

[TRANSLATION]

FEDERAL COURT OF APPEAL

THE HONOURABLE MICHEL GIROUARD
Applicant (Respondent in the Appeal)

and

THE ATTORNEY GENERAL OF CANADA
Respondent
(Respondent in the Appeal)

and

THE CANADIAN JUDICIAL COUNCIL
Moving Party (Appellant in the Appeal)

and

THE ATTORNEY GENERAL OF QUEBEC
Third Party

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE, WITHOUT FURTHER NOTICE TO YOU.

[DATED 7 SEPTEMBER 2018]

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honourable Simon Noël, dated August 29, 2018, by which the Court dismissed the following motions:

- a) The motion to strike the application for judicial review of the decision of the Appellant's First Inquiry Committee contained in the notice of application bearing docket number T-733-15 of the Federal Court;
- b) The motion to strike the application for judicial review of the decision of the Appellant's First Inquiry Committee contained in the notice of application bearing docket number T-2110-15 of the Federal Court;
- c) The motion to strike the application for judicial review of the decision of the Appellant's Second Inquiry Committee contained in the notice of application bearing docket number T-423-17 of the Federal Court;
- d) The motion to strike the application for judicial review of the decision of the Appellant contained in the notice of application bearing docket number T-409-18 of the Federal Court.

THE APPELLANT CLAIMS the following relief:

- a) Strike the application for judicial review of the decision of the Appellant's First Inquiry Committee contained in the notice of application bearing docket number T-733-15 of the Federal Court;
- b) Strike the application for judicial review of the decision of the Appellant's First Inquiry Committee contained in the notice of application bearing docket number T-2110-15 of the Federal Court;
- c) Strike the application for judicial review of the decision of the Appellant's Second Inquiry Committee contained in the notice of application bearing docket number T-423-17 of the Federal Court;

- d) Strike the application for judicial review of the decision of the Appellant contained in the notice of application bearing docket number T-409-18 of the Federal Court;
- e) Declare that the Appellant is not a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7;
- f) Issue any other order that this Honourable Court considers fair and appropriate.

THE GROUNDS OF APPEAL are as follows:

1. The Canadian Judicial Council (the "Appellant") applied to the Federal Court (the "Court") to strike the applications for judicial review contained in notices of application bearing the Court's docket numbers T-733-15, T-2110-15, T-423-17 and T-409-18 (collectively referred to as the "applications for judicial review"), pursuant to subsection 221(1) of the *Federal Courts Rules*, SOR/98-106.
2. The Appellant applied to have the aforesaid applications for judicial review struck on the grounds that it is not a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*.
3. That being said, the Federal Court does not have the jurisdiction to declare against the Appellant or its inquiry committees the remedies set out in section 18 of the *Federal Courts Act*.
4. The Court held that the Federal Court does have the jurisdiction to declare against the Appellant or its inquiry committees the remedies set out in section 18 of the *Federal Courts Act*.
5. This finding by the Court is based on the following errors of law.

A) *The application of the test established in Anisman*

6. In order to establish whether an institution is a "federal board, commission or other tribunal", the Court needed to conduct a two-step enquiry in order to determine 1) the nature of the powers

exercised by the institution, and 2) the source of its jurisdiction. Of those two steps, the second is the primary determinant.

7. With the exception of bodies expressly excluded at section 2, the Court erred in extending the Federal Court's jurisdiction to all federal institutions not listed at section 28 of the *Federal Courts Act*, which enumerates all federal boards, commissions or other tribunals over which the Federal Court of Appeal has exclusive jurisdiction. Although the Federal Courts have a broad supervisory power over federal boards, commissions or other tribunals, this power is not unlimited and must exclude the Appellant and its inquiry committees because of the nature and source of their jurisdiction and powers.

i. The source of the jurisdiction and powers of the Appellant and its inquiry committees

