Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Office of the Executive Council, and the Judicial Council

Appellants

v.

Judge Jocelyne Moreau-Bérubé *Respondent*

Indexed as: Moreau-Bérubé *v*. New Brunswick (Judicial Council)

Neutral citation: 2002 SCC 11.

File No.: 28206.

2001: June 19; 2002: February 7.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for new brunswick

Administrative law -- Judicial review -- Standard of review -- Natural justice -- Rules of procedural fairness -- Provincial Judicial Council recommending that Provincial Court judge be removed from office because of statements she made in court -- Applicable standard of review of Council's decision -- Whether Council violated rules of procedural fairness by imposing penalty more severe than that

recommended by inquiry panel -- Whether Council bound to follow findings of inquiry panel -- Whether Council's decision to recommend removal of judge justified -- Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 6.11(4).

Constitutional law -- Judicial independence -- Security of tenure of judges -- Provincial legislation empowering Lieutenant-Governor in Council to remove Provincial Court judge without first addressing Legislative Assembly -- Whether procedure set out in legislation to sanction misconduct of Provincial Court judges meets minimal standards required to ensure respect for principle of judicial independence -- Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 6.11(8).

The respondent, a judge of the New Brunswick Provincial Court, made derogatory comments about the residents of the Acadian Peninsula while presiding over a sentencing hearing. Three days later, while presiding in an unrelated hearing, she made an apology. The Judicial Council received several complaints alleging misconduct and an inability on the part of the respondent to continue to perform her duties as a Provincial Court judge. The majority of a three-member inquiry panel, appointed to conduct an inquiry and report findings, concluded that the respondent's comments did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended that she receive a reprimand. Under s. 6.11(4) of the *Provincial Court Act*, the Council was then required to make a decision "[b]ased on the findings contained in the [panel's] report". Despite the panel's findings the Council concluded that the respondent's remarks created a reasonable apprehension of bias and a loss of the public trust and recommended that she be removed from her office as judge. The respondent filed an application for judicial review of the Council's decision. The Court of Queen's Bench quashed the Council's decision on the grounds that the rules of natural justice had been breached and that the Council had

exceeded its jurisdiction by ignoring findings of fact made by the panel. The majority of the Court of Appeal upheld that decision.

Held: The appeal should be allowed and the decision of the New Brunswick Judicial Council should be restored.

This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review for a decision from an administrative tribunal. Here, a consideration of the relevant factors leads to the conclusion that a high degree of deference should be afforded to the Judicial Council's decisions.

A core principle of judicial independence is the liberty of the judge to hear and decide cases without fear of external reproach. Judicial councils as well as reviewing courts must remain acutely alive to the high level of protection that applies to comments made by judges in the conduct of court proceedings. However, while judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole and that the harm alleged is not curable by the appeal process. Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the *Provincial Court Act*. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, is eminently

qualified to render a collegial decision regarding the conduct of a judge. A single judge sitting in judicial review of a decision of the Council would not enjoy a legal or judicial advantage.

While the proper interpretation of s. 6.11(4) of the Act, as to whether it binds the Judicial Council to the findings of fact made by the inquiry panel, is a question of law normally attracting a "correctness" standard of review, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference where other factors of the pragmatic and functional analysis suggest such deference is the legislative intention. In this case, the Council was interpreting an operational provision within its own statute, which conferred upon it a special and unique decision-making role within the justice system. The Council must be regarded as having a reasonable degree of specialization and a high level of expertise. Reviewing courts should not intervene unless the interpretation adopted by the Council is not one that the provision can reasonably bear. Applying the proper standard of review to the interpretation given by the Council to the scope of its mandate based on its interpretation of s. 6.11(4), that standard being one of reasonableness *simpliciter*, the reviewing judge and the majority of the Court of Appeal should not have substituted their interpretation of that provision for the one adopted by the Council. In any event the interpretation given by the Council should be upheld even on a correctness standard. To suggest that the words "based on" in s. 6.11(4) have a binding effect creates a number of inconsistencies and incongruities within the Act. Moreover, any delegation of decision-making power from a tribunal to another body must be clearly and expressly authorized by statute. In this case, the Act clearly indicates that the Council is to make the decision with regard to the sanction, if any, that should be imposed. The words "based on" cannot be read to permit an abdication of that authority.

The Council's ultimate decision to recommend the respondent's removal from office, which is a question of mixed law and fact, was justifiable. The Council must serve its purpose with some degree of authority and finality, and its conclusions on questions of mixed law and fact should be afforded a high degree of deference and should not be interfered with unless they are patently unreasonable. It was within the Council's power to draw its own conclusions, and, in light of the sweeping and generalized nature of the respondent's derogatory comments, the conclusion reached by the Council was not patently unreasonable. Even on a standard of reasonableness *simpliciter*, there is no basis to interfere with the Council's decision.

Evaluating whether procedural fairness has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority. The Council did not violate the respondent's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. Acknowledging that the nature of these disciplinary proceedings imposes on the Council a stringent duty to act fairly, there was no breach of the rules of natural justice in this case.

The procedure set forth by the Act to sanction misconduct of a Provincial Court judge does meet the minimal standards required to ensure respect for the principle of judicial independence.

Cases Cited

Followed: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; **referred to:** *Michaud v. Institut des comptables agréés (N.-B.)* (1994), 149 N.B.R. (2d) 328; *College of Physicians and Surgeons (Ont.) v. Petrie* (1989), 32 O.A.C. 248; *Jackson v. Saint John Regional Hospital* (1993), 136 N.B.R. (2d) 64; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595; *R. v. Ewanchuk* (1998), 13 C.R. (5th) 324; *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)* (1999), 71 Alta. L.R. (3d) 214, 1999 ABQB 309, aff'd (2000), 192 D.L.R. (4th) 540, 2000 ABCA 241; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525.

Statutes and Regulations Cited

Inquiries Act, R.S.N.B. 1973, c. I-11, s. 8.

Provincial Court Act, R.S.N.B. 1973, c. P-21 [am. 1987, c. 45], ss. 6 [rep. & sub. 1985, c. 66, s. 2], 6.1(1) [am. 1990, c. 21, s. 1], 6.6(1), (3), 6.7(1) to (5), 6.8(1), 6.9(1) [*idem*, s. 2], (7), (8), (10), 6.10(1), (3), 6.11(1) to (4), (8).

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APPEAL from a judgment of the New Brunswick Court of Appeal (2000), 233 N.B.R. (2d) 205, 194 D.L.R. (4th) 664, [2000] N.B.J. No. 368 (QL), 2000 NBCA 12, affirming a decision of the Court of Queen's Bench (1999), 218 N.B.R. (2d) 256, [1999] N.B.J. No. 320 (QL). Appeal allowed.

Cedric L. Haines, for the appellant Her Majesty the Queen in Right of New Brunswick.

J. C. Marc Richard and *Chantal A. Thibodeau*, for the appellant the Judicial Council.

Anne E. Bertrand, *Paul Bertrand* and *Michael Phelan*, for the respondent.

The judgment of the Court was delivered by

ARBOUR J. --

I. Introduction

1 This appeal involves a decision of the Judicial Council of New Brunswick ("the Council") which recommended the removal from office of a Provincial Court judge because of statements she made in court, while presiding over a sentencing hearing. The Council concluded that her remarks created a reasonable apprehension of bias and a loss of the public trust. This Court must first establish the applicable standard of review of the Council's decision. We must then decide whether the Council violated certain rules of procedural fairness by imposing a penalty more severe than that recommended by an inquiry panel, whether and to what extent the Council was statutorily bound to follow findings of an inquiry panel, and whether the Council's final decision to recommend the removal of the judge was justified in light of the evidence at its disposal. For reasons that are set out in full below, I have concluded that the Council was entitled to decide as it did and that its decision should be restored.

II. Relevant Statutory Provisions

2 *Provincial Court Act*, R.S.N.B. 1973, c. P-21

6 Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

6.1(1) There is hereby continued a Judicial Council which shall be composed of

(*a*) the Chief Justice of New Brunswick, who shall be chairman,

(*b*) a judge of The Court of Appeal of New Brunswick, who shall be appointed by the Chief Justice of New Brunswick and who shall be the vice-chairman,

(*c*) three judges of The Court of Queen's Bench of New Brunswick who shall be appointed by the Chief Justice of that Court, of whom the Chief Justice of The Court of Queen's Bench of New Brunswick may be one of the appointees,

(*d*) two judges other than the chief judge or associate chief judge, who shall be appointed by the chief judge, and

(*e*) three other persons who shall be appointed by the Lieutenant-Governor in Council.

