

JOURNAL ARTICLE NO. 5
THE ROLE AND POWER OF THE PROVINCIAL
JUDICIAL COUNCIL: A REVIEW OF THE SUPREME
COURT OF CANADA DECISION IN
Moreau-Bérubé v. New Brunswick (Judicial Council)

INTRODUCTION:

In a recently released decision¹, the Supreme Court of Canada upheld the removal of New Brunswick Provincial Court Judge Jocelyne Moreau-Bérubé from her office after she made remarks during a sentencing hearing disparaging the honesty and integrity of Acadians.

This case is of particular interest, as the New Brunswick Judicial Council imposed a more severe penalty than that which had been recommended by a Council-Appointed Inquiry Panel. On this appeal, the Supreme Court of Canada was required to consider a number of administrative law issues including the applicable standard of review of the Judicial Council's decision and whether or not the Judicial Council violated rules of procedural fairness by imposing a penalty more severe than that required by the Inquiry Panel.

My review of the Supreme Court of Canada decision in *Moreau-Bérubé* will demonstrate the important role and powers of the provincial judicial councils and the high degree of deference afforded by the Supreme Court of Canada to the Judicial Council's decision.

FACTS:

Jocelyne Moreau-Bérubé was a Judge of the New Brunswick Provincial Court. On February 16, 1998, Judge Moreau-Bérubé was presiding over a sentencing hearing of two accused who had been found guilty of several charges, including breaking and entering and theft.² Both of the gentlemen appearing before Judge Moreau-Bérubé for sentencing had extensive criminal records.

While delivering the sentence in *LeBreton*, Justice Moreau-Bérubé made the following statements:

“These are people who live on welfare and we are 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 center 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,

¹ *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11.

² *R v. Le Breton*, [1998] N.B.J. No. 120.

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 on 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 costs 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 one who pay, because we have to wake up every morning and go to work. When we receive our pay cheque, 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...."³

While presiding over an unrelated hearing three days later, Judge Moreau-Bérubé apologized for her remarks made during the *LeBreton* sentence hearing. In her apology, reading from prepared notes, Judge Moreau-Bérubé stated that during the previous sentence hearing she had spoken without prepared notes. In her apology she stated:

“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

³ As produced in New Brunswick Court of Appeal judgment *Conseil de la Magistrature (N.B.) v. Moreau-Bérubé* (2000), 233 N.B.R. (2d) 205 at para.5.

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.”⁴

THE NEWS BRUNSWICK JUDICIAL COUNCIL:

The New Brunswick Judicial Council received several complaints about Judge Moreau-Bérubé ‘s comments made during the sentencing hearing in *LeBreton* on February 16, 1998. These complaints alleged judicial 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 of New Brunswick and reported to a designated member of the Judicial Council under The New Brunswick Provincial Court Act.⁵ The designated Council member recommended that an inquiry be held and a three member inquiry panel was appointed. The panel determined that there was sufficient evidence to warrant a formal hearing and a formal complaint was drafted by the inquiry panel.

Under the *Provincial Court Act*, the panel was then required to conduct an inquiry and report its findings of fact and the allegations of misconduct to the Judicial Council. The majority of the inquiry panel found that the remarks made by Judge Moreau-Bérubé constituted and amounted to misconduct on her part. The majority decision stated that by uttering those remarks, Judge Moreau-Bérubé had exceeded what was considered appropriate judicial comment and had made comments denigrating the honesty of the residents of the Acadian Peninsula.

Notwithstanding this finding, the majority of the inquiry panel found that the conduct of Judge Moreau-Bérubé did not warrant her removal from office. The majority decision found that bias or the appearance of bias had not been established stating:

“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.”⁶

The majority of the panel concluded that although the comments made by Judge Moreau-Bérubé did constitute misconduct, that she was still able to perform her duties as a Judge. Accordingly, the majority recommended that Judge Moreau-Bérubé should receive a reprimand. The minority decision of the panel found that the comments did not constitute misconduct. Therefore, the

⁴ As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, footnote 3, at para.6.

⁵ Provincial Court Act, R.S.N.B. 1973, c.P-21, s.6.

