

# A P P E N D I X A

## MEMBERS OF THE CANADIAN JUDICIAL COUNCIL, 1996-97

The Right Honourable Antonio Lamer, P.C.  
Chairman  
*Chief Justice of Canada*

The Honourable André Deslongchamps  
*Associate Chief Justice of the Superior Court of Quebec (from September 1996)*

The Honourable Allan McEachern  
First Vice-Chairman  
*Chief Justice of British Columbia*

The Honourable René W. Dionne  
*Senior Associate Chief Justice of the Superior Court of Quebec*

The Honourable Lorne O. Clarke  
Second Vice-Chairman (to September 1996)  
*Chief Justice of Nova Scotia*

The Honourable Patrick D. Dohm  
*Associate Chief Justice of the Supreme Court of British Columbia*

The Honourable Pierre A. Michaud  
Second Vice-Chairman (from September 1996)  
*Chief Justice of Quebec*

The Honourable William A. Esson  
*Chief Justice of the Supreme Court of British Columbia (to September 1996)*

The Honourable Edward D. Bayda  
*Chief Justice of Saskatchewan*

The Honourable Catherine A. Fraser  
*Chief Justice of Alberta*

The Honourable Norman H. Carruthers  
*Chief Justice of Prince Edward Island*

The Honourable Constance R. Glube  
*Chief Justice of the Supreme Court of Nova Scotia*

The Honourable Donald H. Christie  
*Associate Chief Judge of the Tax Court of Canada*

The Honourable James R. Gushue  
*Chief Justice of Newfoundland*

The Honourable J.-Claude Couture  
*Chief Judge of the Tax Court of Canada*

The Honourable Benjamin Hewak  
*Chief Justice of the Court of Queen's Bench for Manitoba*

The Honourable Joseph Z. Daigle  
*Chief Justice of the Court of Queen's Bench of New Brunswick*

The Honourable T. Alex Hickman  
*Chief Justice of the Trial Division of the Supreme Court of Newfoundland*

*Notes:*

1. Except that the Chairman and Vice-Chairmen are listed first, members are listed here in alphabetical order.
2. The senior judges of the Supreme Courts of the Yukon and the Northwest Territories alternate on the Council every two years.

The Honourable William L. Hoyt  
*Chief Justice of New Brunswick*

The Honourable Ralph E. Hudson  
*Senior Judge of the Supreme Court of the  
Yukon Territory*

The Honourable Julius A. Isaac  
*Chief Justice of the Federal Court of Canada*

The Honourable James A. Jerome  
*Associate Chief Justice of the Federal Court  
of Canada*

The Honourable Lyse Lemieux  
*Associate Chief Justice of the Superior Court  
of Quebec (to August 1996)  
Chief Justice of the Superior Court of Quebec  
(from August 1996)*

The Honourable Patrick J. LeSage  
*Chief Justice of the Ontario Court of Justice*

The Honourable Kenneth R. MacDonald  
*Chief Justice of the Trial Division of the  
Supreme Court of Prince Edward Island*

The Honourable Donald K. MacPherson  
*Chief Justice of the Court of Queen's Bench  
for Saskatchewan*

The Honourable R. Roy McMurtry  
*Chief Justice of Ontario*

The Honourable Gerald Mercier  
*Associate Chief Justice, Family Division  
of the Court of Queen's Bench for Manitoba*

The Honourable W. Kenneth Moore  
*Chief Justice of the Court of Queen's Bench  
of Alberta*

The Honourable John W. Morden  
*Associate Chief Justice of Ontario*

The Honourable Jeffrey J. Oliphant  
*Associate Chief Justice of the Court of Queen's  
Bench for Manitoba*

The Honourable Ian H.M. Palmeter<sup>\*</sup>  
*Associate Chief Justice of the Supreme Court  
of Nova Scotia*

The Honourable Lawrence A. Poitras  
*Chief Justice of the Superior Court of Quebec  
(to August 1996)*

The Honourable Richard J. Scott  
*Chief Justice of Manitoba*

The Honourable Heather J. Smith  
*Associate Chief Justice of the Ontario Court  
of Justice*

The Honourable Barry L. Strayer  
*Chief Justice of the Court Martial Appeal Court  
of Canada (from November 1996)*

The Honourable Allan H.J. Wachowich  
*Associate Chief Justice of the Court of Queen's  
Bench of Alberta*

The Honourable Bryan Williams  
*Chief Justice of the Supreme Court of British  
Columbia (from September 1996)*

<sup>\*</sup> The Canadian Judicial Council members were deeply saddened on the death of their colleague, Associate Chief Justice Ian Palmeter, on March 14, 1997.

# A P P E N D I X B

## COMMITTEE MEMBERS

### **Executive Committee**

Chief Justice Antonio Lamer (Chairman)  
 Chief Judge J.-Claude Couture  
 Chief Justice Joseph Z. Daigle  
 Chief Justice Benjamin Hewak  
 Chief Justice Lyse Lemieux  
 Chief Justice Kenneth R. MacDonald  
 Chief Justice Allan McEachern  
 Chief Justice R. Roy McMurtry  
 Chief Justice Pierre A. Michaud  
 Associate Chief Justice John W. Morden  
 Associate Chief Justice Allan H.J. Wachowich

### **Standing Committees**

#### *Administration of Justice Committee*

Chief Justice Patrick J. LeSage (Chairman)  
 Chief Justice Joseph Z. Daigle  
 Associate Chief Justice Patrick D. Dohm  
 Chief Justice James R. Gushue  
 Chief Justice Kenneth R. MacDonald  
 Associate Chief Justice Jeffrey J. Oliphant  
 Associate Chief Justice Allan H.J. Wachowich