. . .

6.6(1) The Judicial Council shall receive and the chairman shall refer to the chief judge for investigation all written communications suggesting any misconduct, neglect of duty or inability to perform duties on the part of a judge.

. . .

6.6(3) Where a written communication comes to the attention of the chief judge, whether by way of referral from the chairman or otherwise, suggesting any misconduct, neglect of duty or inability to perform duties on the part of a judge, the chief judge shall investigate the matter.

6.7(1) The chairman shall designate one or more members of the Judicial Council for the purpose of receiving reports referred to in this section.

6.7(2) Where a written communication is received by the chief judge or associate chief judge, whether by way of referral from the chairman or otherwise, the chief judge or associate chief judge, as the case may be, shall within fifteen days after receiving the written communication, or within such longer period as the chairman permits, report on the results of the investigation to a member of the Judicial Council who has been designated by the chairman for that purpose.

6.7(3) Based upon the report, the member of the Judicial Council who receives the report shall, within ten days after receiving the report, recommend to the chairman whether or not an inquiry should be held.

6.7(4) A recommendation that an inquiry not be held is subject to review by the Judicial Council which may determine that an inquiry should be held.

6.7(5) A recommendation that an inquiry be held is not subject to review by the Judicial Council.

6.8(1) At any time after the receipt of a written communication suggesting misconduct, neglect of duty or inability to perform duties on the part of a judge, the Judicial Council may suspend the judge whose conduct is in question from the performance of the judge's duties with pay, pending the outcome of an investigation, inquiry or formal hearing, and may lift the suspension prior to the conclusion of an investigation, inquiry or formal hearing, where a change in circumstances warrants the lifting of the suspension.

. . .

6.9(1) Where an inquiry is recommended under subsection 6.7(3) or where the Judicial Council determines on review under subsection 6.7(4) that an inquiry should be held, the chairman shall

(*a*) appoint a panel consisting of three members of the Judicial Council. . . .

(*b*) appoint a barrister to act as counsel to the panel, and

(*c*) designate one of the members of the panel, other than a judge of the court, as the panel chairman.

. . .

6.9(7) The counsel to the panel shall inquire into the suggestions of misconduct, neglect of duty or inability to perform duties on the part of a judge received in a written communication referred to in section 6.6 for the purpose of gathering all information that may be relevant to preparing a formal complaint.

6.9(8) The counsel to the panel shall present the findings to the panel who shall then determine whether there is sufficient evidence to warrant holding a formal hearing.

. . .

6.9(10) Where the panel determines that there is sufficient evidence to warrant holding a formal hearing, the panel shall advise the Judicial Council that a formal hearing is to be conducted and shall instruct the counsel to the panel to prepare a formal complaint setting forth the

allegations of misconduct, neglect of duty or inability to perform duties against the judge whose conduct is in question.

. . .

6.10(1) Where the panel has made a determination under subsection 6.9(10), it shall conduct a formal hearing respecting the allegations set forth in the formal complaint referred to in subsection 6.9(10) and it has all the powers of a commissioner under the *Inquiries Act*.

. . .

6.10(3) Notice of the formal hearing together with a copy of the formal complaint referred to in subsection 6.9(10) shall be served on the judge whose conduct is in question in accordance with the regulations.

. . .

6.11(1) After the formal hearing, the panel shall report to the chairman its findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question.

6.11(2) The chairman shall place the report of the panel before the Judicial Council for a decision.

6.11(3) The Judicial Council shall give a copy of the report of the findings of the panel to the judge whose conduct is in question and shall advise the judge of the judge's right to make representations to it either in person or through counsel and either orally or in writing, respecting the report prior to the taking of action by the Judicial Council under subsection (4).

6.11(4) Based on the findings contained in the report and the representations, if any, made under subsection (3), the Judicial Council may

(*a*) dismiss the complaint,

(*b*) direct the chief judge to issue a reprimand to the judge with such conditions as the Judicial Council considers appropriate,

(*c*) where the conduct of the chief judge is in question, reprimand the chief judge with such conditions as the Judicial Council considers appropriate, or

(*d*) recommend to the Lieutenant-Governor in Council that the judge be removed from office.

. . .

6.11(8) The Lieutenant-Governor in Council shall, on receipt of the Judicial Council's recommendation under paragraph (4)(d), remove the judge from office.

III. Facts

3 The respondent, a judge of the New Brunswick Provincial Court, was presiding over a sentencing hearing in *R. v. LeBreton*, [1998] N.B.J. No. 120 (QL). The two accused had been found guilty of several charges, including breaking and entering and theft, and both had extensive criminal records. When passing sentence on February 16, 1998, the respondent said this:

> [TRANSLATION] These are people who live on welfare and we're the ones who support them; they are on drugs and they are drunk day in and day out. They steal from us left, right and centre and any which way, they find others as crooked as they are to buy the stolen property. It's a pitiful sight. If a survey were taken in the Acadian Peninsula, of the honest people as against the dishonest people, I have the impression that the dishonest people would win. We have now got to the point where we can no longer trust our neighbour next door or across the street. In the area where I live, I wonder whether I'm not myself surrounded by crooks. And, that is how people live in the Peninsula, but we point the finger at outsiders. Ah, we don't like to be singled out in the Peninsula. And it makes me sad to say this because I live in the Peninsula now. It's my home. But look at the honest people in the Peninsula, they are very few and far between, and they are becoming fewer and fewer. And do you think these people care that it cost hundreds and thousands of dollars to repair that? They don't give a damn. Are they going to pay for it? No, not a dime. All the money is spent on coke. These people, they don't give a damn. It doesn't bother them one bit, they just -- do you think you are going to arouse their sorrow and sympathy by saying that it costs hundreds and thousands of dollars. We, it bothers us because we are the ones who pay, because we have to wake up every morning and go to work. When we receive our paycheck, three quarters are taken away to support these people. They, don't care. They have nothing to do. They party all day and party all night and that's all they do. They don't care, not one bit. We on the other hand, we have to care because it is our property. These people, if they don't have enough they go to welfare and they get even more and that is how it works. So, I do not want to interrupt you, but I understand what you mean when you say that it cost thousands of dollars and counsel here understand, but the type of people we are dealing with here today in this courtroom, they couldn't care less. Whether it cost one thousand dollars to repair it or whether it cost only two cents, whether it requires six police officers to investigate, they find it funny. Their mentality is that "The pigs will not be at Tim's while they are chasing after us."
>
> (As reproduced in the New Brunswick Court of Appeal judgment, *Conseil de la magistrature (N.B.) v. Moreau-Bérubé* (2000), 233 N.B.R. (2d) 205, 2000 NBCA 12, at para. 5, hereinafter *Moreau-Bérubé* (N.B.C.A.).)

4 Three days later, while presiding in an unrelated hearing, Judge Moreau-Bérubé made this apology:

> [TRANSLATION] On Monday of this week, at the sentencing hearing of two gentlemen, I made certain remarks concerning honesty and dishonesty. I should point out that at the time, unlike this morning, I was speaking without prepared notes.
>
> After court on Monday, in rethinking about my remarks, I quickly realized that I had made a serious mistake and that the words I had spoken in open court were not those that I intended to speak and that I had in mind. In other words, my words went beyond my thinking and I misspoke myself. I certainly had no intention of impugning the honesty of my fellow citizens of the Acadian Peninsula. As a matter of fact, in a case preceding that of those two gentlemen, I had spoken of the kindness and generosity of people in this area who had given large sums of money to somebody who defrauded them. By my comments, I wanted to refer only to those directly or indirectly involved in these types of offences.
>
> Fully realizing my mistake, at the Tuesday sentencing hearing, I tried to correct my mistake, but it is obvious to me that I did not make myself quite clear or precise and that some of my statements of Tuesday were not understood.
>
> So, this morning, I very candidly, clearly and specifically offer my most sincere and profound apology to the people of the Acadian Peninsula and, in particular, to those I have offended. It was never my intention, because I am particularly concerned about the welfare of the people of this area.
>
> I have never doubted and I have no doubt about the honesty and integrity of the people of the Acadian Peninsula. I made a huge mistake, I am human. I am profoundly sorry and I apologize sincerely. Thank you.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 6.)