⁶ As reproduced in *Moreau-Bérubé* (N.B.C.A.), *supra*, footnote 3, at para.22.

panel concluded unanimously that Judge Moreau-Bérubé was able to continue exercising her judicial duties.

Despite the findings of the inquiry panel, the Judicial Council rejected the decision and recommendations of the Inquiry Panel. Based on the finding of misconduct by the Inquiry Panel, the Judicial Council found that there would be a reasonable apprehension that Judge Moreau-Bérubé would not be able to act in a completely impartial manner in the performance of her duties stating:

“...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 within the impartiality that the public is entitled to expect from a Judge.”⁷

The Judicial Council recommended that Judge Moreau-Bérubé be removed from office. When Judge Moreau-Bérubé became aware of the decision of the Judicial Council, she wrote to the New Brunswick Provincial Cabinet requesting a stay of her removal while she proceeded with a Judicial Review application. Notwithstanding this request, the Provincial Cabinet removed Judge Moreau-Bérubé from office.

NEW BRUNSWICK COURT PROCEEDINGS:

The New Brunswick Court of Queens Bench allowed Judge Moreau-Bérubé ‘s application for Judicial Review quashing the decision of the Judicial Council.⁸ Justice Angers of the Court of Queens Bench found that the rules of natural justice had been breached as Judge Moreau-Bérubé had never been advised that a penalty more severe than the one recommended by the Inquiry Panel could be imposed by the Judicial Council. His judgment suggested that it was a fundamental principle of administrative law that a tribunal imposing a more serious penalty than the one which had been recommended by an Inquiry Panel, should indicate it was considering the more serious penalty and request submissions.

Justice Angers found that Judge Moreau-Bérubé had no reason to suspect dismissal was being considered as a possible penalty by the Judicial Council, and it was a breach of natural justice not to have requested her to make submissions when a dismissal was being considered.

Justice Angers also found that the Judicial Council had exceeded its jurisdiction by ignoring findings of fact made by the Inquiry Panel, including the finding that Judge Moreau-Bérubé was able to continue performing her judicial duties. Justice Angers held that the Judicial Council was

⁷ *Ibid.*, at para.90.

⁸ *Moreau-Bérubé v. Conseil de la Magistrature (N.B.)*, (1999) 218 N.B.R. (2d) 256.

bound by the Inquiry Panel's findings of fact and it exceeded its jurisdiction in finding that Judge Moreau-Bérubé had "preconceived opinions and ideas".⁹

The decision of Justice Angers was appealed to the New Brunswick Court of Appeal. On the appeal it was alleged that Justice Angers had committed an error in law in finding that the Council had exceeded its jurisdiction and violated the rules of natural justice. It was also alleged that Justice Angers had committed an error in law by concluding that the Council had exceeded its jurisdiction in ignoring findings of fact made by the Inquiry Panel.

The New Brunswick Court of Appeal held Justice Angers was correct in concluding the Judicial Council was required to advise Judge Moreau-Bérubé that the penalty recommended by the Inquiry Panel could be disregarded by the Judicial Council and that she was liable to the more substantial penalty of removal from office.

The New Brunswick Court of Appeal also agreed with Justice Angers that the Judicial Council had committed a jurisdictional error by ignoring the findings of fact made by the Inquiry Panel. The majority of the New Brunswick Court of Appeal concluded that the findings of fact by the Inquiry Panel should have been afforded a high degree of deference by the Judicial Council.

The dissenting judgment of Justice Drapeau in the New Brunswick Court of Appeal disagreed with the majority judgment on whether the Judicial Council had respected the rules of natural justice. Justice Drapeau concluded that the Judicial Council did not have to inform Judge Moreau-Bérubé that a recommendation for her removal could be made. The dissenting judgment of Justice Drapeau also found Justice Angers had erred in ruling that the Council exceeded its jurisdiction by not accepting the findings of the Inquiry Panel. Justice Drapeau held that the Judicial Council was not patently unreasonable in choosing not to adopt all the findings of the Inquiry Panel.