#### *Finance Committee*

Chief Justice Kenneth R. MacDonald  
 (Chairman)  
 Associate Chief Judge Donald H. Christie  
 Chief Justice William L. Hoyt  
 Chief Justice Lyse Lemieux  
 Chief Justice W. Kenneth Moore

#### *Judicial Benefits Committee*

Chief Justice Constance R. Glube (Chairman)  
 Chief Justice Edward D. Bayda  
 Associate Chief Justice André Deslongchamps  
 Associate Chief Justice Patrick D. Dohm  
 Chief Justice Catherine A. Fraser  
 Associate Chief Justice Gerald Mercier

#### *Judicial Conduct Committee*

Chief Justice Allan McEachern (Chairman)  
 Chief Justice Joseph Z. Daigle,  
 (Vice-Chairman)  
 Associate Chief Justice John W. Morden  
 (Vice-Chairman)  
 Chief Judge J.-Claude Couture  
 Chief Justice Benjamin Hewak  
 Chief Justice Antonio Lamer  
 Chief Justice Lyse Lemieux  
 Chief Justice Kenneth R. MacDonald  
 Chief Justice R. Roy McMurtry  
 Chief Justice Pierre A. Michaud  
 Associate Chief Justice Allan H.J. Wachowich

*Notes:*

1. Committee membership is generally established at the Council's annual meeting, held in the autumn.
2. These lists show Committee membership as at March 31, 1997.

***Judicial Education Committee***

Chief Justice Catherine A. Fraser (Chairman)  
Chief Justice Norman H. Carruthers  
Chief Justice Lorne O. Clarke  
Associate Chief Justice René W. Dionne  
Chief Justice Benjamin Hewak  
Chief Justice T. Alex Hickman  
Chief Justice William L. Hoyt  
Mr. Justice Ralph E. Hudson  
Chief Justice Julius A. Isaac  
Chief Justice Donald K. MacPherson  
Chief Justice W. Kenneth Moore  
Associate Chief Justice John W. Morden  
Chief Justice Bryan Williams

***Appeal Courts Committee***

Chief Justice Pierre A. Michaud (Chairman)  
Chief Justice Edward D. Bayda  
Chief Justice Norman H. Carruthers  
Chief Justice Lorne O. Clarke  
Chief Justice Catherine A. Fraser  
Chief Justice James R. Gushue  
Chief Justice William L. Hoyt  
Chief Justice Julius A. Isaac  
Chief Justice Allan McEachern  
Chief Justice R. Roy McMurtry  
Associate Chief Justice John W. Morden  
Chief Justice Richard J. Scott  
Chief Justice Barry L. Strayer

***Judicial Independence Committee***

Chief Justice Richard J. Scott (Chairman)  
Associate Chief Judge Donald H. Christie  
Chief Justice Constance R. Glube  
Chief Justice Allan McEachern  
Chief Justice R. Roy McMurtry  
Chief Justice Pierre A. Michaud  
Associate Chief Justice Heather J. Smith  
Chief Justice Barry L. Strayer

***Trial Courts Committee***

Chief Justice Lyse Lemieux (Chairman)  
Associate Chief Judge Donald H. Christie  
Chief Judge J.-Claude Couture  
Chief Justice Joseph Z. Daigle  
Associate Chief Justice André Deslongchamps  
Associate Chief Justice René W. Dionne  
Associate Chief Justice Patrick D. Dohm  
Chief Justice Constance R. Glube  
Chief Justice Benjamin Hewak  
Chief Justice T. Alex Hickman  
Mr. Justice Ralph E. Hudson  
Associate Chief Justice James A. Jerome  
Chief Justice Patrick J. LeSage  
Chief Justice Kenneth R. MacDonald  
Chief Justice Donald K. MacPherson  
Associate Chief Justice Gerald Mercier  
Chief Justice W. Kenneth Moore  
Associate Chief Justice Jeffrey J. Oliphant  
Associate Chief Justice Heather J. Smith  
Associate Chief Justice Allan H.J. Wachowich  
Chief Justice Bryan Williams

## **Ad Hoc Committees**

### ***Judges Computer Advisory Committee***

Judge Pierre Archambault (Chairman)

Mr. Justice N. Douglas Coo

Mr. Justice Morris Fish

Mr. Justice Maurice Lagacé

Mr. Justice John McQuaid

Madam Justice M. Anne Rowles

Chief Justice Richard J. Scott

Madam Justice Lawrie Smith

### ***Advisors:***

Dr. Martin Felsky

Professor Denis Marshall

Professor Daniel Poulin

### ***Special Committee on Equality in the Courts***

Chief Justice Constance R. Glube (Chairman)

Chief Judge J.-Claude Couture

Chief Justice Lyse Lemieux

Chief Justice Patrick J. LeSage

Chief Justice Richard J. Scott

Associate Chief Justice Allan H.J. Wachowich

### ***Study Leave Selection Committee***

Chief Justice Edward D. Bayda (Chairman)

Chief Justice Constance R. Glube

Associate Chief Justice John W. Morden

Dean Louis Perret

Dean Peter MacKinnon

### ***Working Committee on Ethical Principles for Judges***

Chief Justice Richard J. Scott (Chairman)

Chief Justice Allan McEachern

Madam Justice Elizabeth McFadyen

Chief Justice R. Roy McMurtry

Chief Justice Pierre A. Michaud

Professor Tom Cromwell

Ms. Jeannie Thomas

## **Nominating Committee**

Chief Justice Norman H. Carruthers (Chairman)