5 The Judicial Council, a body created under the *Provincial Court Act*, R.S.N.B. 1973, c. P-21, received several complaints about Judge Moreau-Bérubé's comments of February 16, 1998. These complaints alleged misconduct and that Judge Moreau-Bérubé was unable, in light of her comments, to continue to perform her duties as a Provincial Court judge. The complaints were investigated by the Chief Judge and reported to a designated member of the Council, pursuant to ss. 6.6(3) and

6.7(2) respectively. Guided by ss. 6.7(3), 6.9(1), 6.9(7) and 6.9(8) of the Act, the designated Council member recommended that an inquiry be held; a three-member inquiry panel was appointed, chaired by Mr. Justice Riordon, a judge of the New Brunswick Court of Queen's Bench, and also composed of Judge Pérusse of the Provincial Court and Ms. Susan Calhoun, and the panel determined that there was sufficient evidence to warrant a formal hearing. A formal complaint was drafted by the inquiry panel, pursuant to s. 6.9(10) of the Act, as follows:

> [TRANSLATION] 1. THAT Her Honour Judge Jocelyne J. Moreau-Bérubé committed a misconduct on or about February 16, 1998, at Tracadie-Sheila, in the province of New Brunswick, as a result of remarks she made about the honesty of residents of the Acadian Peninsula at a sitting of the Provincial Court in the Acadian Peninsula.
>
> 2. THAT as a result of the remarks she made about the honesty of the residents of the Acadian Peninsula, Her Honour Judge Jocelyne J. Moreau-Bérubé is no longer able to perform her duties as a judge.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 12.)

6 As dictated by s. 6.11(1) of the Act, the panel was then required to conduct an inquiry and report its findings "of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question". To this end, the panel was required under s. 6.10(1) to hear and accept any relevant evidence, even if not admissible under normal trial rules within the province of New Brunswick (as per s. 8 of the *Inquiries Act*, R.S.N.B. 1973, c. I-11). The panel heard 17 witnesses, and 25 documents were filed.

7 The majority of the panel (Riordon J. and Ms. Susan Calhoun) made the following relevant findings of fact:

> [TRANSLATION] I must therefore conclude that the comments made by Judge Moreau-Bérubé during a trial in Tracadie-Sheila on February 16, 1998 constitute inappropriate judicial expression. The remarks were incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge makes them even more inappropriate and aggressive. My conclusion is therefore that the remarks made by Judge Moreau-Bérubé constitute and amount to misconduct on her part. By uttering those remarks, Judge Moreau-Bérubé exceeded what is considered appropriate judicial conduct and made comments denigrating the honesty of the residents of the Acadian Peninsula while she was presiding a trial.
>
> . . .
>
> In determining whether Judge Moreau-Bérubé was biassed in behaving the way she did, which would lead to a lack of public confidence in her, we have to consider whether she has established beliefs which may be an obstacle in deciding cases impartially and with an open mind. We have to determine if the inappropriate remarks made in this case amount to judicial misconduct warranting her removal from office.
>
> In applying the test, taking into account all the evidence and interpretations concerning this complaint, it is my finding that the conduct of Judge Jocelyne J. Moreau-Bérubé does not warrant her removal from office.
>
> . . .
>
> I find that bias or the appearance of bias has not been established nor have the consequences leading to a loss of public confidence.
>
> Upon considering all of the evidence adduced, I am not ready to find that Judge Moreau-Bérubé has an established belief or conviction that residents of the Acadian Peninsula are dishonest nor that her neighbours are not trustworthy nor even that there are few honest people in the Acadian Peninsula.
>
> It has not been established upon my perusal of all this evidence that Judge Moreau-Bérubé holds a strong belief detrimental or potentially detrimental to her impartiality in deciding various cases.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 22 (emphasis deleted).)

8 The majority of the panel concluded that the comments uttered by Judge Moreau-Bérubé did constitute misconduct, but that she was still able to perform her duties as a judge. They recommended that Judge Moreau-Bérubé should receive a reprimand. The minority (Judge Pérusse) found that the comments, in the

circumstances of the case, did not constitute misconduct. The panel was unanimous that Judge Moreau-Bérubé was able to continue exercising her judicial duties.

9 Pursuant to ss. 6.11(2) and 6.11(3) of the Act, the report of the inquiry panel was presented to the Council for a decision, and a copy was sent to Judge Moreau-Bérubé so that she could make informed representations before the Council. The Council received her submissions pursuant to s. 6.11(3) of the Act, and her counsel argued that the formal complaint should be dismissed.

10 Despite findings by the panel that Judge Moreau-Bérubé did not have a pre-established belief or conviction that residents of the Acadian Peninsula are dishonest or untrustworthy, the Council characterized the issue before it as follows:

> [TRANSLATION] . . . given the finding of misconduct by the panel, the real issue before the Council is whether there is a reasonable apprehension that Judge Moreau-Bérubé would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the pre-conceived opinions and ideas that she expressed when making a determination based on the evidence in a given case.
>
> (As reproduced in *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé* (1999), 218 N.B.R. (2d) 256, at para. 39 (emphasis deleted), hereinafter *Moreau-Bérubé* (N.B.Q.B.).)

11 Section 6.11(4) dictates that, "[b]ased on the findings contained in the report and the representations, if any, made under subsection (3), the Judicial Council may

> (*a*) dismiss the complaint,
>
> (*b*) direct the chief judge to issue a reprimand to the judge with such conditions as the Judicial Council considers appropriate,
>
> (*c*) where the conduct of the chief judge is in question, reprimand the chief judge with such conditions as the Judicial Council considers appropriate, or

> (*d*) recommend to the Lieutenant-Governor in Council that the judge be removed from office."

12 The Council recommended that Judge Moreau-Bérubé be removed from her office as judge. In doing so, the Council followed the criterion established with regard to apprehension of bias in the Marshall Report (*Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990)) and asked [TRANSLATION] "[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?" (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 22.) Based on these criteria, and on a series of factors that, in its view, a reasonable observer would consider in rendering an informed judgment about an apprehension of bias, the Council came to the following conclusion:

> [TRANSLATION] Taking into account all the circumstances surrounding this matter and applying the foregoing tests and the principles of judicial impartiality and independence established by the Supreme Court of Canada in the cases referred to, we believe that in the event that Judge Moreau-Bérubé were to preside over a trial, a reasonable and well-informed person would conclude that the misconduct of the judge has undermined public confidence in her and would have a reasonable apprehension that she would not perform her duties with the impartiality that the public is entitled to expect from a judge.
>
> Accordingly, we recommend that she be removed from office.
>
> (As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 90.)

13 After becoming aware of the Council's decision, the respondent wrote the provincial Cabinet, asking for a stay of her removal while she applied for judicial

review. Nevertheless, the Cabinet removed the judge pursuant to s. 6.11(8), which states:

> The Lieutenant-Governor in Council shall, on receipt of the Judicial Council's recommendation under paragraph (4)(d), remove the judge from office.

14 The respondent filed an application for judicial review of the Council's decision before the New Brunswick Court of Queen's Bench, and the Council's recommendation was quashed. The majority of the New Brunswick Court of Appeal dismissed the appeal (Rice and Ryan JJ.A.), Drapeau J.A. dissenting.

IV. The Courts Below

A. *New Brunswick Court of Queen's Bench* (1999), 218 N.B.R. (2d) 256

15 The application for judicial review of the Council's decision came before Angers J. of the New Brunswick Court of Queen's Bench. The Judicial Council's decision was quashed on two main grounds. First, Angers J. found that the rules of natural justice, in particular the principle of *audi alteram partem*, had been breached since the respondent had never been advised that a penalty more severe than the one recommended by the panel could be imposed by the Council. Angers J. suggested that it was a fundamental principle that a tribunal imposing a more substantial penalty than the one which had been recommended on a joint submission, or, as in this case, by a panel committee, should indicate that it is considering such a penalty and request submissions thereon (*Michaud v. Institut des comptables agréés (N.-B.)* (1994), 149 N.B.R. (2d) 328 (C.A.); *College of Physicians and Surgeons (Ont.) v. Petrie* (1989), 32 O.A.C. 248 (Div. Ct.); *Jackson v. Saint John Regional Hospital* (1993), 136 N.B.R.

