

HON. D. SMITH
HON. L. O'NEIL
HON. B.R. BELL,
DISSENTING

I. OVERVIEW

1. The Canadian Judicial Council [Council]'s deliberations proceeded only on the written record. The transcript of the eight day hearing before the second Inquiry Committee and provided to members of Council was largely in French only, it not having been translated to English. It is common knowledge that a significant number of the members of Council, including 2 of the 3 who join this dissent, do not speak, nor do they understand, the French language. The failure to have the same record available to all members of Council is the foundation of our dissent.

2. We believe Justice Girouard's right to a fair hearing has not been respected. We express no conclusion on the issue of whether his rights under the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) have been violated. Nor do we express an opinion on the issue of whether his language rights as informed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*], have been respected. We do not need to do so. Our dissent rests solely on our view that Council violated Justice Girouard's right to procedural fairness. We consider the majority report of Council to be a nullity. We therefore recommend that the matter be abandoned. We view that result to be an appropriate outcome given the history of this matter.

II. PROCEDURAL FAIRNESS

3. Before a judge can be removed from office, he or she is entitled to a fair hearing (*Valente v. The Queen et al.*, [1985] 2 S.C.R. 673, at page 696). In order for Council's deliberations on an Inquiry Committee's recommendation for removal to be considered a fair "hearing," those involved in the deliberations must be able to understand the record before them. That record included a French language transcript of the oral evidence before the Inquiry Committee. That transcript was provided to all members of the Council deliberating in this matter. The Report of the Inquiry Committee itself dated 6 November 2017 is replete with references to the transcript of proceedings before it in May 2017. The transcript is therefore relied upon extensively by the Inquiry Committee and forms part of the record. To the same effect, counsel for Justice Girouard relied upon and made frequent references to the transcript of proceedings before the Inquiry Committee. If Council is held to respect the principle that "he who decides must hear," then surely, he who decides on the strength of a written record, which includes a transcript, must be able to read the transcript. We note that the 2010 *CJC Policy on Council Review of Inquiry Committee Report* expressly provided that "The review by the Council is based on the record and report of the Inquiry Committee and on written submissions by the judge and by independent counsel."

4. Prior to the Council meeting called to deliberate on the second Inquiry Committee's recommendation regarding Justice Girouard, a Council member inquired as to whether a complete translation of the evidence (largely in French) would be available for unilingual English-speaking members of Council. Virtually all materials, other than the transcripts of evidence given before the first and second Inquiry Committees, had been translated and circulated in both official languages to all members. This included the Inquiry Committee report, some extracts of the evidence, submissions made before the Inquiry Committee and Council, as well as the decisions

on the preliminary matters. As a preliminary matter, prior to the commencement of Council's deliberations, Council decided a fully translated record would not be made available to all members of Council. Obviously, the record available to be considered by the unilingual English-speaking members of Council was different than the record available for consideration by the bilingual members.

5. As this body stated at paragraph 6 in the 2015 Council report to the Minister in the case of Justice Déziel and reconfirmed at paragraph 21 of the majority opinion herein, Council is required to consider the recommendations of the Inquiry Committee "afresh," applying independent judgment to the facts. Justice Girouard was entitled to the informed views of all members of Council tasked with deliberating on his future. In addition, in the course of their deliberations, all members were entitled to consider the same information.

6. We note in passing that Council ensures simultaneous translation of its annual and semi-annual meetings to ensure all members are informed and can participate fully in its activities and deliberations. Justice Girouard's rights to a fair hearing should be informed by the *Charter* no less so than annual or semi-annual meetings of Council. His future and that of constitutional democracy whereby judges are not easily removed from office deserve no less.

7. The majority of Council members state at paragraph 73 of their report that they "considered the Committee's Report and the Judge's submissions, as well as all information we deemed relevant to the issues." We respectfully observe they did so without a complete and reliable understanding of over 4,000 pages of stenographic notes reporting the 14 days of hearings before the first Inquiry Committee and the transcripts from the eight days of testimony before the second Inquiry Committee, which included the testimony of Justice Girouard.

III. CONCLUSION

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