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REPORT OF THE JUDICIAL CONDUCT REVIEW PANEL CONSTITUTED BY THE CANADIAN JUDICIAL COUNCIL CONCERNING THE HONOURABLE GÉRARD DUGRÉ OF THE SUPERIOR COURT OF QUÉBEC

COMPLAINT FILED BY MS STÉPHANIE SIMARD ON 11 SEPTEMBER 11 2018

(CJC FILE: 18-0318)

30 AUGUST 2019

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INTRODUCTION

On September 11, 2018, Stéphanie Simard submitted a complaint to the Canadian Judicial Council (the "Council") against the Honourable Justice Gérard Dugré of the Superior Court of Québec.

Essentially, the complainant alleges that Justice Dugré made inappropriate comments during a family law case in which he was to rule on the application for the parties' child to change schools. It is also alleged that Justice Dugré did not let the parties' counsel express themselves.

On March 14, 2019, in accordance with subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-laws (2015)* ("By-laws") after having reviewed the complaint, the comments by Justice Dugré and Chief Justice of the Superior Court of Québec, the Honourable Jacques Fournier, the Vice-Chair of the Judicial Conduct Committee, the Honourable Glenn Joyal, Chief Justice of the Court of Queen's Bench of Manitoba, issued the following conclusions:

[TRANSLATION]

- "Justice Dugré's remarks clearly violate his ethical duties with regard to courtesy and respect. Not only were they inappropriate in the context of this case, they would not be defensible in any case. In short, this conduct has no place in a court of justice."

[TRANSLATION]

- "I am of the view that the conduct of Justice Dugré shows a distinct lack of judgment and empathy and is unacceptable. The statements made by Justice Dugré were harsh and, in my opinion, in the case of the comment on adoption, quite simply mean and petty. Justice Dugré should have understood that the mother was upset following the comments he had made and should have tempered his comments. On the contrary, he continued with conduct that was akin to intimidation or bullying."

[TRANSLATION]

- "In his reply, Justice Dugré denied the events as they happened, shifted all responsibility to the complainant and her counsel and, essentially, stated that he acted in accordance with good practice. He even stated that his conciliation was successful. According to him, the parties [TRANSLATION]"didn't understand anything"."

[TRANSLATION]

- "In my opinion, his explanations do not correspond to reality. I feel that the allegations are true. The lack of acknowledgement of the facts clearly shows that the discernment and judgment that are so important for the duties of a superior court justice are severely lacking in Justice Dugré. His conduct, in my opinion, seriously undermines the public trust in the judiciary."

[TRANSLATION]

- "Moreover, he had the opportunity to recognize his breaches and express regret, but he did not do so, in fact, the opposite happened."

[TRANSLATION]

- "For these reasons, I feel that the complainant's allegation was established. Additionally, I agree with Chief Justice Fournier that the judge's conduct has no place in a court room. Lastly, the judge's lack of understanding of the consequences of his conduct are very troubling to me. His comments were to the effect that the complainant and her counsel were in the wrong and did not understand the nature of his interventions. In my opinion, this shows a severe lack of comprehension of his obligations."

[TRANSLATION]

- "As a result, I feel that at first glance, the complaint against the judge might be serious enough to warrant the removal of the judge. In accordance with subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, I have decided to establish a Judicial Conduct Review Panel that will be decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*."

The same day, a Judicial Conduct Review Panel ("Review Panel") was constituted to determine, as provided under subsection 2(4) of the *By-laws*, whether "the matter might be serious enough to warrant the removal of the judge."

This Review Panel is composed of the signatories of this report.

After reviewing the complaint, the comments of Justice Dugré and Chief Justice Fournier, the documentary evidence mentioned in Appendix 1 of this report, the Reasons (of Chief Justice Joyal) in support of the decision to refer a complaint to a Judicial Conduct Review Panel in the matter of Justice Dugré of the Superior Court of Québec, dated March 14, 2019 ("March 14, 2019, Reasons") and the comments of Justice Dugré and his counsel on these reasons and after having heard the audio recording of the September 7, 2018, hearing provided by Justice Dugré, the Review Panel concludes as follows:

- **That an Inquiry Committee is to be constituted into the conduct of Justice Dugré that is subject to Stéphanie Simard's complaint in file CJC-18-318 and formulates the issues to be reviewed by the Inquiry Committee as follows:**

1. **Did Justice Dugré fail in the proper execution of his office in the hearing before him on September 7, 2018, in *Simard v. Lépine*, in his behaviour towards the parties and in his comments made during this hearing?**

2. **Do the reasons presented by Justice Dugré to justify his conduct and comments and, in particular, his duty to conduct a conciliation of the parties, lead to the conclusion that Justice Dugré did not fail in the proper execution of his office?**

3. **If appropriate, was Justice Dugré's failure in the proper execution of his office serious enough to warrant recommending his removal, in accordance with the criteria set out in the *Judges Act* and the case law?**

COMPLAINT AND CONTEXT

The complainant, Stéphanie Simard, and her spouse, Mathieu Lépine, appeared before Justice Gérard Dugré of the Superior Court of Québec on September 7, 2018, to obtain a decision in an application for the former couple's child to change schools. After thirty-some minutes, the hearing was suspended at the request of the complainant's counsel and the parties came to an agreement that Justice Dugré homologated.