(2d) 64 (C.A.); S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at pp. 212-13).

16 Angers J. found that Judge Moreau-Bérubé had no reason to suspect that dismissal was being considered as a possible sanction. Dismissal had not been suggested during the hearing, and she had never been expressly informed that it was being considered. Moreover, while the Council had the discretion to suspend Judge Moreau-Bérubé pending its decision, she had been allowed to continue hearing cases for some 14 months after the impugned remarks were made (although, as I note later, she had been reassigned to a different district). Angers J. concluded it was a breach of natural justice not to have requested her to make submissions with the understanding that a dismissal was being considered. As he stated at para. 27:

> [TRANSLATION] . . . the defence or acceptance of a reprimand is one thing, removal from office is an entirely different matter. It is inconceivable to me that a judge would be removed from office without having been able to defend against such action since he or she did not receive any indication of such threat, except as a mere possibility under the Act.

17 As the second ground for quashing the decision of the Council, Angers J. found that the Council had exceeded its jurisdiction by ignoring findings of fact made by the panel, which included the finding that Judge Moreau-Bérubé was able to continue performing her judicial duties. Based on s. 6 of the Act, Angers J. found that the Council has the power to remove a judge simply for misconduct, and does not have to base a dismissal on a finding by the panel that the judge is unable to perform her duties as a judge. However, given that the Council had identified as a basis for her dismissal that Judge Moreau-Bérubé [TRANSLATION] "would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the pre-conceived opinions and ideas that she expressed when making

a determination based on the evidence in a given case" (see *Moreau-Bérubé* (N.B.Q.B.), *supra*, at para. 39 (emphasis deleted)), Angers J. concluded the Council had overruled certain findings of fact made by the panel. In this respect, Angers J. stated, at para. 41-42:

> [TRANSLATION] Now, the panel had expressly concluded that the judge did not have preconceived notions, that she did not really believe what she had said, that she did not have any "firm belief or conviction" in the remarks she had made. The remarks were spontaneous and off the cuff, in the context of passing sentence at the end of a particularly busy day.
>
> In my opinion, under the Act, the Council was bound by the panel's findings of fact and therefore it exceeded its jurisdiction in finding that the judge had expressed "pre-conceived opinions or beliefs".

18 Although he concluded that proper notice had not been given to the Attorney General, as required, Angers J. briefly discussed the constitutionality of the *Provincial Court Act* provisions which grant the power to remove a judge from office. He held the matter had been settled in *Valente v. The Queen*, [1985] 2 S.C.R. 673, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, where this Court recognized that removal of a provincial court judge from office did not have to be done by a legislative or executive body, and that a system such as the one in New Brunswick where the Lieutenant-Governor in Council is bound by a decision of the Judicial Council does not violate security of tenure of provincial court judges.

B. *New Brunswick Court of Appeal* (2000), 233 N.B.R. (2d) 205, 2000 NBCA 12

(1) Majority Judgment (Rice and Ryan JJ.A.)

19 The decision of Angers J. was appealed to the New Brunswick Court of Appeal on a number of grounds, including the following two:

1. The judge committed an error in law in finding that the Council had exceeded its jurisdiction and violated the rules of natural justice by not respecting the *audi alteram partem* rule.

2. The judge committed an error in law by concluding the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel.

20 On the first issue, the majority of the Court of Appeal concluded at para. 34:

> [TRANSLATION] . . . the reviewing judge was right in concluding that the Council had not observed this principle of natural justice. In my opinion, given the circumstances of this matter, the Council had to advise Judge Moreau-Bérubé that the penalty recommended by the panel could be disregarded by the Council and that she was liable to a more substantial penalty such as removal from office.

21 With regard to the second ground for appeal, the majority agreed with Angers J. that the Council committed a jurisdictional error by ignoring certain findings of fact made by the inquiry panel. While the Council may not be bound by recommendations made by the panel with regard to an appropriate sanction, the majority of the Court of Appeal concluded that findings of fact by the inquiry panel should have been afforded a high degree of deference. Rice J.A. reproduced at para. 37 the following from the Council's decision:

> [TRANSLATION] With all due respect for the opinion of the members of the majority, we are of the view that the panel is not empowered nor

> authorized to make such recommendations and that it therefore exceeded its powers. As a result, we feel it is necessary to state that the Council is not bound by the Panel's decision to make recommendations nor by the recommendations themselves. On the other hand, the Council adheres to the highest standard of deference as to the factual findings contained in the inquiry report submitted to it.

22 However, according to the majority, the Council did much more than simply disagree with recommendations made by the panel as to the sanction. Rather, the Council largely ignored certain findings of fact, replacing those with conclusions of their own. Rice J.A. referred to two key passages on that point at para. 40:

> [TRANSLATION] In light of the foregoing tests and given the finding of misconduct by the Panel, the real issue before the Council is whether there is a reasonable apprehension that Judge Moreau-Bérubé would not be able to act in a completely impartial manner in the performance of her duties because of not being able to set aside the preconceived opinions and ideas that she expressed when making a determination based on the evidence in a given case.
>
> . . .
>
> . . . Finally, we believe such a reasonable person would have to take into account the extreme seriousness and vehemence of the statements made by the judge, the fact that they attacked an entire community and went to the very core of the sense of integrity and honour of its every member, that the statements were made spontaneously and extemporaneously, but that given the length and the vehemence of her remarks, that they could not have been completely without thought. [Emphasis by Rice J.A.]

23 Since the inquiry panel had found that the judge had no preconceived or fixed idea with respect to the people of the Acadian Peninsula, Rice J.A. noted at para. 41 that:

> [TRANSLATION] It obviously flows from the foregoing that not only did the Council fail to recognize the jurisdiction of the panel to determine if the respondent was fit to perform her duties as a judge, but it even altered its findings with respect to the heedlessness of the remarks and the preconceived and fixed ideas of the judge as I have highlighted by underlining the relevant lines.

24 In light of this apparent "override" by the Council of the findings of fact made by the inquiry panel, the majority of the Court of Appeal concluded that the judgment of Angers J. quashing the dismissal was within his discretionary power. The majority held that the Council should have deferred to the panel in the same way that an appellate court must show deference in examining the findings of fact of a trial judge. In this case, Rice J.A. concluded the findings of fact by the inquiry panel were [TRANSLATION] "amply supported by the evidence" and [TRANSLATION] "[g]iven that evidence, they are consistent and irrefutable" (para. 45).

25 The majority of the Court of Appeal found no merit in the constitutional challenge and upheld the decision of Angers J.

(2) Dissenting Judgment

26 Drapeau J.A. concluded, as the majority did, that the constitutional challenge should be dismissed, but disagreed on the other two issues.

27 On the question of whether the Council exceeded its jurisdiction by ignoring certain findings of fact made by the inquiry panel, Drapeau J.A. decided that the heart of the issue was in the meaning to be given the words "based on" in s. 6.11(4), and whether it placed some obligation on the Judicial Council, or merely provided a foundation to assist the Council in its decision-making process.

28 Drapeau J.A. found no similarity between the expression "based on" and the expression "bound by", and suggested that the former would more appropriately be compared to "taking into account". According to the dissenting judge, equating the

words "based on" with "bound by" creates a number of inconsistencies within the Act, including:

> (i) Subsection 6.11(2) of the Act clearly provides that the panel report is to be rendered to the Council "for a decision", and the Act does not indicate anywhere that any other group or individual, including the inquiry panel, should have jurisdiction in this regard. If the Council was "bound" by findings of the panel with regard to the ability of Moreau-Bérubé J. to continue her duties as a judge, that decision would have effectively been made by the panel and not the Council.
>
> (ii) Subsection 6.11(3) grants the subject of the inquiry the right to make representations "respecting the report", which would be an empty and illusionary right if the findings of the panel were in any way entrenched and binding on the Council.
>
> (iii) Under s. 6.11(4), the Council is to make a decision "based on" not only the panel's report, but also representations made by the judge pursuant to s. 6.11(3). Thus, if the words "based on" are to be read as equivalent to "bound by", the Council would be obligated to render a sanction based on whatever the judge's submissions "respecting the report" happened to be.
>
> (My summary of Drapeau J.A., at paras. 135-141.)

