special institution and has its own knowledge. However, the issues in the application for judicial review require that they be determined in accordance with the applicable legislation and with the CJC's by-laws and handbook. The parties and the Court can deal with these issues in full knowledge of the facts. As formulated, the motion for leave to intervene does not change that fact.

(3) **Is the CJC's function to adjudicate individual conflicts between two adversarial parties, or is it to serve a policy-making, regulatory or investigative role, or act on behalf of the public interest?**

[42] The role of the CJC can be summarized as follows for the purposes of this case: through the Inquiry Committee composed of certain members of the CJC, it conducts investigations in response to a complaint about a judge's conduct. It acts as an investigator, and subsequently the CJC as a whole studies the inquiry report and the evidence and then collectively decides whether to recommend that the judge be removed from office. It assumes a jurisdictional task during the inquiry process. It is its report and its decisions that are the subject of judicial review. Its participation upon judicial review must be circumscribed so as not to undermine its impartiality. As formulated, the motion for leave to intervene, if granted, could even give the impression that the CJC is acting as a party to the dispute, which is not in the interests of justice.

[43] In *Ontario (Energy Board)*, the Supreme Court wanted the judge to be satisfied with two (2) aspects. It must first ensure that the Court tasked with deciding the dispute is fully able to make an informed decision and, secondly, that the administrative tribunal/decision-maker is completely impartial. I have no information or indication that the Attorney General of Canada does not have the knowledge and jurisdiction to deal with all the issues raised by the application for judicial review. On the contrary, so far, the Attorney General of Canada has fully assumed his role of respondent. As for the impartiality of the CJC, its role as investigator and decision-maker with regard to the report and the decisions taken requires that its impartiality be preserved. The intervention sought raises a serious probability that the role to be assumed would taint this valiant impartiality.

D. ***The six (6) factors of Rothman, Benson and Hedges***

[44] I will now review the assessment factors developed in *Rothman, Benson and Hedges* to determine the motion for leave to intervene as formulated and filed under rule 109 of the Rules, taking into account the circumstances and facts of this case. Some of these answers will repeat in part the ones given to the criteria above and even when providing answers to the factors given below.

(1) **Is the proposed intervener directly affected by the outcome?**

[45] Given that the application for judicial review concerns the CJC's report and its decisions, it goes without saying that the CJC may be directly affected by the outcome of the dispute, as the applicant raises several issues which, if they are validated, will have consequences for the CJC.

(2) **Does there exist a justiciable issue and a veritable public interest?**

[46] The issues are all within the jurisdiction of the Court. It has full jurisdiction to determine the constitutionality and fairness of the inquiry process and the procedures and practices established under the *Judges Act* and its regulations. The Court also has the necessary tools to deal with these matters, and it will also have the benefit of the submissions of the respondent Attorney General of Canada and the third party. I would add that the specific role of the CJC in investigating the conduct of judges does not make it an exceptional body to the point that on this aspect alone the motion for intervention should be granted according to the desired parameters. There are several bodies that have a specialized vocation and are subject to the Court's supervision, and their interventions are not granted as of right. The question of the translation of the evidence (the subject of dissent) is not a new one for the Court. The principles and laws in this area are a matter of judicial notice. Moreover, both the majority and dissent address this issue in the CJC report. As for the constitutional questions, the Court is familiar with such questions and is called upon to make appropriate determinations in many cases. There is a public interest to preserve: that of ensuring that the dispute will be judicially determined, with full objectivity. Consequently, it would be inappropriate for a decision-maker to play such an important role as the one sought by the motion for leave to intervene.

(3) **Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?**

[47] The CJC, as a decision-maker subject to an application for judicial review, wrote a report concluding by a majority that Justice Girouard should be removed from office. It explained in its decision the reasons for its conclusion. Reasons are also given for the decisions of the Inquiry

Committee, and those decisions are subject to an application for judicial review. In its motion to be allowed to intervene as formulated, the CJC submits that it intends to explain and submit comments and evidence, in addition to the report and the decisions already rendered, as well as its position with respect to the dissent. In principle, in the context of an application for judicial review, it is not permitted to add to the decision under review, except with leave of the Court in certain circumstances. In addition, the Attorney General of Canada will act as respondent and will make appropriate representations. The dispute can therefore be validly submitted.