The complainant alleges that Justice Dugré entered the courtroom stating loud and clear that it was ridiculous to choose a school so late after classes had started. The parties' counsel then explained that it was the first date offered by the registry when they came to the court in June 2018.

The complainant added that after strongly suggesting that the parties [TRANSLATION]"get back together", Justice Dugré then proposed [TRANSLATION]"giving our son up for adoption or to a foster family."

It is also alleged that Justice Dugré did not let either counsel for the father or counsel for the complainant speak.

The complainant stated that she was very upset by the judge's comments, to the extent that the hearing had to be interrupted.

The complainant alleges that the judge had a pre-established judgment on the subject and in addition, he made unpleasant comments and did not let the parties express themselves.

To conclude, she alleges that no judgment was rendered in this case because she was too shaken to return before the judge after the suspension and as a result, she and her former spouse came to an agreement. During the homologation of this agreement, the complainant states that the judge also asked the clerks if they wanted to adopt the parties' son.

In light of Justice Dugré's behaviour, on September 11, 2018, four days after the hearing, Ms. Simard filed a complaint with the Canadian Judicial Council against Justice Dugré.

PROCESSING THE COMPLAINT AND JUSTICE DUGRÉ'S COMMENTS

The Council acknowledged receipt of Ms. Simard's complaint on September 12, 2018. On December 12, 2018, at the request of the Vice-Chair of the Judicial Conduct Committee, the Executive Director and Senior General Counsel, Norman Sabourin, wrote to Justice Dugré to send him Ms. Simard's complaint, dated September 11, 2018, and to ask him, in accordance with section 8.1 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* ("Review Procedures") to send him his written comments within a 30-day deadline. At the time, Mr. Sabourin mentioned to Justice Dugré that the Vice-Chair of the Judicial Conduct Committee [TRANSLATION]"could consider any prior decisions on complaints made against you, when relevant." That same day, December 11,

2018, Mr. Sabourin wrote to the Chief Justice of the Superior Court of Québec, the Honourable Jacques Fournier, to send him Ms. Simard's complaint regarding Justice Dugré and requested his comments on the subject.

On January 10, 2019, Justice Dugré replied to Mr. Sabourin to share his comments on the complaint. To the complainant's allegations, he essentially argued the following:

- The statements in this complaint are erroneous, cited out of context, and are clearly a result of Ms. Simard's lack of understanding about what happened during this hearing;

- After reviewing the file, I entered the courtroom at 9:35 and I proceeded, as usual and as required by law, with a brief conciliation (article 9 C.C.P. and 400 C.C.Q.);

- These short conciliations often lighten the mood, allow for friendly discussions with the parties and their counsel and very often lead to resolutions that satisfy all parties. In the case of this conciliation, the court's tone was friendly and the parties and their counsel are invited to answer the court's questions that are to explore various possible solutions before formally beginning the case;

- Clearly, on September 7, 2018, Ms. Simard did not appreciate the court's method of proceeding because she did not seem to understand that it was a conciliation as required under the law in family matters;

- During the conciliation, it became clear that the problem raised by the complainant was not the choice of school but the transportation of the child to school when she had custody. I then asked the parties to check whether this transportation problem could be resolved in a way other than changing the school the six-year-old child was attending;

- During the conciliation, it became clear that it was difficult to find a perfect solution as the child's father lived in Blainville while he mother lived in St-Jérôme and the child had been attending a school that was a three-minute walk from the father's residence for at least two years;

- Counsel for the complainant then advised the court that the complainant also wanted to request an amendment to the child custody conditions. It became even more evident that the application for the change in school should be decided by the judge who would also rule on the change in custody that Ms. Simard wanted to submit at a later date;

- This legal jargon was likely not understood by the complainant and since she was represented by counsel, the court assumed that her counsel would explain the situation to her after the hearing. [TRANSLATION]"However, it appears that counsel probably did not do her job";

- After this conciliation that lasted 30 minutes and in which the parties' counsel actively participated—and I believe the father and mother on several occasions—the parties went to discuss the possibility of coming to an agreement that would solve Ms. Simard's transportation problem when her schedule did not allow her to bring the child to school when she had custody. This negotiation lasted from 10:05 to 12:07, when Ms. Simard's counsel, Mr. Lépine and his counsel returned to the hearing room to inform me that they had reached an interim agreement;

- As a result, this conciliation, held in the same manner for the past ten years, was fruitful and allowed for the true issue to be identified and to find an adequate solution to resolve it;

- If she is complaining that her application was not heard or decided by the court, it is because she did not understand that her true problem was a transportation one and that the custody change request was necessarily preventing the court from ruling on her application to change schools on September 7;

- If her counsel had explained this obvious situation, which she had not thought of, Ms. Simard would probably not have complained;

- With regard to the more specific allegations in Ms. Simard's complaint, Justice Dugré replied as follows:

    1. Ms. Simard is wrong because on September 7, 2018, it was not a choice of school but a change of school during the school year, which is very different;

    2. I was ready to hear Ms. Simard's application but she and her counsel resolved it with the father and his counsel;

    3. I never said that it was "was ridiculous to choose a school so late after classes had started." I merely stated at the start: [TRANSLATION]"Hello, so the choice of school, aren't we a little late for that?"