29 According to Drapeau J.A., a more pragmatic approach to interpreting the words "based on" in s. 6.11(4) compels the Council [TRANSLATION] "to accept neither

the findings of the panel nor the representations of the judge whose conduct is in question, while acknowledging that the Council has the jurisdiction to attach such importance to either of these influences as it deems appropriate given the particular circumstances of each individual case" (para. 142). Drapeau J.A. found that Angers J. erred in principle in ruling that the Council had exceeded its jurisdiction in this regard, and further found that the Council was not patently unreasonable in choosing not to adopt all the findings of the panel. Since Judge Moreau-Bérubé had never testified under oath, Drapeau J.A. felt that the Council was in as good a position as the panel to draw conclusions about any preconceived opinions or fixed beliefs Judge Moreau-Bérubé might have, or whether her statements had created an appearance of bias such as to undermine the public trust in her as a judge.

30 Drapeau J.A. also disagreed with the majority on whether the Council properly respected the rules of natural justice. He acknowledged that, when considering issues of procedural fairness such as the one at bar, [TRANSLATION] "the law requires a high standard of justice when the right to continue one's profession is at stake" (para. 149). Further, Drapeau J.A. conceded that where a tribunal had lured the subject of a possible sanction into believing that a mutually agreed penalty would likely be imposed, and that there was nothing to gain in making submissions in that regard, the decision of that tribunal might not be upheld if a harsher penalty were then imposed. However, Drapeau J.A. felt that this was not a case where the subject of an inquiry had been misled in any way.

31 Judge Moreau-Bérubé had not suggested that her right to be heard had been infringed prior to the ruling of Angers J., who raised the *audi alteram partem* issue himself for the first time. Drapeau J.A. indicated that [TRANSLATION] "it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard" (para.

150). Before the Council itself, Judge Moreau-Bérubé was entitled to make representations pursuant to s. 6.11(3), and she did so, urging the Council to dismiss the complaint altogether. In the opinion of Drapeau J.A., the fact that she argued for a dismissal of the complaint re-emphasized that [TRANSLATION] "Judge Moreau-Bérubé did not concede before the Judicial Council that the Council was bound by the recommendation of its panel concerning the penalty" (para. 155).

32 Moreover, Drapeau J.A. indicated that the principal case relied on by Angers J. in his decision, *Michaud*, *supra*, involved the imposition of a harsher sanction than that envisaged as a result of a joint submission. Moreover, he noted that the enabling statute in *Michaud* gave the tribunal jurisdiction to recommend a penalty. This is clearly distinguishable from the current case, where there was no joint submission, and the inquiry panel had no statutory power to make recommendations with regard to sanction in the first place.

33 Drapeau J.A. concluded that the Judicial Council [TRANSLATION] "did not have to inform Judge Moreau-Bérubé that a recommendation for her removal could be made", and that [TRANSLATION] "[t]he Act is quite clear with respect to the actions that the Judicial Council may take following a finding of judicial misconduct" (para. 155). Based on the foregoing, Drapeau J.A. would have allowed the appeal, with the effect that the Decree of the Lieutenant-Governor in Council would be legally valid and enforceable, and Judge Moreau-Bérubé would be removed from her position as judge.

V. Issues

34 The appeal raises four issues, the first two requiring a determination of the applicable standard of review:

1. Did the Court of Appeal err in law by concluding that the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel?

2. Based on the panel report, representations made by Judge Moreau-Bérubé and all other evidence at the Council's disposal, was the conclusion that Judge Moreau-Bérubé could no longer serve as a Provincial Court judge justifiable?

3. Did the Court of Appeal err in law in finding that the Council had exceeded its jurisdiction and violated the rules of natural justice by not respecting the *audi alteram partem* rule?

The fourth issue is again the constitutional one:

4. Does the authority granted by s. 6.11(8) of the *Provincial Court Act* of New Brunswick, empowering the Lieutenant-Governor in Council to remove a Provincial Court judge without first addressing a legislative assembly, violate the principles of judicial independence, and more specifically security of tenure?

VI. Analysis

35 As indicated above, the first two issues in this appeal must be addressed in light of the standard of review applicable. I will therefore set out general observations about the level of deference with which courts should approach decisions

of judicial councils involving the security of tenure of provincial court judges, before turning to the specific issues arising from the Court of Appeal decision.

A. *Standard of Review*

36 Although articulating the applicable standard of review is a critical part of the analysis, the issue received minimal consideration in the courts below. It is important to approach the task at hand with a clear understanding of the amount of deference, if any, that should be afforded to the decision of the administrative body.

37 This Court's jurisprudence has evolved to endorse a pragmatic and functional approach to determining the proper standard of review, which focuses on a critical question best expressed by Sopinka J. in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18:

> [W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?

(See: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and generally *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.)

38 This pragmatic and functional approach creates a spectrum of levels of deference that may be required. In the words of Bastarache J. in *Pushpanathan*, *supra*, at para. 27, referring to *Southam*, *supra*, at para. 30:

> Traditionally, the "correctness" standard and the "patent unreasonableness" standard were the only two approaches available to a reviewing court. But in [*Southam*] a "reasonableness *simpliciter*" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the legislator. Indeed, the Court there described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end".

The more exacting end is represented by the correctness standard, which places relatively low deference on the decision under review and allows the court wide discretion to investigate, while at the more deferential end is the patently unreasonable standard. Reasonableness *simpliciter*, or unreasonableness, falls somewhere in the middle, as described by Iacobucci J. in *Southam*, *supra*, at para. 57:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

39 As articulated by this Court in *Pushpanathan*, *supra*, *Southam*, *supra*, and *Baker*, *supra*, there are four main factors, each not conclusive in and of itself, that must be considered in determining the proper standard of review for a decision from an administrative tribunal:

> (i) the nature of the problem under review, and whether it constitutes a question of law, fact or mixed law and fact;
>
> (ii) words within the tribunal's enabling statute, most importantly, whether a privative clause is present or absent;

(iii) the purpose of the tribunal's enabling statute, and whether that purpose lends itself to less or more deference; and,

(iv) whether the tribunal has any particular expertise in reference to the question under review.

40 I will now examine each of these four factors in the context of the current case.

(1) The Nature of the Problem

41 The two issues in this case where the question of an appropriate standard of review will be addressed, namely, whether the Court of Appeal erred in law by concluding the Council had exceeded its jurisdiction in ignoring certain findings of fact made by the inquiry panel and whether the conclusion that Judge Moreau-Bérubé could no longer serve as a Provincial Court judge was justifiable, can be characterized as a question of law and a question of mixed law and fact respectively. The proper interpretation of s. 6.11(4), in determining the extent to which the Council may have been "bound" by the inquiry panel's report, must be characterized as a question of law. Determining whether the Council was justified in concluding that Judge Moreau-Bérubé should be removed from the bench, on the other hand, is a question of mixed law and fact. The proper articulation of the apprehension of bias threshold by the Council, based on all the evidence available to it pursuant to s. 6.11(4) of the Act, clearly involves considerations of mixed law and fact.

(2) The Words of the Tribunal's Enabling Statute

42 The New Brunswick *Provincial Court Act* does not contain a privative clause, and there is no language in the statute to suggest that decisions made by the Judicial Council are to be considered final and conclusive. While the presence of a privative clause strongly suggests a legislative intent of strong deference by courts to the tribunal's decision, the absence of such a clause is not conclusive and the proper standard of review will be a function of other applicable factors (*Pushpanathan, supra, per* Bastarache J., at para. 30).

(3) The Purpose of the Statute Empowering the Tribunal and its Expertise

43 The intended purpose and function of an administrative tribunal, and its empowering statute, will play a large role in determining the appropriate standard of review of its decisions, as will the nature and extent of its expertise. As noted by Iacobucci J. in *Southam, supra,* these two categories often overlap and I find that here they are best dealt with together.