Chief Justice Patrick J. LeSage

Associate Chief Justice Jeffrey J. Oliphant



## A P P E N D I X C

### PAST CANADIAN JUDICIAL COUNCIL MEMBERS

(December 1971 to March 1996)

NAME/COURT	OFFICE	DATES ON COUNCIL
<b>Adams</b> , William G. District Court of Newfoundland	Chief Judge	July 1983 – Sept. 1986
<b>Anderson</b> , N. Robert County Court of Nova Scotia	Senior Judge	July 1983 – Oct. 1985
<b>Barkman</b> , Gordon J. County Court of Manitoba	Chief Judge	July 1983 – July 1984
<b>Batten</b> , Mary J. Court of Queen's Bench for Saskatchewan	Chief Justice	June 1983 – Feb. 1989
<b>Bence</b> , Alfred Henry Court of Queen's Bench for Saskatchewan	Chief Justice	Dec. 1971 – May 1977
<b>Bisson</b> , Claude Court of Appeal of Quebec	Chief Justice	May 1988 – Nov. 1994
<b>Bridges</b> , G.F. Gregory Supreme Court of New Brunswick, Appeal Division	Chief Justice	Dec. 1971 – Feb. 1972
<b>Callaghan</b> , Frank W. Supreme Court of Ontario, High Court of Justice	Associate Chief Justice	Oct. 1985 – Sept. 1989
	Chief Justice	Sept. 1989 – Sept. 1990
Ontario Court, General Division	Chief Justice	Sept. 1990 – Jan. 1994
<b>Campbell</b> , David H. County Courts of British Columbia	Senior Judge	July 1983 – Oct. 1987
	Chief Judge	Oct. 1987 – July 1990
Supreme Court of British Columbia	Associate Chief Justice	July 1990 – Jan. 1995
<b>Cardin</b> , Lucien Tax Court of Canada	Chief Judge	July 1983 – Aug. 1983
<b>Cormier</b> , Adrien J. Supreme Court of New Brunswick, Trial Division	Chief Justice	Dec. 1971 – Sept. 1979
Court of Queen's Bench of New Brunswick	Chief Justice	Sept. 1979 – Mar. 1982

*Note:*

*By amendments to the Judges Act which came into force on July 18, 1983 the Chief Judge and the Associate Chief Judge of the Tax Court of Canada and the Chief Judge (or senior judge in cases where there was no chief judge) and Associate Chief Judge of County and District Courts were added to the membership of the Council. In addition, the senior judges of the Northwest Territories and the Yukon Territory were added as members of the Council in alternating, two-year terms.*

NAME/COURT	OFFICE	DATES ON COUNCIL
<b>Coté, Pierre</b> Superior Court of Quebec	Senior Associate Chief Justice	June 1984 – July 1992
<b>Cowan, Gordon S.</b> Supreme Court of Nova Scotia, Trial Division	Chief Justice	Dec. 1971 – Sept. 1981
<b>Crête, Marcel</b> Court of Appeal of Quebec	Chief Justice	May 1980 – Mar. 1988
<b>Culliton, Edward M.</b> Court of Appeal for Saskatchewan	Chief Justice	Dec. 1971 – Apr. 1981
<b>Davey, Herbert William</b> Supreme Court of British Columbia, Appeal Division	Chief Justice	Dec. 1971 – Oct. 1972
<b>Deschênes, Jules</b> Superior Court of Quebec	Chief Justice	Aug. 1973 – Aug. 1983
<b>Dewar, Archibald S.</b> Court of Queen's Bench for Manitoba	Chief Justice	Sept. 1973 – July 1985
<b>de Weerd, Mark M.</b> Supreme Court of the Northwest Territories	Senior Judge	July 1985 – June 1987 July 1989 – June 1991 July 1993 – June 1995
<b>Dickson, R.G. Brian</b> Supreme Court of Canada	Chief Justice	Apr. 1984 – June 1990
<b>Dorion, Frédéric</b> Superior Court of Quebec	Chief Justice	Dec. 1971 – Aug. 1973
<b>Dubin, Charles L.</b> Supreme Court of Ontario, Court of Appeal Court of Appeal for Ontario	Associate Chief Justice Chief Justice	July 1987 – Mar. 1990 Mar. 1990 – Feb. 1996
<b>Estey, William Z.</b> Supreme Court of Ontario, High Court of Justice Supreme Court of Ontario, Court of Appeal	Chief Justice Chief Justice	June 1975 – Dec. 1976 Dec. 1976 – Sept. 1977
<b>Evans, Gregory T.</b> Supreme Court of Ontario, High Court of Justice	Chief Justice	Dec. 1976 – June 1985
<b>Farris, John L.</b> Supreme Court of British Columbia, Appeal Division	Chief Justice	Feb. 1973 – Dec. 1978