    4. As for the complainant's statement that I strongly suggested that the parties [TRANSLATION]"get back together" and [TRANSLATION]"give our son up for adoption or to a foster home", Ms. Simard clearly did not listen to the court's words and the context in which they were stated, nor the tone in which the words were said. It was a light and friendly tone that was to put the parties at ease. The court uses various metaphors to help the parents understand that the child's interests must come first: [TRANSLATION]"so I often begin by indicating to the parties that the perfect solution in the case is that the parties get back together." I note that the parties laughed at this comment; [TRANSLATION]"nobody has ever complained about this rather funny metaphor."

[TRANSLATION]"As for the adoption and foster family, I did not suggest giving the child up for adoption or to a foster family, but with both counsel and both parties I expressed several possible solutions for the problem Ms. Simard raised, such as hiring a private transporter…I inquired as to whether the school had a residence, and adoption and the foster family were mentioned merely to make the two parties aware that they had to find a solution for the transportation problem in the best interest of their child Mikael";

Ms. Simard certainly has the right to interpret my metaphors literally, but this does not mean that the metaphoric statements were unpleasant;

5. Despite the complainant's affirmations, after listening to the hearing again, it can be confirmed that Ms. Simard's counsel intervened 112 times and counsel for the father intervened 53 times;

6. In response to the complainant's statement that she was very upset by the judge's words and that as a result, the parties had to interrupt the hearing, Ms. Simard is wrong and the hearing was not interrupted. The conciliation concluded in order for the parties and their counsel to withdraw and try to negotiate an agreement to resolve the child's transportation problem;

7. Since the court had learned of the nine-page proceeding prepared by Ms. Simard's counsel, it was up to counsel for the parties to respond to the court's questions, and not for the court to re-hear what was written in the procedure. That should have been explained to Ms. Simard by her counsel;

8. To the allegation that the judge already had a pre-established judgment on the subject, in addition to making unpleasant comments, Justice Dugré replied that it is curious that Ms. Simard is complaining when her counsel negotiated for two hours for an interim consent that she signed and that was homologated.

   [TRANSLATION]
   "I did not have a pre-established judgment on the subject; I simply referred to the fact that in August 2018, I had been presented with an application about the choice of school and I had made a decision before the start of classes."

   As for the "unpleasant comments", the statements the complainant is making are probably beyond her understanding as the comments I made during this conciliation allowed the parties to come to an agreement in the best interest of the child;

9. To the complainant's statement that questions "how we can have confidence in justice when the judge never let us express ourselves", Justice Dugré replied that as evidenced, her counsel and counsel for the father both had the freedom to express themselves during the conciliation and if they had not settled, he would have gladly ruled on her application;

10. To the complainant's statement that she was too shaken to return to the hearing room and that was the reason the parties came to an agreement, Justice Dugré replied that these statements made him think and that the complainant seems to be accusing him of coming to an agreement with the father when the two parties were assisted by their counsel;

11. Justice Dugré also notes that after listening to the hearing again, one cannot hear the offer to the clerks to adopt Ms. Simard's son.

12. To conclude, the judge stated again that Ms. Simard's complaint is likely the result of poor explanations her counsel gave her, but certainly not his conduct, which allowed the true issue to be identified and resolved, and ensured that the appropriate court would hear her applications at the same time for the change in custody and the change of school.

On January 28, 2019, Chief Justice Fournier responded to the correspondence that was sent to him on December 11 by the Executive Director and Senior General Counsel. In his reply, Chief Justice Fournier states he does not have any comments with regard to Ms. Simard's complaint. He added, however, that he would not support the type of comments the judge is accused of making in section 4 of his reply, namely the judge's proposal regarding residence, adoption and a foster home. Chief Justice Fournier added that [TRANSLATION] "objectively, the words were offensive and the metaphor the judge was intending did not have its place in a court room, and even less so when there are issues that involve the custody of a child."

On March 18, 2019, the Executive Director and Senior General Counsel of the Council sent Justice Dugré the *March 14, 2019, Reasons* to ask him, as set out in section 8.5 of the *Review Procedures* to provide his written comments by April 17, 2019, including on the issue of whether the investigation should be conducted under subsection 63(3) of the *Judges Act.*

On May 2, 2019, counsel for Justice Dugré, Magali Fournier, Ad.E., wrote to the Council to submit her client's observations further to the decision of the Vice-Chair of the Judicial Conduct Committee, the Honourable Chief Justice Joyal, to refer the complaint to the Review Panel. The arguments Me Fournier submitted on behalf of Justice Dugré are essentially as follows:

1. The impressions of Chief Justice Joyal do not correspond to what was heard in the informed discussion in the particular context of a conciliation that, because of Justice Dugré, had a satisfactory outcome in the interest of the child. In the circumstances, an Inquiry Committee does not need to be constituted;

2. As in all family law cases, Justice Dugré first attempted to conciliate the parties. It is true that he did not mention this at the beginning of the hearing. However, all counsel acting in these matters must be aware there is an obligation by the judge to first attempt to achieve conciliation between the parties (articles 400 and 604 C.C.Q.; articles 9 and 25 C.C.P.);

3. There is nothing to tell the judge how the pre-hearing conciliation should proceed and be carried out. Justice Dugré therefore relied on the training he received in 2009 regarding informal resolution conferences: using plain language that is clearer and more vivid makes it easier for the parties to understand and increases the likelihood of conciliation;

4. In this type of situation, counsel also appreciates it when the judge shares his thoughts after analyzing the file, since if it becomes necessary, the important questions the judge has will be expressed more clearly by counsel;

5. The judge first explained to counsel and the parties that a motion for a change of school was, ideally, presented before classes start. It was important for him that the parties understand that the criteria in the case law for a change of school after the start of classes made it very difficult to obtain this type of request, except in exceptional circumstances;

6. Counsel should have insisted with the registrar to obtain a hearing date before the start of classes and Justice Dugré recommended to them that in the future, they return before the judge who had heard them on the custody of the child in order to get a hearing date prior to the start of classes. The judge's comments on this were therefore perfectly relevant and justified;

7. Justice Dugré's tone was perfectly friendly;

8. Justice Dugré also [TRANSLATION]"makes metaphors" so the parties can understand the importance of being a parent, even in a separation: [TRANSLATION]"in fact, all the metaphors used were clearly not said as if they were really solutions that applied in the present case";

9. The complainant's cries can indeed be heard but we do not know what the judge saw or heard. It is clear, upon listening, that this crying came, not after any specific metaphor by the judge, but instead when the complainant realized that certain facts were hindering her application to change schools, including the fact the application was being heard after the start of classes, but also that the judge was going to analyze the interest of the child before that of the mother;

10. [TRANSLATION]"It is absolutely impossible to understand from listening to the recording that the request for a suspension was because of her emotional state. On the contrary, it seems that counsel for the complainant wanted to suspend the hearing to discuss with her counterpart, counsel for the father, and in the facts, this is what happened";

11. Justice Dugré never refused to hear Ms. Simard's application, never prevented counsel from speaking. However, the formal hearing never actually began. It is true that Justice Dugré intervened often, but there is nothing preventing such a practice, especially if it allows the parties to understand the judge's questions regarding a file. Moreover, in the recording, we can clearly hear the judge tell Ms. Simard's counsel that she can present her motion;

12. This case is absolutely not at the same level of seriousness as those that have been reported (in the Council's past conduct cases). None of the comments made were mean in regard to Ms. Simard because it is clear, upon reading or listening, that the comments were to make the parties understand their role as separated parents;

13. Justice Dugré never showed partiality: he merely shared certain well-known concepts in case law, namely the interest of the child, stability, and the greater burden when a change of school request is made after classes have started;

14. Contrary to the statements by Chief Justice Joyal in his report, Justice Dugré did not raise his voice, his comments were not offensive or vexatious to the complainant and she did not start crying because of a metaphor by the judge;

15. It is not possible to state, after simply listening to the recording, that counsel had forced laughs when Justice Dugré talked about the [TRANSLATION]"magical solution". To the contrary, counsel seemed to have genuinely found this statement funny;

16. The judge's statements were not harsh and it is very possible that Justice Dugré did not hear or see the complainant crying;

17. It was not the judge who suggested terminating the hearing. If Ms. Simard had wanted to continue, there was nothing preventing it and the judge never refused (to hear the application). However, he took the time to mention the issues raised in the application

so the parties knew what to expect;

18. The tone was not unfriendly. The judge was never rude, he was always courteous. He was not intimidating either;

19. The judge acted as a facilitator in this case and this is what judges are asked to do, in particular in family matters, where the judge has a statutory obligation do to so.

Lastly, on August 27, 2019, counsel for Justice Dugré sent counsel for the Review Panel additional written observations, which can be summarized as follows:

- In *Bradley,*[1] the Court of Appeal of Québec, which was seized with a recommendation for dismissal due to the refusal of the judge to rule on the applications before him, and insisted that the parties request an adjournment to discuss among themselves in order to reach an agreement, found that there was no ground for dismissal but merely a reprimand. According to the Court of Appeal, ruling in favour of dismissal required "the intimate conviction that it would be impossible for the judge to perform the duties of the office and that the principle of security of tenure no longer applied." The Court of Appeal found that in the circumstances, the dismissal of Judge Bradley would have been an excessive measure;

- The fact the Quebec legislator decided to impose an obligation to first conduct a conciliation in family matters places the judges in a difficult situation as they must first attempt to conciliate the parties and then if there is no agreement, render a decision. Given this difficulty, several judges do not dare enter into the conciliation process, to the detriment of the parties, the children, and the justice system. Justice Dugré respects the legislator's wish and attempts to conciliate the interest of the parties and the best interest of the children when possible. His rate of success is very high and he regularly receives thanks for his involvement in his cases;

- Justice Dugré recognizes that some of the statements he made in this case may have been interpreted in a negative manner by some people and should have been avoided. He restated that they were stated with one objective only: to trigger a settlement in the best interest of the children;

- Justice Dugré is willing to find a solution and to correct practices that might be considered problematic. Moreover, he has already changed his way of handling conciliations and has adopted a more neutral tone.