44 Judicial councils may be viewed as unique not only amongst administrative tribunals but even amongst professional disciplinary bodies. A tribunal charged with the task of disciplining provincial court judges does not fit into the more traditional specialized against non-specialized dichotomy for purposes of evaluating the appropriate standard of review. The first provincial judicial councils emerged in 1968 and 1969 (Ontario and British Columbia), and others were created over the following two decades in every province except Prince Edward Island. New Brunswick created its first Judicial Council in 1985. Thus, these administrative bodies are a relatively recent phenomena. However, the call for judicial accountability is not. Provincial and superior court judges had previously faced disciplinary action through various means, but always through *ad hoc* processes initiated and pursued through the

legislature. For example, in 1933 Judge Stubbs, an outspoken "socialist" judge in Manitoba, was investigated for judicial misbehaviour by a commissioner appointed under the *Judges Act* (*Journals of the House of Commons*, vol. LXXII, 5th Sess., 17th Parl., January 26, 1934, at p. 18). In the case of the former Mr. Justice Landreville of the Supreme Court of Ontario, the Law Society of Upper Canada struck a "special committee" to consider what might be done about Justice Landreville's decision to remain on the bench after he had been discharged by a magistrate on charges related to a fraudulent stock transfer. A commissioner was eventually appointed under the *Inquiries Act* (the Hon. Ivan C. Rand, formerly of this Court), and Justice Landreville was found "unfit for the proper exercise of his judicial functions" (*Inquiry Re: The Honourable Justice Leo A. Landreville* (1966), at p. 108). This report was subsequently tabled to the House of Commons, and the then Minister of Justice, Pierre Trudeau, told the House that resolutions for the removal of Justice Landreville would be introduced. Before this was done, Justice Landreville resigned, citing reasons of "health and wealth", but he defended his judicial record to the end (see M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), report prepared for the Canadian Judicial Council, at pp. 84-87). In the wake of such disciplinary hearings, the need for institutions such as the present judicial councils was grounded in the "awkwardness and uncertainty" of proceedings that, prior to 1968, had dealt with matters of judicial accountability primarily by way of a "one-judge ad hoc inquiry" (see the Friedland Report, at pp. 87-89). Implicit in the need for a more specialized process was the unique and special role judicial councils serve in light of competing constitutional interests. As the Friedland Report discusses at p. 129, with regard to disciplinary hearings for judges in general:

> There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. The public has to have confidence in the judicial system

> and to feel satisfied, as Justice Minister Allan Rock stated in a speech to the judges in August, 1994 "that complaints of misconduct are evaluated objectively and disposed of fairly." At the same time, accountability could have an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.

45 Thus, in the present case, the purpose and expertise issues present themselves in a unique fashion. On the one hand, the Judicial Council is in a sense a highly specialized tribunal required to deal with constitutionally protected rights -- such as judicial independence and security of tenure of judges and the right of persons who come before the courts to a fair trial by an impartial tribunal -- in the overall public interest. On the other hand, the tribunal is composed primarily of members of the judiciary. This might invite little deference, since, arguably, no more "specialization" exists in the judges sitting as Council members than in their colleagues sitting in court. The idea that specialization leads to deference is based on the more typical scenario, where a tribunal is composed of people who are not judges and who have a specialized expertise superior to that of judges who are, on the whole, generalists.

46 Despite provincial variations in their composition, discipline bodies that receive complaints about judges all serve the same important function. In *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, Gonthier J. described, at para. 58, the committee of inquiry in Quebec as "responsible for preserving the integrity of the

whole of the judiciary" (also see *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267). The integrity of the judiciary comprises two branches which may at times be in conflict with each other. It relates, first and foremost, to the institutional protection of the judiciary as a whole, and public perceptions of it, through the disciplinary process that allows the Council to investigate, reprimand, and potentially recommend the removal of judges where their conduct may threaten judicial integrity (*Therrien*, *supra*, at paras. 108-12 and 146-50). Yet, it also relates to constitutional guarantees of judicial independence, which includes security of tenure and the freedom to speak and deliver judgment free from external pressures and influences of any kind (see *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Valente*, *supra*.

47 In light of their functions, judicial discipline committees must be composed primarily of judges. Gonthier J. quoted the work of Professor H. P. Glenn in *Therrien*, *supra*, at para. 57 to demonstrate this point:

> . . . in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H. P. Glenn in his article "Indépendance et déontologie judiciaires" (1995), 55 *R. du B.* 295, at p. 308:
>
> > [TRANSLATION] If we take as our starting point the principle of judicial independence -- and I emphasize the need for this starting point in our historical, cultural and institutional context -- I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

48 Gonthier J. subsequently expressed, at para. 148, in the following terms how a decision of the Conseil de la magistrature involving the dismissal of a provincial court judge should be reviewed:

> . . . the legislature has chosen to assign the important responsibility of determining whether the conduct of a provincial court judge warrants a recommendation for removal from office exclusively to the Court of Appeal, under s. 95 *C.J.A.* This is a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects. Accordingly, this Court should only review the assessment made by the Court of Appeal if it is clearly in error or seriously unfair.

49 Although in Quebec the final decision in recommending the removal of a provincial court judge lies with the Quebec Court of Appeal, I am not persuaded that a different approach should be adopted in New Brunswick. The Judicial Council in that province is composed of at least seven judges, at least two of whom will be from the Court of Appeal. It is fair to say that the Council, in this case, is a tribunal with a rich and wide-ranging collection of judicial expertise. The Council is eminently qualified to render a collegial decision regarding the conduct of a judge, including where issues of apprehension of bias and judicial independence are involved. There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.

50 As indicated earlier, the membership of the New Brunswick Judicial Council is established by s. 6.1(1) of the Act. It is composed of the Chief Justice of New Brunswick, a judge of the New Brunswick Court of Appeal, three judges from the Court of Queen's Bench (possibly including the Chief Justice of that court), two Provincial Court judges, and three additional members as named by the Lieutenant-Governor in Council. In other words, at least 7 of 10 Council members must be judges. It is obvious that membership in this tribunal requires, in most cases, vast legal training. As compared to a single judge from the Court of Queen's Bench, it would have to be assumed that the Council is at least as qualified, and likely more

qualified in light of its collegial composition, to draw conclusions where considerations of judicial independence, security of tenure and apprehension of bias are concerned. It would be nonsensical for a single judge or an appellate court to show low deference to decisions of the Council in an area in which they have no additional expertise.

51 The Council also has in fact a certain degree of specialization over that of the reviewing court. Gonthier J. noted in *Therrien*, *supra*, at para. 147 (with reference to the Friedland Report, *supra*, at pp. 80-81), that "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". In making such a determination, issues surrounding bias, apprehension of bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence. This, according to Gonthier J., creates "a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects" (para. 148). Although this is clearly not the type of tribunal that develops an expertise from the sheer volume of cases before it, the fact that the Council is engaged in this special and unique role gives it some degree of specialty not enjoyed by ordinary courts of review who have never, historically, been involved in such matters.

52 In my view, there must be a degree of authority and finality in decisions made by the Council. To place decisions of the Council under liberal review standards would undermine this objective, and detract from the public's confidence in the

Council to fulfil its mandate. In *Therrien*, after highlighting at length the importance of protecting the public's perception of the judiciary as an integral institution, Gonthier J. noted at para. 112:

> [W]e also must not forget that this Court is sitting on appeal from the report of the inquiry panel of the Quebec Court of Appeal, to which a specific function has been assigned by s. 95 [of the *Courts of Justice Act*, R.S.Q., c. T-16]. As I said earlier, the Court of Appeal, when it makes its report under that provision, is called upon to play a fundamental role in terms of both the ethical process itself and the principle of judicial independence. This Court must therefore respect that jurisdiction and show it the proper deference.