NAME/COURT	OFFICE	DATES ON COUNCIL
<b>Fauteux, Gérald</b> Supreme Court of Canada	Chief Justice	Dec. 1971 – Dec. 1973
<b>Freedman, Samuel</b> Court of Appeal for Manitoba	Chief Justice	Dec. 1971 – Apr. 1983
<b>Furlong, Robert S.</b> Supreme Court of Newfoundland Supreme Court of Newfoundland, Court of Appeal	Chief Justice Chief Justice	Dec. 1971 – July 1975 July 1975 – Dec. 1979
<b>Gale, G.A. (Bill)</b> Supremet Court of Ontario, Court of Appeal	Chief Justice	Dec. 1971 – Dec. 1976
<b>Gold, Alan B.</b> Superior Court of Quebec	Chief Justice	Aug. 1983 – July 1992
<b>Goodridge, Noel H.A.</b> Supreme Court of Newfoundland, Court of Appeal	Chief Justice	Nov. 1986 – Dec. 1995
<b>Hamilton, Alvin C.</b> Court of Queen’s Bench for Manitoba, Family Division	Associate Chief Justice	Oct. 1983 – Mar. 1993
<b>Howland, William G.C.</b> Supreme Court of Ontario, Court of Appeal	Chief Justice	Nov. 1977 – Mar. 1990
<b>Hugessen, James K.</b> Superior Court of Quebec	Associate Chief Justice	Sept. 1973 – July 1983
<b>Hughes, Charles J.A.</b> Supreme Court of New Brunswick, Appeal Division Court of Appeal of New Brunswick	Chief Justice Chief Justice	Mar. 1972 – Sept. 1979 Sept. 1979 – Mar. 1984
<b>Iacobucci, Frank</b> Federal Court of Canada	Chief Justice	Sept. 1988 – Jan. 1991
<b>Jackett, Wilbur R.</b> Federal Court of Canada	Chief Justice	Dec. 1971 – Oct. 1979
<b>Johnson, Fred W.</b> Court of Queen’s Bench for Saskatchewan	Chief Justice	July 1977 – July 1983
<b>Laskin, Bora</b> Supreme Court of Canada	Chief Justice	Dec. 1973 – Mar. 1984
<b>Laycraft, J.H. (Herb)</b> Court of Appeal of Alberta	Chief Justice	Feb. 1985 – Dec. 1991
<b>Lyon, William D.</b> District Court of Ontario	Chief Judge	July 1983 – Sept. 1990

NAME/COURT	OFFICE	DATES ON COUNCIL
<b>MacKeigan, Ian M.</b> Supreme Court of Nova Scotia, Appeal Division	Chief Justice	Sept. 1973 – June 1985
<b>MacKinnon, Bert J.</b> Supreme Court of Ontario, Court of Appeal	Associate Chief Justice	Apr. 1978 – June 1987
<b>McGillivray, William A.</b> Supreme Court of Alberta	Chief Justice	Dec. 1974 – June 1979
Court of Appeal of Alberta	Chief Justice	June 1979 – Dec. 1984
<b>McKinnon, Alexander Hugh</b> Supreme Court of Nova Scotia, Appeal Division	Chief Justice	Dec. 1971 – June 1973
<b>McLachlin, Beverley</b> Supreme Court of British Columbia	Chief Justice	Sept. 1988 – Mar. 1989
<b>Maddison, Harry C.B.</b> Supreme Court of the Yukon Territory	Senior Judge	July 1983 – June 1985 July 1987 – June 1989 July 1991 – Aug. 1992
<b>Marquis, Eugène</b> Superior Court of Quebec	Senior Associate Chief Justice	Sept. 1973 – July 1976
<b>Mifflin, Arthur S.</b> Supreme Court of Newfoundland, Trial Division	Chief Justice	July 1975 – Dec. 1979
Supreme Court of Newfoundland, Court of Appeal	Chief Justice	Dec. 1979 – Sept. 1986
<b>Miller, Tevie H.</b> Court of Queen's Bench of Alberta	Associate Chief Justice	Feb. 1984 – Jan. 1993
<b>Milvain, J. (Val) H.</b> Supreme Court of Alberta, Trial Division	Chief Justice	Dec. 1971 – Feb. 1979
<b>Monnin, Alfred M.</b> Court of Appeal for Manitoba	Chief Justice	Apr. 1983 – Feb. 1990
<b>Nemetz, Nathan T.</b> Supreme Court of British Columbia	Chief Justice	Nov. 1973 – Jan. 1979
Court of Appeal of British Columbia	Chief Justice	Jan. 1979 – Sept. 1988
<b>Nicholson, John P.</b> Supreme Court of Prince Edward Island	Chief Justice	Jan. 1977 – May 1985
<b>Noël, Camil</b> Federal Court of Canada	Associate Chief Justice	Dec. 1971 – July 1975

NAME/COURT	OFFICE	DATES ON COUNCIL
<b>Parker, William D.</b> Supreme Court of Ontario, High Court of Justice	Associate Chief Justice Chief Justice	Dec. 1978 – Oct. 1985 Oct. 1985 – Aug. 1989
<b>Richard, Guy A.</b> Court of Queen's Bench of New Brunswick	Chief Justice	Mar. 1982 – Dec. 1994
<b>Rinfret, G.-Édouard</b> Court of Appeal of Quebec	Chief Justice	Sept. 1977 – May 1980
<b>Sinclair, William R.</b> Court of Queen's Bench of Alberta	Chief Justice	Feb. 1979 – Feb. 1984
<b>Smith, S. Bruce</b> Supreme Court of Alberta, Appeal Division	Chief Justice	Dec. 1971 – Dec. 1974
<b>Stratton, Stuart G.</b> Court of Appeal of New Brunswick	Chief Justice	Apr. 1984 – June 1992
<b>Thurlow, Arthur L.</b> Federal Court of Canada	Associate Chief Justice Chief Justice	Dec. 1975 – Jan. 1980 Jan. 1980 – May 1988
<b>Trainor, C. St. (Clair)</b> Supreme Court of Prince Edward Island	Chief Justice	Dec. 1971 – Dec. 1976
<b>Tremblay, Lucien</b> Court of Appeal of Quebec	Chief Justice	Dec. 1971 – Dec. 1977
<b>Tritschler, Gordon E.</b> Court of Queen's Bench for Manitoba	Chief Justice	Dec. 1971 – Aug. 1973
<b>Vallée, Gabrielle</b> Superior Court of Quebec	Senior Associate Chief Justice	Sept. 1976 – June 1984
<b>Wells, Dalton C.</b> Supreme Court of Ontario, High Court of Justice	Chief Justice	Dec. 1971 – June 1975
<b>Wilson, John O.</b> Supreme Court of British Columbia	Chief Justice	Dec. 1971 – Nov. 1973



**A P P E N D I X D****HUMAN AND FINANCIAL RESOURCES, 1996-97**

The Council is served by an executive director, a legal officer and two support staff located at the Council office in Ottawa.