ANALYSIS AND REASONS OF THE REVIEW PANEL

The role of the Review Panel

The *By-laws* succinctly describes the role of the Review Panel in the context of processing complaints submitted to the Canadian Judicial Council.

Certain elements warrant being taken into consideration to establish the parameters of this role.

First, subsections 2(1), 2(4) and 2(7) of the *By-laws* should be compared. They state:

> **2(1)** The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or

[1] *Bradley (Re), 2018 QCCA 1145.*

> 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.
>
> …
>
> **(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.
>
> …
>
> **(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:
>
> (a) the judge and their Chief Justice;
> (b) the Minister; and
> (c) the Inquiry Committee, once it is constituted.
>
> [emphasis added]

The analysis of these provisions reveals that the decision of the Chair or Vice-President of the Judicial Conduct Committee to constitute a Review Panel is rendered based on an analysis of a complaint or allegation "on its face" ("*à première vue*") as specifically stated in subsection 2(1) of the *By-laws*. Moreover, this provision clearly states that it is the Review Panel that decides whether to constitute an Inquiry Committee. Then, subsection 2(7) requires the Review Panel to justify its decision to constitute an Inquiry Committee since it "must prepare written reasons" ("*rédiger ses motifs*").

In this context, the Review Panel is of the opinion that it is not required to rule solely based on the facts brought to its attention in the reasons in support of the decision of the Vice-President of the Judicial Conduct Review Panel to defer the complaint file to an Inquiry Committee since the Vice-President's analysis is a *prima facie* decision whereas the decision of the Review Panel must lead to a decision with reasons.

Second, the Review Panel believes that it is relevant to distinguish its role from that of the Inquiry Committee. The Committee has the true mission of collecting evidence in order to rule on the validity of the complaint. It is from this perspective that section 4 of the *By-laws* provides that the Inquiry Committee may engage legal counsel and other persons to provide advice and assist in the conduct of the inquiry. This counsel may meet with witnesses and collect testimony, obtain evidence, etc.

Conversely, the Review Panel does not have this power of investigation but must nonetheless render a decision with reasons. On this issue, the Review Panel constituted by the Council regarding the Honourable Justice Newbould wrote the following in its report:

> [33] A Review Panel does not hear evidence. Accordingly, it does not make findings of fact. Its role is to review the available information relating to the matter and to decide whether an Inquiry Committee should be constituted under subsection 63(3) of the *Judges Act*.[2]

[2] Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable F.J.C.

[emphasis added]

The Review Panel shares this point of view. It therefore plans to render its decision based on the information available.

The role of the Review Panel is administrative in nature and in the absence of specific indications in the *By-laws* about how it is to accomplish its mission, it seems reasonable to us that it is the master of its procedures and methods, as provided by general administrative law principles.[3] It is, however, required to respect the rules of procedural fairness, as it did in this case by allowing the judge in question to share his written comments about the *March 14, 2019, Reasons* and any other information available in regard to this case, as shown in the correspondence exchanged with Justice Dugré or his counsel and in the responses they provided on behalf of Justice Dugré.

The concept of "serious enough to warrant the removal of the judge"

Section 65 of the *Judges Act* states that after an inquiry, the Council may make a recommendation to remove the judge if it feels that the judge has become incapacitated or disabled from the due execution of the office of judge for the following reasons:

- age or infirmity,
- having been guilty of misconduct,
- having failed in the due execution of that office, or
- having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

…

In *Therrien (Re),*[4] the Supreme Court of Canada described the type of conduct that could justify the removal of a judge as follows:

> [147] … Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office…
>
> [emphasis added]

Additionally, in the document "Ethical Principles for Judges"[5] used to guide federally appointed judges, the Canadian Judicial Council writes that "[j]udges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone." The same document states that "[u]njustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality."

It has also been well established that "the judge must understand that the power and prestige of his or her role confer great importance upon his or her comments and decisions."[6] From this

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Newbould, 8 February 2017.

[3] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 53.

[4] *Therrien (Re)*, [2001] 2 S.C.R. 3, at para. 147.

[5] Canadian Judicial Council. *Ethical Principles for Judges*, 2004, at pages 25 and 33.