(4) **Is the position of the proposed intervener adequately defended by one of the parties to the case?**

[48] As already mentioned, the Attorney General of Canada has consented to the motion to be authorized to intervene, by means of a letter in which he consents, as long as the CJC files its intervention file by April 12, 2019, and the schedule provided for by the order of February 12, 2019 is not called into question. I have no indication from the Attorney General of Canada that he is not in a position to assume his role as respondent in this case. I would add that, as a case manager, I am familiar with the Court record, the issues raised, the CJC's record and the applicable laws and regulations in this area, and it seems to me that the tools are there to ensure that each party can fully assume its role, so that the Court can make an informed decision.

(5) **Are the interests of justice better served by the intervention of the proposed third party?**

[49] The Court could not grant the intervention as formulated, except for the three (3) topics discussed below, because without having any indication as to the content sought, it could be that such an intervention would prejudice the rights of the Justice Girouard by adding new unknowns,

which would likely create a litigation within a litigation and jeopardize the schedule. Given the current state of the case, it is not in the interests of justice that leave to intervene be granted, except for the three (3) topics discussed further on.

(6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[50] I have already stated that I believe that the Court, with the parties, could make an informed decision. They have the tools to contribute to the judicial process, in the interests of justice. Given how the amended application for judicial review is proceeding, and following the order of February 12, 2019 (subject to the reasons hereinafter), setting the schedule with the agreement of the parties, I have no reason to believe that the case cannot be heard and decided. The parties have not expressed any fears in this regard.

[51] Had the record for this motion for leave to intervene not been limited to only giving the reasons, means and topics of intervention, and had it contained information for each intervention topic as to the content of the intervention for each of them, the Court would have been in a much better position to assess the reason for the intervention, its relevance and the impact it would have on the judicial review case. All that the Court currently has is a statement from the CJC that it does not intend to make submissions about the reasonableness or correctness of the decisions and the recommendation decision. In addition, the affidavit states that the CJC intends to present comments and explanations on five (5) subjects of the application for judicial review, in addition to seeking to file new evidence on eight (8) other topics, many of which deal with Justice Girouard’s record. No content is offered to the Court to enable it to assume its judicial role and

exercise its discretion. The Court obviously cannot delegate its role to the CJC. Under such circumstances, the undersigned cannot grant the application for intervention as formulated.

[52] Could the motion as formulated be granted in part? For eleven (11) topics of intervention, I have absolutely no indication as to the content that is intended to be submitted. For three (3) of these topics of intervention, they will be discussed below.

[53] As an exception to the above statements and conclusions, there are three (3) topics that will be treated differently: the mission and functioning of the CJC, the procedure followed for inquiries carried out under section 63 of the *Judges Act*, and the application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees.* Allow me to explain: Mr. Sabourin's affidavit states in paragraphs 11, 12, 13 and 14 that the CJC [TRANSLATION] "independently governs the procedure for the inquiries referred to in section 63 of the *Judges Act*, and said By-laws were not approved by the Governor-in-Council*"* and explains its intended role and the subjects covered by the By-laws (see paragraphs 11 and 13). He added in paragraph 12 that [TRANSLATION] *"*the Council independently establishes its rules and procedures". The same is true for the first topic: the mission and functioning of the CJC (see paragraphs 7, 8 and 9).

[54] In *Sport Maska* (see paragraph 42), Justice Nadon invites the judge in charge of the motion for leave to intervene to be "flexible" when assessing the interests of justice at stake. Moreover, Justice Stratas in *Ishaq*, while asking us to properly analyze the motion to see and understand the reason for granting the motion, also suggests doing so with an overall view of the record. In this respect, the explanations given in paragraphs 7, 8, 9, 11, 12, 13 and 14 allow me to

understand the relevance of dealing with the topics through an intervention so as to reassure me that this will be useful for making a decision on the case. I may use my discretion and be flexible about it, knowing full well that for all the other topics, the evidence disclosed did not allow it. I am aware that for these three (3) topics there is no disclosure of what will be filed, but there is at least a factual explanation given that allows me to better understand what will be discussed. In addition, the following conditions will help to ascertain the content.