**1996-97 EXPENDITURES OF THE CANADIAN JUDICIAL COUNCIL**

Salaries and Benefits	\$251,247
Transportation and Communications	62,519
Professional and Special Services	510,675
Rentals	24,134
Purchase, Repair and Upkeep	896
Utilities, Materials and Supplies	22,760
Construction and Acquisition of Machinery and Equipment	8,764
Other	144
Internal Government Expenditures	61,562
<b>TOTAL</b>	<b>\$942,701*</b>

*\* This amount is considerably higher than the expenditures in 1995-96 because supplementary funds were required during the year to cover costs associated with the ss.63(1) Judges Act Inquiry held during the year.*



# A P P E N D I X E

## PART II OF THE *JUDGES ACT*

Following is the text of Part II of the *Judges Act*, which governs the Canadian Judicial Council. It is taken from the 1997 Office Consolidation of the *Act*.

### Part II Canadian Judicial Council

#### Interpretation

##### *Definition of “Minister”*

**58.** In this Part, “Minister” means the Minister of Justice of Canada.

#### Constitution of the Council

##### *Council established*

**59.** (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

- (a) the Chief Justice of Canada, who shall be the chairman of the Council;
- (b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof;
- (c) subject to subsection (2), one of the senior judges, as defined in subsection 22(3), of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories;
- (d) the Chief Justice of the Court Martial Appeal Court of Canada; and
- (e) the Chief Judge and Associate Chief Judge of the Tax Court of Canada.

##### *Successive terms of senior judges*

(2) The senior judges referred to in paragraph (1)(c) shall succeed each other on the Council every two years.

##### *Successor to senior judge*

(3) In the event of the death or resignation of a senior judge referred to in paragraph (1)(c) during the term of that judge on the Council, the judge who succeeds that judge as senior judge of the same court shall become a member of the Council for the remainder of the term.

##### *Substitute member*

(4) Each member of the Council may appoint a judge of that member’s court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council. R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6.

##### *Objects of Council*

**60.** (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts and in the Tax Court of Canada.

### ***Powers of Council***

(2) In furtherance of its objects, the Council may

- (a) establish conferences of chief justices, associate chief justices, chief judges and associate chief judges;
- (b) establish seminars for the continuing education of judges;
- (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
- (d) make the inquiries described in section 69.

R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26.

### ***Meetings of Council***

**61.** (1) The Council shall meet at least once a year.

### ***Work of Council***

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

### ***By-laws***

- (3) The Council may make by-laws
  - (a) respecting the calling of meetings of the Council;
  - (b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and
  - (c) respecting the conduct of inquiries and investigations described in section 63.

R.S., c. J-1, s. 30; R.S., c. 16 (2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

### ***Employment of counsel and assistants***

**62.** The Council may engage the services of such persons as it deems necessary for carrying

out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.

R.S., c. 16 (2nd Supp.), s. 10; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 157, s. 16.

## **Inquiries Concerning Judges**

### ***Inquiries***

**63.** (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

### ***Investigations***

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court or of the Tax Court of Canada.

### ***Inquiry Committee***

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

### ***Powers of Council or Inquiry Committee***

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

- (a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to

produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and  
(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

***Prohibition of information relating to inquiry, etc.***

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

***Inquiries may be public or private***

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.  
R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27.

***Notice of hearing***

**64.** A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his own behalf.  
R.S., c. J-1, s. 31; R.S., c. 16 (2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

## **Report and Recommendations**

***Report of Council***

**65.** (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

***Recommendation to Minister***

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

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

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5.

## **Effect of Inquiry**

**66.** (1) [Repealed, R.S., 1985, c. 27 (2nd Supp.), s. 6]

***Leave of absence with salary***

(2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the

case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

#### ***Annuity to judge who resigns***

(3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the time when the finding was made by the Governor in Council.

R.S., 1985, c. J-1, s. 66; R.S., 1985, c. 27 (2nd Supp.), s. 6.

67. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68. [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

## **Inquiries Concerning Other Persons**

### ***Further inquiries***

69. (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

(a) a judge of a superior court or of the Tax Court of Canada, or

(b) a person to whom section 48 of the *Parliament of Canada Act* applies, should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

### ***Applicable provisions***

(2) Subsections 63(3) to (6), sections 64 and 65 and subsection 66(2) apply, with such modifications as the circumstances require, to inquiries under this section.

### ***Removal from office***

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

R.S., 1985, c. J-1, s. 69; 1992, c. 1, s. 144(F), c. 51, s. 28; 1993, c. 34, s. 89.