[6] Plante and Provost, 2007 CMQC 22 (inquiry) (motion for judicial review dismissed, 2009 QCCS 5116; appeal dismissed 2011 QCCA 550; motion for leave to appeal to the Supreme Court dismissed, 22-09-2011, No.

perspective, the judges' words must show reserve and restraint.[7]

Even in the case where a judge allows the parties to express their claims, a judge has been criticized by the judicial council for using an inappropriate tone that could have negatively affected the complainant and had a negative influence their perception of the administration of justice, which the Council considered to be misconduct.[8]

The Review Panel therefore feels that inappropriate words, the tone used and inappropriate remarks show a lack of sensitivity to the parties' situation and can constitute misconduct or ethical misconduct. However, according to the Review Panel, it must be determined whether the judge's remarks were truly unacceptable or vexatious or if his behaviour demonstrates a true lack of understanding of his role or a lack of sensitivity to the parties for them to reach a level of seriousness required by the Supreme Court in *Therrien*.

Justice Dugré's Conduct

The Review Panel first notes upon listening to the audio recording that the complainant's allegation that Justice Dugré entered the courtroom "Loud and clear that it was ridiculous to choose a school so late after the start of classes" is inaccurate. Justice Dugré, when entering the courtroom, said:

> [translation]"Hello, for school choice, aren't we a little late?"

It is true, however, according to the Review Panel, that Justice Dugré began the hearing abruptly, scolding counsel with regard to the late filing of the motion. When counsel for the complainant explained to the court that September 7 was the first available date according to the registry, Justice Dugré accused her of not having insisted on appearing before Justice Collier who had granted custody of the child and to be heard by this same judge before the start of classes on the choice of school.

Then, the judge delivered a long monologue, often raising his voice, to essentially make the parents feel guilty or to accuse them—more so the complainant—of not considering the interests of her child. During this monologue, Justice Dugré stated the following, in particular:

> [translation]
> - Let's axe this. We will tell the little guy: "we got the wrong school…
> - Have you ever heard of stability?
> - We could put him in residence and that will solve the problem. But they will see him on June 24…we'll leave the little boy in peace. We'll say, look, stay at the residence and have fun with your little friends. Daddy and mommy, you'll see them on June 24, ok?
> - We won't send him here and there. The child is the king of the castle. We won't wake him up at 5 in the morning. We will encourage stability for the child. They just have to get closer to each other.

34267), at para. 82 citing the Canadian Judicial Council. *Commentaries on Judicial Conduct*, Cowansville: Éditions Yvon Blais, 1991, p. 86.

[7] Bettan and Dumais, 2000 CMQC 55.

[8] 2004 CMQC 63.

- The magic solution; I order the parties to get together until Mikael turns 18! But unfortunately, this is not a solution that is favoured by the parties usually. For me, I find it great, you know, the parties get back together. The parties don't want to, that's the problem. I have the solution here. But you don't want it.

- When we separate, it creates problems. Debts are doubled, income is divided in half… children become fragile. It is a good way to cause problems.

- Let's put him in residence. Give him up for adoption. That was another solution I favoured. For me, I'd give the kid up for adoption. You know, if the parents aren't able to take care of him, it's the other. As for the first, it won't work. So now, listen, we don't want to get back together.

Aside from the judge's qualification of the change of school request being "ridiculous", which is not heard in the recording, it seems that the complainant's other allegations are confirmed by this recording.

It is also true that after the judge raised the possibility of placing the child in residence or up for adoption, we can clearly hear the mother crying on the recording and it is easy to understand that counsel requested a suspension of the hearing because her client was reacting emotionally to the judge's statements by crying.

It is also true that the judge monopolized most of the hearing by talking and making comments that were often irrelevant or that had to do with other cases he had heard in family matters.

Lastly, in the recording, we cannot hear the judge suggest to the clerks that they adopt the complainant's son as she alleges.

However, in addressing counsel when they returned to the courtroom around noon to have the parties' agreement homologated, the judge stated:

> [translation]"I suppose you would have liked to be raised like that?"

In the Panel's opinion, there is no doubt that Justice Dugré's comments, with regard to the parties, are needless, harsh and often out of place or unacceptable. He shows a lack of sensitivity and tact in the face of a situation that, for the complainant and her ex-spouse, is very emotional and difficult. It seems that the judge, in the content and tone of his words, does not seem to realize he is attacking the parents, making them feel guilty and accusing them of not agreeing to get back together when they had been separated for four years. In the name of the child's best interest, he threatens to make extreme decisions: placing him in residence or up for adoption. We must note, however, that the recording does not suggest that the child be placed in a foster home.

There is also no doubt in the mind of the Review Panel, that these words were likely to lead the complainant to believe that the judge had already decided to not allow her change of school request, especially since he gave counsel for the parties very little opportunity to express their points of view.

Justifications raised by Justice Dugré

Essentially, Justice Dugré justifies his behavior and comments at the September 7, 2018, hearing with his statutory obligation to encourage the conciliation of the parties. He feels that his comments about the "magic solution" which involved the parties' getting back together to live

together or his comments about putting the child in residence or up for adoption were "metaphors" for the purpose of making the parties aware of the importance of considering the child's interests. They were also to make the mood less tense and to encourage conciliation.

Justice Dugré feels that the statements he is accused of making were intended to be funny and were said in friendly tone, meant to put the parties at ease.

Several times, Justice Dugré noted that the complainant simply did not understand the nature of his intervention to conciliate the parties and that counsel for the complainant should have given her explanations.