[55] I would also add that in taking into account the conditions that I will associate with the three (3) topics, the rights of Justice Girouard and the attorneys general should not be affected.

[56] Therefore, I will allow the intervention on these three (3) topics: the mission and functioning of the CJC, the procedure followed in the inquiry under section 63 of the *Judges Act*, and the application of the *By-laws* and *Handbook of Practice and Procedure of CJC Inquiry Committees*, with the following conditions:

1. The affidavit to be submitted will be limited to a maximum of ten (10) pages and will deal with general topics and at no time with the case of Justice Girouard;

2. Written submissions will have only a maximum of fifteen (15) pages and will deal with general topics and at no time with the case of Justice Girouard;

3. The intervention is permitted to allow the CJC to share its legal knowledge on the three (3) topics, solely for the purpose of explaining to the parties and the Court the legislative and regulatory framework as implemented by the CJC. If it intends to deal with the practices of the CJC on these topics, it can do so with circumspection, reserve and wisdom, knowing full well that it must not touch on the case of Justice Girouard;

4. The oral submissions of the CJC will not exceed 40 minutes;

5. For the purposes of this intervention, it is not necessary for the CJC to consult the Attorney General of Canada;

6. The attorneys general will be able to take note of this intervention and comment as needed. The schedule will be amended for this purpose;

7. As for Justice Girouard, he will be able to address the content of the intervention in his reply and, as mentioned above, the schedule will be amended accordingly.

[57] I believe that the conditions for the intervention respect the rights of all the parties. The intervention is authorized, taking into account the evidence submitted, although limited, because in my opinion, it is in the interests of justice.

[58] In closing, taking into account the record as submitted and exercising my discretion, as well as the flexibility that the case law suggests in such situations, I dismiss in large part the motion for leave to intervene from the CJC and only allow it for the three (3) topics mentioned and with the conditions specified above. I am confident that in doing so, the Court and the parties will have all the information required to fully assume their roles and that there will be an informed decision at a later date. In addition, taking into account the intervention permitted with conditions, the impartiality of the CJC is ensured, in the interests of justice.

ORDER

FOR ALL THESE REASONS, THIS COURT ORDERS AS FOLLOWS:

1. The motion of the Canadian Judicial Council for leave to intervene in the application for judicial review by the Honourable Justice Michel Girouard is granted in part.

2. The CJC will be permitted to intervene only on the following topics:

    a) The mission and functioning of the CJC and the inquiry procedure under section 63 of the *Judges Act* including the application of the *By-laws* and the *Handbook of Practice and Procedure of CJC Inquiry Committees*;

    b) The affidavit will be no more than ten (10) pages long and will deal with general topics and at no time with the case of Justice Girouard;

    c) Written submissions will only have a maximum of fifteen (15) pages and will deal with general topics and at no time with the case of Justice Girouard;

    d) Oral submissions will not exceed forty (40) minutes.

3. The schedule is amended as follows:

    a) The CJC's intervention record will be served and filed no later than April 16, 2019;

    b) The Attorney General of Canada's record will be served and filed no later than April 30, 2019;

c) The Attorney General of Quebec's record will be served and filed no later than May 8, 2019;

d) The applicant's reply record, if any, will be served and filed no later than May 15, 2019;

e) The hearing will take place on May 22, 23 and 24, 2019, at 9:30 am, at the Federal Court, at 30 McGill Street, in the city of Montréal, in the province of Quebec.

4. Without costs.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-409-18
STYLE OF CAUSE:	THE HONOURABLE MICHEL GIROUARD v THE ATTORNEY GENERAL OF CANADA ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*, SOR/98-106

ORDER AND REASONS:	NOËL S. J.
DATED:	APRIL 9, 2019

WRITTEN REPRESENTATIONS BY:

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