THE SUPREME COURT OF CANADA DECISION:

The decision of the New Brunswick Court of Appeal was appealed to the Supreme Court of Canada. On the appeal, the Supreme Court was required to consider the applicable standard of review, whether or not the Judicial Council had exceeded its jurisdiction and violated the rules of natural justice, and the constitutionality of the provisions in the New Brunswick Provincial Court Act which allowed the Cabinet to remove a provincial Court Judge.

⁹ *Ibid.*, at para.42.

The decision of the Supreme Court of Canada stated that the intended purpose and function of an administrative tribunal, and its empowering statute, will play a large role in determining the standard of review of its decisions, as will the nature and extent of its expertise. In considering the standard of review to be applied in *Moreau-Bérubé*, the Court set out a number of general observations about the level of deference which Courts should give to decisions of Judicial Councils involving the security of tenure of Provincial Court Judges.

The Court found the Judicial Council is “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.”¹⁰ Although provincial variations were identified in the composition of Judicial Councils, the Court found that discipline bodies who received complaints about Judges all serve the same important function. When considering specifically the Judicial Council in New Brunswick, the Court found that the Council was “a tribunal with a rich and wide ranging collection of judicial experience”.¹¹ The Court held that the Council was “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.”¹²

In *Moreau-Bérubé*, the Supreme Court considered the composition of the New Brunswick Judicial Council as established by s.6.1(1) of The New Brunswick Provincial Court Act. Under this statute, at least seven of the ten Council members were required to be Judges. The Supreme Court of Canada found that when compared to a single Judge from the Court of Queens Bench, the Council is at least as qualified, and likely more qualified, to draw conclusions where considerations of judicial independence, security of tenure and apprehension of bias are considered. The Court stated that “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.”¹³

The Court held that the Judicial Council has a certain degree of specialization over that of the reviewing Court, and “there must be a degree of authority and finality in decisions made by the Council.”¹⁴

¹⁰ *Moreau-Bérubé* (S.C.C.), *supra*, at para.45.

¹¹ *Ibid.*, at para.49.

¹² *Ibid.*

¹³ *Ibid.*, at para.50.

¹⁴ *Ibid.*, at para.52.

In summarizing the level of deference which should be afforded to a provincial judicial council, the Supreme Court stated:

“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...the Council should be characterized as an unique decision making body with some degree of specialization, and is 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.”

The Supreme Court of Canada agreed with the standard of review set out in the dissenting judgment of Justice Drapeau in the New Brunswick Court of Appeal. The Court held that determinations made by the Judicial Council should not be interfered with unless they are patently unreasonable. The Supreme Court found nothing patently unreasonable in the Judicial 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.

The Supreme Court rejected the argument that Judge Moreau-Bérubé had a reasonable expectation that the Judicial Council would not impose a penalty more serious than a reprimand and that accordingly, the Judicial Council had not complied with the rules of natural justice and the rules of procedural fairness.

The Court found that the doctrine of reasonable expectations does not create substantive rights and does not fetter the discretion of a statutory decision maker. In this case, the Court found that the Judicial Council had not violated Judge Moreau-Bérubé’s right to be heard by not expressly informing her that they might impose a sanction which was clearly open to them. The Supreme Court agreed with the comments of Justice Drapeau in the dissenting judgment of the New Brunswick Court of Appeal which stated “it is undeniable that at each step where she had the right, Judge Moreau-Bérubé was fully heard.”¹⁵

The Supreme Court of Canada allowed the appeal and reinstated the decision of the Judicial Council removing Judge Moreau-Bérubé from office.

CONCLUSION:

The judgment of the Supreme Court in *Moreau-Bérubé* identified the special role played by the

¹⁵ *Ibid.*, at para.83.

Judicial Council, both in terms of the disciplinary process and the principles of judicial independence. The Court identified the qualifications of the Judicial Council to draw conclusions when considering judicial independence, security of tenure and apprehension of bias.¹⁶ In *Moreau-Bérubé*, the Supreme Court has clearly stated that decisions of the provincial judicial councils should be reviewed with a great deal of deference.

¹⁶ An overview of the conduct of judges is contained at Chapter 14 in B.G. Smith, *Professional Conduct for Lawyers and Judges*, Maritime Law Book Ltd., Fredericton, 2002.