53 The composition of a body such as a provincial judicial council, the special and perhaps unique purpose it plays within the framework of the justice system, and the nature of the objective it aims to fulfil all lead to the conclusion that a high degree of deference should be afforded to its decisions. Being primarily composed of members of all levels of the New Brunswick judiciary, and mandated to protect the integrity of the judiciary within the province, the Council should be characterized as a unique decision-making body with some degree of specialization, and as a tribunal with equal or better qualifications than the reviewing court to make the decisions that the legislature has vested in it. Therefore, in my opinion, the objective of the *Provincial Court Act* and the composition of the Judicial Council itself suggest that decisions of the Council should be reviewed with a great deal of deference.

B. *The Appropriate Standards of Review*

54 I wish to stress at this point that judicial councils as well as reviewing courts must remain acutely alive to the high level of protection that applies to comments made by judges in the conduct of court proceedings.

55 While the Canadian Judicial Council and provincial judicial councils receive many complaints against judges, in most cases these are matters properly dealt with through the normal appeal process. There have been very few occasions where the comments of a judge, made while acting in a judicial capacity, could not be adequately dealt with through the appeal process and have necessitated the intervention of a judicial council (see: Marshall Report, *supra*, where the Canadian Judicial Council inquiry panel concluded that the Nova Scotia Court of Appeal had been "inappropriately harsh in their condemnation of the victim of an injustice they were mandated to correct" (p. 35) after the Court of Appeal had noted, among other things, that any injustice suffered by Mr. Marshall was "more apparent than real" (p. 36); *Report to the Canadian Judicial Council by the Inquiry Committee appointed under subsection 63(1) of the Judges Act to conduct a public inquiry into the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge* (1996), where removal from office was recommended, mainly for comments made while presiding over a sentencing hearing; and, Canadian Judicial Council file 98-128, where the Canadian Judicial Council released a letter expressing strong disapproval for comments made by a justice of the Alberta Court of Appeal in reasons delivered while sitting in his capacity as a judge in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595, and *R. v. Ewanchuk* (1998), 13 C.R. (5th) 324).

56 One half of the "two-pronged" modern articulation of judicial independence (the other prong being institutional independence), without which there can be no public confidence in the justice system, rests on the individual independence of each and every judge. Within this, the core principle is the liberty of the judge to hear and decide cases without fear of external reproach. The majority of this Court stated in *Beauregard*, *supra,* at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [Also see *Valente*, *supra*, *per* Le Dain J., at p. 685.]

The Canadian Judicial Council echoed this principle in the Marshall Report, *supra*, asserting that "[j]udicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal" (p. 24). Thus, the Council's inquiry panel noted, while criticizing the comments of the Nova Scotia Court of Appeal that "[w]e are deeply conscious that criticism can itself undermine public confidence in the judiciary, but on balance conclude in this case that that confidence would more severely be impaired by our failure to criticize inappropriate conduct than it would by our failure to acknowledge it" (p. 36).

57 While acting in a judicial capacity, judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen. In *Alberta (Provincial Court Judge) v. Alberta (Provincial Court Chief Judge)* (1999), 71 Alta. L.R. (3d) 214, 1999 ABQB 309, aff'd (2000), 192 D.L.R. (4th) 540, 2000 ABCA 241 (*sub nom. Reilly v. Provincial Court of Alberta, Chief Judge*), Mason J. highlighted some of the consequences of this principle, citing the words of the now Chief Justice, at para. 132:

> At present, this core principle of individual judicial independence has concomitant immunities from suit and prosecution, as well as from being required to testify about the how and why of a particular decision. As McLachlin, J. stated for the majority in *MacKeigan* [*v. Hickman*, [1989] 2 S.C.R. 796] (at 830):

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence [*Valente*, *supra*; *Beauregard*, *supra*]. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence.

58 Even within the appeal process, which is designed to correct errors in the original decision and set the course for the proper development of legal principles, the judge whose decision is under review is not called to account for it. He or she is not asked to explain, endorse or repudiate the decision or the statement which is called into question by the appeal, and the result of the appeal process suffices to deliver justice to those aggrieved by the error made by the judge of first instance. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

59 The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole. The comments of Gonthier J. in *Therrien*, *supra*, at paras. 108-11 regarding the role of the judge and public perceptions of that role, bear repeating:

The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard*, *supra*, at p. 70, and *Reference re Remuneration of Judges of the Provincial Court*, *supra*, at para. 123. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them (Justice Jean Beetz, Introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.
>
> (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.

60 Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary as a whole, thus requiring intervention through the disciplinary provisions of the Act. The separation of functions between judicial councils and the courts, even if it could be said that their expertise is virtually identical, serves to insulate the courts, to some extent, from the reactions that may attach to an unpopular council decision. To have disciplinary proceedings conducted by a judge's peers offers the guarantees of expertise and fairness that judicial officers are sensitive to, while avoiding the potential perception of bias or conflict that could arise if judges were to sit in court regularly in judgment of each other. As Gonthier J. made clear in *Therrien*, other judges may be the only people in a position to consider and weigh effectively all the applicable principles, and evaluation by any other group would threaten the perception of an independent judiciary. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, must in my view attract in general a high degree of deference.

(1) Statutory Interpretation

61 The question of the proper interpretation of s. 6.11(4) of the Act, as to whether it binds the Judicial Council to the findings of fact made by the inquiry panel, is a question of law, and thus might normally attract a "correctness" standard of review. However, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference (see *Pasiechnyk*, *supra*). As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 37, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative

intention". In this case, the Council was interpreting an operational provision within its own statute, which conferred upon it a special and unique decision-making role within the justice system. The Council, composed of seven judges and three lay persons, must be regarded as having a reasonable degree of specialization and a high level of expertise.

62 In light of this, and other factors reviewed above, issues of statutory interpretation by the Council should attract considerable deference and reviewing courts should not intervene unless the interpretation adopted by the Council is not one that it can reasonably bear. In any event I would uphold the interpretation given by the Council even on a correctness standard, as reflected in my analysis below.

63 As indicated above, the inquiry panel was required to investigate a two-pronged complaint that it drafted. The first branch alleged that the remarks made by the respondent constituted misconduct, and the panel concluded that it did. The second branch alleged that as a result of those remarks the respondent was [TRANSLATION] "no longer able to perform her duties as a judge". On that issue the panel found that no bias or appearance of bias had been demonstrated, that the respondent did not have pre-established beliefs and that her conduct did not justify her removal from office.

64 Pursuant to s. 6.11(4), the Council was then required to make a decision between dismissal of the complaint, reprimand and recommendation for dismissal from the bench, "[b]ased on the findings contained in the report and the representations [if any, by the respondent respecting the report]".

65 I agree with the analysis of Drapeau J.A., equating the words "based on" in s. 6.11(4) of the Act with "taking into account" as opposed to "bound by". As Drapeau J.A. has indicated, to suggest that the words have a binding impact creates a number of inconsistencies and incongruities within the Act. Moreover, any delegation of decision-making power from a tribunal to another body must be clearly and expressly authorized by statute. As Gonthier J. effectively summarized in *Therrien*, *supra*, at para. 93, "[i]t is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*". In this case, the Act clearly indicates that the Council is to make the decision with regard to the sanction, if any, that should be imposed. The words "based on" in s. 6.11(4) cannot be read to permit an abdication of that authority.

66 In this case, the Council applied the evidence available to it to the question, [TRANSLATION] "[i]s the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?" (*per* Drapeau J.A., *Moreau-Bérubé* (N.B.C.A.), *supra*, at para. 88). While the panel is required to express its "findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question" (s. 6.11(1) of the Act) (emphasis added), the Council must interpret the findings of the panel for the purposes of "taking [them] into account" in rendering a final decision. There is nothing incongruous or unfair in such an interpretation of s. 6.11(4). The Council is free to put the weight that it considers

appropriate on the findings of the panel, in light, in part, of the respondent's submissions, in order to come to a conclusion that must not be patently unreasonable.

67 Applying the proper standard of review to the interpretation given by the Council to the scope of its mandate based on its interpretation of s. 6.11(4) of its enabling statute, that standard being one of reasonableness *simpliciter*, the reviewing judge and the majority of the Court of Appeal should not have substituted their interpretation of that provision for the one adopted by the Council.