He feels that his words were not injurious or vexatious and that his conciliation was successful since the parties managed to come to an agreement, which in his eyes seems to justify his interventions.

His counsel added that the recording did not allow for a determination as to whether the judge noticed that the complainant was crying or not and whether the request to suspend the hearing was due to the complainant's emotional state.

The Review Panel recognizes that article 400 of the *Civil Code of Québec* states that the judge presiding over an application from spouses who disagree as to the exercise of their rights and the performance of their duties must foster the conciliation of the parties before ruling on the issue.

This obligation undoubtedly justifies the judge's speaking at the hearing to explain to the parties that they have the possibility of continuing other than by an adversarial legal proceeding, and to try and find a solution for their problem themselves, alone or with a judge's assistance, or to find alternative solutions to their dispute. At this stage, the judge's interventions are more aimed at encouraging communication and understanding the issues rather than assessing the legal merit of the parties.[9]

Although it is clear today that judges have the duty to encourage conciliation, this duty also has its limits. In the case regarding Justice Peter Bradley,[10] the Conseil de la magistrature du Québec found that the judge had gone beyond what was considered reasonable conduct when insisting on reaching conciliation between the parties despite the fact they had stated they could not come to an agreement and they wanted the judge to rule on their dispute.

The Court of Appeal of Québec also ruled in *Bradley* on the judge's conduct, which attempted to justify his insistence on bringing the parties to an agreement by his statutory obligation to encourage conciliation. For the Court of Appeal of Québec, the conduct of Justice Bradley could not be justified by the mere obligation to conciliate the parties. The mediation and conciliation mission of the courts does not change anything, according to the Court of Appeal of Québec, with regard to the fact that these methods of resolution cannot be imposed on the parties. On this, the Court of Appeal stated the following:

> [47] The provisions of the new *Code* may not be used to justify behaviour that constitutes serious ethical misconduct, made evident in this case by the mere reading of the transcripts and listening to the recording. Adjourning the hearing was not an appropriate solution to the parties' refusal to lend themselves to a pointless encounter. Judge Bradley may have thought his role was to verify whether the parties were open to compromise but, once this had been done – several times in this instance, – that role was surely

[9] Jean-François Robert and Elvis Grahovic. *L'accès à la justice et le succès en conférence de règlement à l'amiable (CRA) mythes et réalités*, (2014) 73, Revue du Barreau, 437, at pages 439 to 440.

[10] *Drolet c. Bradley,* 2017 CanLII 4771 (QCCM)

> not, out of impatience or for any other reason, to refuse repeatedly to proceed with a hearing for which the parties were prepared and which could not be adjourned without causing them unnecessary inconvenience.
>
> [emphasis added]

It is true, however, that in its judgment, the Court of Appeal concluded that Judge Bradley's conduct does not justify his removal but simply a reprimand.

The Review Panel understands that, in the case of interim family motions, the judge has the duty to ask the parties if they have tried to find a solution to their problem. It regularly happens that the judge will suggest various possible solutions and ask the parties to discuss them outside the courtroom. It also occasionally happens that the judges suggest to the parties what their decision is likely to be, in order to incite them to find a solution or compromise that is more in accordance with reality than a judgment that will be imposed on them.

On the other hand, the obligation to encourage conciliation in family matters must not be imposed with authority and should not have the effect of preventing counsel for the parties from presenting their arguments or result in discouraging them from obtaining a judgment. The Review Panel also feels it should not lead to a monologue by the judge, to inappropriate comments, or to the parties' feeling that the judge has already made his decision.

In this case, the Review Panel can only note that the tone used by the judge was not courteous, cordial or friendly as he alleged. His tone was paternalistic, often impatient and aggressive. His words were harsh and clearly reflected his disapproval of the parties' separation, which he felt resulted in inconveniences for the child.

But there is more. According to the Review Panel, the statements the complainant is accusing the judge of making, in particular the suggestion that getting back together was the "magic solution" and the threat to order the child to residence (that the parents would not see him again until the end of June) or even giving him up for adoption were not only inappropriate but they were intimidating, guilt-inducing and threatening. The Review Panel shares the opinions of Chief Justice Joyal and Chief Justice Fournier on this subject.

Justice Dugré certainly did not have the power to impose such measures and the hearing was not on the custody of the child. It seems very clear, when listening to the recording, that Justice Dugré used the threat to force the parties to agree. There is nothing, according to the Review Panel, that is "metaphoric" or funny in the remarks made by Justice Dugré. They are simply gratuitous, impertinent and inappropriate.

The Review Panel does not believe that the obligation on the judge to encourage conciliation between the parties can justify such a flagrant lack of sensitivity or empathy towards the parties. It is also difficult to believe that the judge did not notice that the complainant was crying and it is more than likely that these tears were related to the statements made by Justice Dugré.

Lastly, this lack of sensitivity by the judge is shown in his justifications. At no time did Justice Dugré apologize for making such comments or indicate that he regretted the impact they had on the complainant. On the contrary, he accuses the complainant of not having understood the nature of his interventions and her counsel for not explaining them to her.