## **Report to Parliament**

### ***Orders and reports to be laid before Parliament***

70. Any order of the Governor in Council made pursuant to subsection 69(3) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

## **Removal by Parliament or Governor in Council**

### ***Powers, rights or duties not affected***

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

# A P P E N D I X F

## CANADIAN JUDICIAL COUNCIL BY-LAWS

### ARTICLE I

#### *Title*

**1.01** These by-laws may be cited as the *Canadian Judicial Council By-Laws*.

### ARTICLE II

#### *Interpretation*

**2.01** In these by-laws:

- (a) “Act” means the *Judges Act*, R.S.C. 1985, c. J-1;
- (b) “Chairman” means the Chief Justice of Canada;
- (c) “Council” means the Canadian Judicial Council established by the *Act*;
- (d) “Executive Committee” means the Executive Committee of the Council as provided for in these by-laws;
- (e) “Executive Director” means the Executive Director of the Council as provided for in these by-laws;
- (f) “First Vice-Chairman” means the Vice-Chairman who has been a member of the Council longer than the other Vice-Chairman;
- (g) “judge” means a judge to whom the *Act* applies;
- (h) “Second Vice-Chairman” means the Vice-Chairman who is not the First Vice-Chairman;
- (i) “Vice-Chairman” means a vice-chairman pursuant to these by-laws.

### ARTICLE III

#### *Meetings*

Annual Meeting **3.01** There shall be an annual meeting of the Council which shall be held in the month of September unless the Executive Committee directs otherwise.

**3.02** The Executive Committee shall fix the date and place of the annual meeting before August 1 but, if it fails to do so, the date and place shall be fixed by the Chairman.

Mid-year meeting **3.03** There shall be a mid-year meeting of the Council in Ottawa, in the month of March, unless the Executive Committee directs otherwise.

Special meetings **3.04** Special meetings of the Council may also be called by the Chairman, by the Executive Committee, by the Council or at the written request of not less than ten members of the Council. The dates and places for all special meetings, unless fixed by the Council, shall be fixed by the Executive Committee, except a meeting called by the Chairman for which the Chairman shall fix the date and place.

Notice of special meeting **3.05** Notice of the time and place of any such special meeting shall be communicated to every member of the Council in such manner as the Executive Committee deems expedient having regard to the circumstances except a meeting called by the Chairman, for which notice shall be given in a manner deemed expedient by the Chairman.

Notice of meeting **3.06** The Executive Director shall give to each member of the Council at least 30 days notice of the time and place of any meeting of the Council.

Quorum **3.07** A majority of the members of the Council shall constitute a quorum.

Adjournment **3.08** Any meeting of the Council may be adjourned to such date and place as the Council may decide.

Presiding officer of Council **3.09** The presiding officer at all meetings of the Council shall be:  
(a) the Chairman;  
(b) in the absence of the Chairman, the First Vice-Chairman;  
(c) in the absence of the Chairman and the First Vice-Chairman, the Second Vice-Chairman; or  
(d) in the absence of the Chairman and the Vice-Chairmen, the senior member of the Council present at such meeting.

Attendance of non-member at Council meeting **3.10** The Council may authorize any person who is not a member of the Council to attend, but not to vote, at a meeting of the Council.

Voting **3.11** Voting at meetings of the Council shall be by a show of hands unless a vote by secret ballot is requested by at least ten members.

#### **ARTICLE IV** *Officers*

The Chairman **4.01** Except as provided in article 3.09, the Chairman shall preside at all meetings of the Council and of the Executive Committee, and shall be the Chief Executive Officer of the Council.

The Vice-Chairmen **4.02** The Chairman may designate two members of the Council to be Vice-Chairmen of the Council, at least one of whom shall be an elected member of the Executive Committee.

Term of Vice-Chairmen **4.03** The Vice-Chairmen shall hold office at the pleasure of the Chairman.

Duties of Vice-Chairmen **4.04** The First Vice-Chairman or, in the absence of the First Vice-Chairman, the Second Vice-Chairman, shall act in the absence or disability of the Chairman and perform such other functions and duties as the Council may determine.

Chairman of the Executive Committee **4.05** The Chairman may from time to time designate a Vice-Chairman to act as Chairman of the Executive Committee, and the Vice-Chairman so designated shall thereupon have the authority and responsibility of the Chairman of such committee subject to the right of the Chairman to resume the chairmanship at any time.

Chairman of the Judicial Conduct Committee **4.06** The Chairman shall designate one of the Vice-Chairmen to be chairman of the Judicial Conduct Committee, who shall hold office at the pleasure of the Chairman.

Office of Council **4.07** The office of the Council shall be in the National Capital Region.

Executive Director of Council **4.08** The Council shall appoint an Executive Director who is not a member of the Council, and may also employ other personnel as required for the full and proper discharge of its duties and responsibilities.

Duties of Executive Director **4.09** The Executive Director shall have charge of the office of the Council, shall be responsible for all matters generally ascribed to the position and shall perform all

duties required by the Chairman, by the Council or by any of its Committees.

**Acting Executive Director** **4.10** Where, for any reason, the Executive Director is unable to act, an acting Executive Director may be appointed by the Chairman.

## **ARTICLE V** *Executive Committee*

**Composition of the Executive Committee** **5.01** There shall be an Executive Committee of the Council consisting of the Chairman and nine members of the Council who shall be elected by the Council from among its members.

**Additional Member of Committee** **5.02** If the Chairman appoints as one of the Vice-Chairmen a person who is not elected to the Executive Committee that Vice-Chairman shall be an additional member of the Executive Committee.

**Members** **5.03** Three members of the Executive Committee shall be elected at each annual meeting and shall hold office for three years. A member of the Executive Committee whose term expires at an annual meeting shall not be eligible for re-election until the following annual meeting.