(2) Whether the Conclusions of the Council were Justifiable

68 The second issue involves whether the ultimate decision of the Council to recommend the removal from office of Judge Moreau-Bérubé was justifiable. This question is one of mixed law and fact, and presents a more direct challenge to the Council's authority. In reviewing the Council's decisions, courts are asked to pass judgment on the Council's ability to assess, weigh, and apply the evidence to a particular legal threshold while discharging its core function. This is also where all the specialization and expertise of the Council come into play. The Council must serve its purpose with some degree of authority and finality, and its conclusions on questions of mixed law and fact should be afforded a high degree of deference.

69 I agree with the standard imposed by Drapeau J.A., who alone expressed a position on the applicable standard of review, that determinations made by the Council should not be interfered with unless they are patently unreasonable.

70 The central issue that the Council had to resolve in deciding to recommend the respondent's dismissal from the bench was whether her comments evidenced bias,

or created an apprehension of bias such that she could no longer expect to enjoy the public trust in a fair and independent judiciary. Whether the proper legal test was applied is not in dispute. However, the respondent argues that the Council was patently unreasonable in ignoring certain findings made by the panel, which must be regarded as the primary trier of fact in this case, and in replacing those findings with conclusions of its own.

71 In my view, it was within the power of the Council to draw its own conclusions, and, in light of the sweeping and generalized nature of Judge Moreau-Bérubé's derogatory comments, it would be difficult to call the conclusion reached by the Council patently unreasonable. This is not a case where the Council should have deferred to the privileged position of the panel as a primary fact-finder on the critical issue of whether the misconduct of the respondent created a reasonable apprehension of bias such as to render her unfit to continue to occupy a judicial post. The power to impose the appropriate sanction, which rests solely with the Council, presupposes the power to characterize appropriately the nature and seriousness of the misconduct, based in part on the recital of events, and appreciation of these events, by the panel reporting to the Council.

72 The comments of Judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person. The expertise to decide that difficult issue rests in the Council, a large collegial body composed primarily of judges of all levels of jurisdiction in the province, but also of non-judges whose input is important in formulating that judgment. The Judicial Council has been charged by statute to guard the integrity of the provincial judicial system in New

Brunswick. In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.

73 I find nothing patently unreasonable in the Council's decision to draw its own conclusions with regard to whether the comments of Judge Moreau-Bérubé created an apprehension of bias sufficient to justify a recommendation for her removal from duties as a Provincial Court judge. Even on a standard of reasonableness *simpliciter*, I would find no basis to interfere with the Council's decision. On this record, I believe that the respondent has received a fair hearing, conducted in accordance with the will of the legislature and consistent with the requirements of both judicial independence and integrity.

(3) Procedural Fairness

74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. (See generally *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, and *Baker*, *supra*.)

75 The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority (see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,

[1979] 1 S.C.R. 311; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker*, *supra*, at para. 20; *Therrien*, *supra*, at para. 81). Within those rules exists the duty to act fairly, which includes affording to the parties the right to be heard, or the *audi alteram partem* rule. The nature and extent of this duty, in turn, "is eminently variable and its content is to be decided in the specific context of each case" (as *per* L'Heureux-Dubé J. in *Baker*, *supra*, at para. 21). Here, the scope of the right to be heard should be generously construed since the Judicial Council proceedings are similar to a regular judicial process (see *Knight*, *supra*, at p. 683); there is no appeal from the Council's decision (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at pp. 7-66 to 7-67); and the implications of the hearing for the respondent are very serious (see *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113).

76 The respondent argues that she had a reasonable expectation that the Council would not impose a penalty more serious than a reprimand for three main reasons:

> 1. The inquiry panel had recommended a reprimand, and had found that the respondent was able to continue performing her duties as a Provincial Court judge.
>
> 2. The Council, though it had the discretion to suspend her pending the inquiry's outcome, had allowed the respondent to discharge her judicial function for more than a year following her impugned comments. This, the respondent argues, created an expectation that the Council would proceed on the basis that she was able to continue performing her duties as a judge.

3. Dismissal had never been expressly contemplated or argued by any person at any level of the inquiry prior to the delivery of that sanction.

77 Under s. 6.11(3), the respondent had the "right to make representations to [the Council] either in person or through counsel and either orally or in writing, respecting the [panel's] report prior to the taking of action by the Judicial Council" (emphasis added). She essentially argues that when the panel recommended something less than removal from the bench, they indirectly took away her ability to argue against that sanction, and that her representations to the Council would have been affected had she known that a recommendation for removal from the bench was being considered.

78 I am not persuaded by any of these arguments. The doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker. Rather, it operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed: *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557; *Baker*, *supra*, at para. 26. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. But it does not otherwise fetter the discretion of a statutory decision-maker in order to mandate any particular result: see D. Shapiro, *Legitimate Expectation and its Application to Canadian Immigration Law* (1992), 8 *J. L. & Social Pol'y* 282, at p. 297.

79 In the circumstances of this case, I cannot accept that the Council violated Judge Moreau-Bérubé's right to be heard by not expressly informing her that they might impose a sanction clearly open to them under the Act. The doctrine of

legitimate expectations can find no application when the claimant is essentially asserting the right to a second chance to avail him- or herself of procedural rights that were always available and provided for by statute. Moreover, the inquiry panel had no authority to make a recommendation to the Council about the appropriate sanction. This is made abundantly clear in the Act, where s. 6.11(1) states, "the panel shall report to the chairman its findings of fact and its findings as to the allegations of misconduct, neglect of duty or inability to perform duties of the judge whose conduct is in question". This contrasts with the decision-making role of the Council once the panel's report is complete, as stipulated in s. 6.11(4) which states that "[b]ased on the findings contained in the report . . . the Judicial Council may . . . dismiss the complaint, . . . issue a reprimand . . ., or . . . recommend . . . that the judge be removed from office". Regardless of the fact that the panel made a recommendation that it was not mandated to make, the Council had a clear and plain discretion to choose between three options. I do not believe that the respondent, a judge, who had legal advice throughout, could have misapprehended the issues that were alive before the Judicial Council. She never asserted making such an error until it was raised by Angers J. on judicial review.

80 Similarly, the Council's decision not to suspend the respondent pending the outcome of the inquiry does not limit the Council's statutorily authorized discretion. Obviously the outcome of the inquiry is not known at the outset and thus the decision of whether to suspend cannot be taken as any indication as to the inquiry's eventual outcome. Moreover, I note that while the respondent was not suspended from the bench, she was relocated to another district for the duration of the inquiry.

81 The fact that a recommendation for dismissal was not discussed prior to being issued is also not relevant. The Council has no obligation to remind the

respondent to read s. 6.11(4) carefully. While the Council might have opted, as a part of their procedure, to remind Judge Moreau-Bérubé that the Council would not be bound by any recommendations made by the inquiry panel, they chose not to, and that was within their discretion. As L'Heureux-Dubé J. noted in *Baker*, *supra*, at para. 27:

> . . . the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

82 In coming to the conclusions they did, the Court of Appeal and Angers J. relied in particular on *Michaud*, *supra*. I agree with Drapeau J.A. that *Michaud* is distinguishable. In that case, the recommended sanction was a product of a joint submission and the affected person made no representations. By contrast, Judge Moreau-Bérubé's counsel made arguments before the tribunal to the effect that no reprimand should be administered, contrary to the recommendation of the inquiry panel. This demonstrates that the respondent was well aware that the Council was not bound by the recommendations of the inquiry panel and that it would come to its own independent decision about the sanction that was appropriate in light of the misconduct. She herself was urging the Council to disregard the recommendation of the inquiry panel.

83 I agree with the comments of Drapeau J.A. who noted that [TRANSLATION] "it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard" (para. 150). Acknowledging that the nature of these disciplinary

proceedings imposes on the Council a stringent duty to act fairly, I can find no breach of the rules of natural justice in the context of this case.

C. *Constitutional Issue*

84 I agree with Angers J. and the New Brunswick Court of Appeal that this matter has been settled by this Court, and thus that the procedure set forth by the Act to sanction misconduct of a provincial court judge does meet the minimal standards required to ensure respect for the principle of judicial independence. (See *Therrien, supra*, at para. 76; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra*; *Valente, supra*.)

VII. Disposition

85 Accordingly, I would allow the appeal with costs and restore the decision of the New Brunswick Judicial Council.

Appeal allowed with costs.

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