All things considered, the Review Panel notes that the complainant's allegations are serious and the justifications presented by Justice Dugré do not allow the seriousness to be mitigated at this point.

It must now be determined whether the case is sufficiently serious to justify the removal of the

judge, with regard to the criteria stated by the Supreme Court in *Therrien*.

Seriousness of the case with regard to the criteria in *Therrien*

In summary, the Review Panel, relying on the information available regarding the case, notes that in general, Justice Dugré conducted the hearing in this case brusquely, was often impatient and aggressive. Did the circumstances, in particular the late filing of the complainant's request to change schools, justify the judge's irritation? The Review Panel is of the opinion that an Inquiry Commttee would be able to assess the judge's attitude and conduct in this regard and find there was misconduct.

With regard to the judge's suggestions to put the child in residence or to give him up for adoption and his "magic solution" that was to order the parties to get back together until their child turned 18, the Review Panel deems these comments to be inappropriate and unacceptable and believes that they could reasonably have been perceived as bullying and making the parents feel guilty. In its opinion, an Inquiry Committee could find that they are sufficiently serious to warrant a recommendation to remove the judge as they are likely to patently and entirely violate the impartiality, integrity and independence of the judiciary and they undermine the confidence of those who appear before the courts or the public in the justice system and are a sign of the judge's inability to perform his duties. Similarly, the judge fails to listen and monopolized the hearing, often to make his own irrelevant comments.

The Review Panel also feels that the comments to counsel for the parties ("I imagine you would have liked to be raised like that?") did not have their place in a court room.

The judge's lack of sensitivity, his failure to listen to the parties, his intimidating and guilt-inducing comments and numerous inappropriate remarks, in the opinion of the Review Panel, represent the judge's lack of understanding of his role and his duty to be discreet and could lead an Investigation Committee to find that Justice Dugré was not impartial.

On this, the Review Panel believes that an Inquiry Committee might find that there was serious misconduct that might lead an Inquiry Committee to recommend the removal of Justice Dugré.

As for the justifications Justice Dugré raised, the Review Panel has great difficulty imagining that the obligation for conciliation under article 400 of the *Civil Code of Québec* could justify such behaviour. It is not one or two remarks of questionable taste, but all the elements as a whole (tone used, criticism, impatience, vexatious and disrespectful comments, etc.) that indicate inappropriate conduct by the judge who is presiding over a Court hearing. An Inquiry Committee might conclude that the case is serious enough to justify the removal of Justice Dugré.

The Review Panel is perplexed by the judge's argument that he was not understood by the parties, that his comments about putting the child in residence or up for adoption constitute "metaphors" and that counsel for the complainant failed in her duty to explain that Justice Dugré was effecting a conciliation. An Inquiry Committee could consider the conduct and statements of Justice Dugré as well as his justifications, but still find that there was serious enough misconduct to justify his removal.

The Review Panel makes note of the content of Me Fournier's August 27, 2019, letter. According to this letter, Justice Dugré recognized that some of his statements could have been interpreted negatively and should have been avoided. He expressed a will to "correct a way of proceeding that could be considered problematic" and added that he had already changed the way he addresses conciliations and has adopted a more neutral tone. However, given the seriousness of the statements the judge made and his conduct, the Panel does not believe that this is sufficient in this case to conclude that the Inquiry Committee would not find that it is relevant to remove the judge.

The Inquiry Committee could determine whether Justice Dugré has taken any concrete corrective measures and if so, whether they are sufficient to correct his problematic conduct.

Lastly, although the Review Panel considers the lack of prior complaints handled by the Council's Judicial Conduct Committee resulting from misconduct of the same nature is an important element, it finds nonetheless that this case might be serious enough to justify the removal of the judge.

CONCLUSIONS

As a result, the Review Panel considers that an Inquiry Committee is to be constituted into the conduct of Justice Dugré who is the subject of the complaint by Stéphanie Simard in file CJC-18-318 and hereby formulates the questions to be addressed by the Inquiry Committee:

1. **Did Justice Dugré fail in the proper execution of his office in the hearing before him on September 7, 2018, in *Simard v. Lépine*, in his behaviour towards the parties and in the comments he made at this hearing?**

2. **Do the reasons raised by Justice Dugré to justify his conduct and comments and, in particular, his duty to conduct a conciliation of the parties, lead to the conclusion that Justice Dugré did not fail in the proper execution of his office?**

3. **If appropriate, was Justice Dugré's failure in the proper execution of his office serious enough to warrant recommending his removal, in accordance with the criteria set out in the *Judges Act* and the case law?**

August 30, 2019

Original signed
The Honourable Mary Moreau
Chief Justice of the Court of Queen's Bench of Alberta

Original signed
The Honourable Richard Chartier
Chief Justice of Manitoba

Original signed
The Honourable Brigitte Robichaud
Justice of the Court of Queen's Bench of New Brunswick

Original signed

André Dulude

Original signed

The Honourable Alexandra Hoy
Associate Chief Justice of the Court of Appeal
for Ontario and Chairperson of the Review
Panel