**Vacancy** **5.04** When a member of the Executive Committee resigns therefrom or ceases to be a member of the Council, the Executive Committee may appoint another member of the Council as a replacement until the next annual meeting of the Council.

**5.05** When a member of the Executive Committee resigns therefrom or ceases to be a

member of the Council, the Council at its next annual meeting shall elect one of its members as a replacement.

**Duration of term** **5.06** A member of the Executive Committee elected pursuant to article 5.05 shall hold office until the expiry of the term of office of the person being replaced.

**Powers and duties of the Executive** **5.07** The Executive Committee is responsible for the supervision and management of the affairs of the Council. Without limiting the generality of the foregoing, the Executive Committee shall have all the powers vested in the Council except for (i) the making of by-laws, (ii) the appointment of members of the Executive Committee and standing committees other than as provided herein, and (iii) the powers of the Council referred to in Article VIII of these by-laws.

**Quorum** **5.08** A majority of the members of the Executive Committee shall constitute a quorum.

**Functioning of the Committee** **5.09** Meetings of the Executive Committee shall be held at such intervals, in such manner, at such place and upon such notice as the Executive Committee may from time to time determine.

**Meetings** **5.10** The Chairman, a Vice-Chairman or any three members may, at any time, call a meeting of the Executive Committee.

**Resolution** **5.11** A resolution consented to in writing or by any electronic method, by all members of the Executive Committee, shall be as valid and effectual as if it had been

passed at a meeting of the Executive Committee duly called and held. Such resolution may be in two or more counterparts which together shall be deemed to constitute one resolution in writing. Such resolution shall be filed with the minutes of the proceedings of the Executive Committee and shall be effective on the date stated thereon or, if no date is specified, when filed.

**ARTICLE VI**  
*Standing and Ad Hoc Committees*

Standing Committees **6.01** There shall be a Standing Committee of the Council on each of the following subjects:  
(a) judicial conduct,  
(b) judicial education,  
(c) judicial benefits,  
(d) judicial independence,  
(e) administration of justice,  
(f) finance,  
(g) appeal courts, and  
(h) trial courts.

Membership **6.02** Each standing committee, except the Standing Committees on Judicial Conduct, Appeal Courts and Trial Courts, shall have a minimum of five members who shall be elected at each annual meeting. The chairman of each such committee shall be elected annually by the members of the Committee from among their own number.

Exception for committee membership **6.03** The members of the Standing Committees on Appeal Courts and Trial Courts shall respectively consist of the Council members who are members of such courts and the chairmen of such committees shall be the Chief Justices of the Appeal Court and the Trial Court of the province or territory in which the next annual meeting is to be held.

Vacancy **6.04** Any vacancy in a standing committee arising between annual meetings may be filled by the Executive Committee.

Objects **6.05** A standing committee is responsible for the achievement of its objects subject to the approval of the Finance Committee for the expenditure of public funds.

**6.06** Articles 5.08, 5.09 and 5.11 of these by-laws apply *mutatis mutandis* to any committee of the Council.

Ad hoc committees **6.07** The Chairman, the Executive Committee or the Council may establish and prescribe the powers and duties of ad hoc committees. Judges who are not Council members may be included in the membership as needed from time to time.

Expenses **6.08** Judges who attend a meeting of a standing or ad hoc committee of the Council duly called by its chairman, and for which approval to hold the meeting has been received from the Council Chairman, shall be reimbursed their expenses in so attending the meeting pursuant to section 41(1) of the *Act*.

## ARTICLE VII

### *Nominating Committee*

- Election of Nominating Committee **7.01** At every annual meeting the members of the Council shall elect a three-member Nominating Committee.
- Chairman **7.02** The Nominating Committee shall appoint from amongst its members, a chairman who shall organize the work of the Committee and preside over its meetings.
- Duties of Committee **7.03** The Nominating Committee shall nominate candidates for membership on the Executive Committee and on all standing committees.
- Written Report **7.04** A written report of the nominations proposed by the Nominating Committee shall be sent to the members of the Council at least 30 days before each annual meeting of the Council.
- Representation **7.05** In preparing its report the Nominating Committee shall consider and, if possible, nominate candidates who will furnish regional and jurisdictional representation.
- Candidates **7.06** Notwithstanding the report of the Nominating Committee, any member of the Council may nominate from the floor any eligible member of the Council for election to the Executive Committee or to a Standing Committee.

## ARTICLE VIII

### *Judicial Conduct*

- Committee **8.01**  
(a) The members of the Executive Committee shall constitute the Judicial Conduct Committee.
- Vice-Chairman of Committee (b) The Chairman of the Council may, after consultation with the Chairman of the Judicial Conduct Committee, designate one or more Vice-Chairmen of the Committee to carry out such duties of the Chairman of the Committee as may be delegated in writing by the Chairman of the Committee from time to time.
- Complaint or allegation about conduct of a judge **8.02**  
(a) Every complaint or allegation received at the office of the Council, concerning a judge who is subject to the *Act*, shall be referred to the Executive Director.
- (b) Every complaint or allegation received by any member of the Council concerning the conduct of a judge which, in the opinion of such member, may require the attention of the Council, shall be sent to the Executive Director.
- (c) A Council member shall draw to the attention of the Executive Director any conduct of a judge of that member's court which, in the view of that member, may require the attention of the Council, and such conduct shall be treated in the same manner as if it were the subject of a complaint.