8. The Court erred in finding that the sole source of the jurisdiction and powers of the Appellant and its inquiry committees is found in a federal statute, namely the *Judges Act*, R.S.C., 1985, c. J-1.
9. The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.
10. The Court erred in failing to recognize that:
 - a. The source of the Appellant's duties is found in the preamble and sections 96 and 99 of the *Constitution Act, 1867*;
 - b. Their constitutional nature was reinforced by the enactment of the *Constitution Act, 1982* and the recognition of the unwritten principle of judicial independence by the Supreme Court of Canada; and
 - c. Paragraph 11(d) of the *Canadian Charter of Rights and Freedoms* requires that a judicial inquiry by conducted before a judge can be removed from office.
11. The Court erred in failing to apply a binding judgment of the Supreme Court of Canada, whereby the phrase "*federal statute*" signifies the "*Laws of Canada*" within the meaning of section 101 of the *Constitution Act, 1867*, namely the laws that the Parliament of Canada may enact under the grounds of jurisdiction listed at section 91 of the *Constitution Act, 1867*. However, section 91 does not

empower the Parliament of Canada to enact laws concerning the administration of justice or aimed at improving the quality of judicial service in superior courts.

ii. *The nature of the jurisdiction and powers of the Appellant and its inquiry committees*

12. The Court erred in characterizing the jurisdiction and powers of the Appellant as being limited to a "power of inquiry" which does not arise from section 96 of the *Constitution Act, 1867* and is not grounded in the role played by judges in a court of law.
13. The Appellant's jurisdiction and powers are not limited to powers of inquiry. The Appellant's role is to submit recommendations to the Minister of Justice based on its opinion as to the ability of a judge subject to inquiry to perform his or her duties.
14. The question of whether a judge has the ability to perform his or her duties is a judicial ethics issue, which comes under the sphere of administration of justice, which falls within the jurisdiction and powers of the judiciary.
15. In characterizing the nature of the Appellant's jurisdiction and powers, the Court erred in not taking into account the binding findings of the Supreme Court of Canada, whereby, in order to satisfy the constitutional guarantee of tenure, it is essential that the removal of a judge be based on an established ground following a judicial inquiry process, that is to say an inquiry conducted before a committee composed itself of judges.

B) The exclusion of judges appointed under section 96 of the Constitution Act, 1867

16. The definition of "federal board, commission or other tribunal" excludes bodies composed of "*any such person or persons appointed [...] under section 96 of the Constitution Act, 1867.*" The Appellant and, in some cases, its inquiry committees, are composed of at least one person, or persons, appointed under section 96 of the *Constitution Act, 1867*. The exclusion in no way states that such bodies must be composed solely of "persons" appointed under section 96.
17. The Court erred in not ruling that the Appellant is excluded from the definition of "federal board, commission or other tribunal" for this reason.

18. The Court erred in ruling that the Appellant's jurisdiction and powers are conferred upon it as an institution and that, consequently, judges appointed under section 96 do not exercise their powers in this capacity.
19. The Court erred in refusing to acknowledge that, even though the Appellant's jurisdiction and powers are conferred upon it collectively, they are exercised individually by the judges who comprise it. For example, three judges gave dissenting reasons in this case.
20. The Court erred in refusing to apply a binding judgment of the Supreme Court of Canada, whereby each time a statute confers a power upon a judge or an officer of a court referred to in section 96, it must be considered as a power that can be exercised by the judge or the officer in their official capacity as a representative of the court, unless there exists an express provision to the contrary. The *Judges Act* contains no provision to the contrary, and the Court failed to even attempt to find one.

C) The interpretation of the deeming provision

21. The Court erred in that it did not take into account the Appellant's central submission – namely that its exclusion from the definition of "federal board, commission or other tribunal" completely disregards the deeming provision at subsection 63(4) of the *Judges Act*, which states that the Appellant is "*deemed to be a superior court*". In other words, this provision, although deeming, is not determinative because, even in its absence, the Appellant would not be subject to judicial review by the Federal Court.
22. The Court noted that subsection 63(4) is a provision on which the Appellant "*relies very heavily*", or that it is "*the most important provision in this case*". However, as with any issue regarding the jurisdiction of the Federal Court, the most important provision is section 2 of the *Federal Courts Act*.
23. The deeming provision remains important to the extent that the Court must give it effect by presuming a harmony, coherence, and consistency between statutes dealing with the same subject matter, that being the Appellant's and the Federal Court's respective jurisdictions. On their face, neither the French nor the English versions of subsection 63(4) rule out the possibility that the Appellant is excluded from the definition of "federal board, commission or other tribunal".
24. That is the perspective in which the Court needed to assess:

- a. The Appellant's submissions regarding the literal and contextual interpretation of subsection 63(4); and
 - b. The Appellant's submissions regarding judicial independence.
25. However, the Court erred in that its reasons are grounded simply on refuting a position that the Appellant is a superior court. With respect, this position is flawed, because it was not the Appellant's position.
26. On a literal level, the Court erred in giving a contradictory interpretation of subsection 63(4). On the one hand, the Court ruled that subsection 63(4) has no "*general part*", but only "*a very specific scope, that of granting the [Inquiry Committee] the powers necessary to inquire into the conduct of a superior court judge*". Conversely, however, the Court agreed with Justice Mosley that the deeming provision does, in fact, have a broader scope, because it was adopted 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*".
27. The Court did not extend this broad scope in order to recognize that the Appellant, and its inquiry committees, are excluded from judicial review by the Federal Court, as are all "*superior courts*" listed under subsection 35(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21.
28. The Court erred in not considering the Appellant's submission that, historically, and even currently, the remedies provided for in section 18 of the *Federal Courts Act* can only be granted against lower courts. The Court justified its narrow interpretation of the deeming provision by presuming that the Appellant, even though it is "*deemed to be a superior court*", is, in fact, a lower court because, as such, it cannot be excluded from judicial review without undermining the rule of law.
29. This latter justification is erroneous. Within our constitutional order, the rule of law is enforced by judges. The Court erred in finding that judges, who form the majority of inquiry committees and to whom membership in the Appellant is limited, who sit daily within superior courts, would lose the ability to enforce the rule of law, simply because they are members of a body which was created by statute, certainly, but which is still "*deemed to be a superior court*".

30. The Court erred in finding that subjecting the Appellant and its inquiry committees to judicial review would reinforce judicial independence, by providing additional protection to a judge subject to inquiry. On this point, the Court confuses security of tenure, already guaranteed by section 99 of the *Constitution Act, 1867*, with the guarantee of judicial independence, both institutional and individual, which would be compromised if the Appellant and its inquiry committees were subject to supervision by another superior court. The Court also erred in not considering in any way the fact that the removal of a judge by Parliament, provided for in section 99, constitutes in itself the best guarantee of tenure.
31. The Court erred in ruling that "*In our judicial order, [...] a lack of judicial review or of a right of appeal constitutes a breach of procedural fairness*", in which case the Federal Court must safeguard procedural fairness. However, the right to judicial review and the right of appeal do not stem from the general right to procedural fairness; in either case, they are statutory rights that are not guaranteed, as the Court itself pointed out, for that matter.
32. The Appellant submitted that the process set out in the *Judges Act* and its own rules of procedure safeguard the rule of law, because this process provides a mechanism by which a judge subject to inquiry may make a written submission regarding the inquiry committee report, which the Appellant must take into account when considering the report. However, the Court erred in that it did not justify how this procedure fails to sufficiently safeguard the rule of law.

D) Preconceived ideas regarding the Appellant's submissions and a reasonable apprehension of bias

33. Many of the errors of law identified above stem from the Court not having considered, either fully or even partly, the Appellant's submissions regarding the issues that were before the Court.
34. Generally, the Court based its reasons on those given by Justice Mosley in *Douglas*. The Court's reasons appear to be focused on refuting the Appellant's submissions in light of Justice Mosley's reasons, without recognizing, however, that the Appellant's submissions in this case are different from those made in *Douglas*. Many of the errors of law identified above are founded on preconceived ideas regarding the Appellant's submissions.
35. For example, several times in its reasons, the Court refuted a position that the Appellant is a superior court, despite the fact that the Appellant did not put forward such a position before the Court. In fact,

the Appellant unequivocally clarified, both in its response brief and its oral submissions, that this was not the position it put forth. The Court made no mention of it.

36. With all due respect, the general tone of the reasons given, as well as several vexatious and improper remarks made about facts irrelevant to the issues in dispute before the Court, would lead a reasonable and informed person, viewing the matter realistically and practically, to conclude that there is a reasonable apprehension of bias on the part of the judge.

Date: September 7, 2018

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