Referral to **8.03**

Chairman

(a) The Executive Director shall establish a file and, subject to article 8.01 (b), shall refer every complaint or allegation mentioned in article 8.02 to the Chairman of the Judicial Conduct Committee.

Duty to inform

(b) The Executive Director shall provide a copy of any complaint or allegation made to the Council against a judge together with a copy of any reply, to the judge concerned, and to the judge's Chief Justice or Chief Judge.

Duties of Chairman of Committee

**8.04**

(a) The Chairman shall review the complaint or allegation and may:

- (i) close the file where the matter is trivial, vexatious or without substance and advise the complainant, who is the subject of the complaint, accordingly with an appropriate explanation;
- (ii) after obtaining comments from the judge and the judge's Chief Justice or Chief Judge, close the file and advise the complainant, with an appropriate explanation, where the matter is without substance or where the conduct is inappropriate or improper but clearly is not serious enough to warrant removal.

(b) The Chairman may cause further inquiries to be made where the matter is likely to be referred to a Panel of the Canadian Judicial Council and where further information appears to be necessary for the Panel to fulfill its function.

(c) Where further inquiries are made, the judge who is the subject of the complaint shall be provided an opportunity to respond to the gist of the allegations and evidence against such judge and any response by the judge shall be

included in the report of such further inquiries.

(d) The Chairman shall refer any file which is not closed, to a Panel of the Canadian Judicial Council together with the report of the further inquiries, if any, and any recommendation which the Chairman may make.

Duties of Panel **8.05**

(a) A matter which is referred to a Panel of the Canadian Judicial Council pursuant to article 8.04 (d) shall be dealt with by a Panel of up to five members of the Council designated for this purpose by the Chairman of the Judicial Conduct Committee. The Panel member with seniority on the Council shall act as Chairman of the Panel.

(b) The Panel shall review the matter and the report of the further inquiries, if any, and may:

- (i) refer the matter back to the Chairman to cause further inquiries to be made; or
- (ii) decide that no investigation pursuant to subsection 63(2) of the *Act* is warranted and advise the complainant accordingly with an appropriate explanation where the matter is without substance or where the conduct is inappropriate or improper but clearly is not serious enough to warrant removal; or
- (iii) refer the matter to the Council together with its own report and conclusion that an investigation pursuant to subsection 63(2) of the *Act* may be warranted.

(c) If the Panel concludes that an investigation may be warranted pursuant to subsection 63(2) of the *Act*, it shall specify the grounds of alleged misconduct which could warrant an investigation.

(d) After the Panel has completed its review of a complaint, the members of the Panel shall not participate in any further consideration of the same complaint by the Council.

Duties of  
Council

### 8.06

(a) Prior to the Council considering the report of a Panel, the Chairman of the Judicial Conduct Committee shall designate up to five members of the Canadian Judicial Council (other than those who served on the Panel) to be available to serve on any subsequent Inquiry Committee which might be established pursuant to the *Act*. The members so designated shall not participate in any deliberations of the Council in relation to the matter in question.

(b) A copy of the report of the Panel to the Council shall be provided to the judge, who shall be entitled to make written and oral submissions to the Council as to whether or not there should be an investigation pursuant to subsection 63(2) of the *Act*.

(c) After considering the report of the Panel and the submissions, if any, the Council shall decide:

- (i) that no investigation pursuant to subsection 63(2) of the *Act* is warranted and advise the complainant and the judge accordingly with an appropriate explanation where the matter is without substance or where the conduct is inappropriate or improper but is not serious enough to warrant removal; or
- ii) that an investigation into the matter shall be held pursuant to subsection 63(2) of the *Act* since the matter may be serious enough to warrant removal.

Inquiry  
Committee

### 8.07

(a) Such investigation shall be conducted by an Inquiry Committee composed of the members designated previously pursuant to article 8.06(a) together with any additional members appointed by the Minister pursuant to section 63(3) of the *Act*.

(b) The Inquiry Committee shall conduct the investigation in accordance with sections 63 and 64 of the *Act* and shall report its conclusions to the Council.

Inquiry  
Committee  
Report

### 8.08

(a) All of the parties before the Inquiry Committee shall be provided with copies of the Committee's report and shall be provided a full opportunity to be heard before the Council.

(b) Where the Council, in its report to the Minister pursuant to section 65(1) of the *Act*, departs from the report of the Inquiry Committee it shall, nevertheless, provide the Minister with the original report of the Inquiry Committee.

Request from  
Minister or  
Attorney General

### 8.09

(a) Where the Council receives a request from the Minister of Justice of Canada under subsection 63(1) or 69(1) of the *Act* or a request from the Attorney General of a province under subsection 63(1) of the *Act* to conduct an inquiry as to whether a judge or other person should be removed from office for any of the reasons set forth in subsection 65(2) of the *Act*, the Chairman of the Judicial Conduct Committee shall appoint

up to five members of the Council to serve on the Inquiry Committee.

(b) Such an inquiry shall be conducted in accordance with articles 8.07 and 8.08 of these by-laws as though it were an investigation.

Non-participation  
in deliberations

**8.10** The Chairman of the Canadian Judicial Council and the Chief Justice and Associate Chief Justice of the Federal Court of Canada shall not participate in the consideration of any aspect of a complaint in any capacity unless he or she considers it to be necessary to do so in the interests of the due administration of justice.

#### **ARTICLE IX** *Judicial Education*

Seminars and  
Conferences

**9.01** Pursuant to sections 41(1) and 60(2)(b) of the *Act* the Council may authorize judges to attend seminars and conferences for their continuing education.

#### **ARTICLE X** *Finance*

Meetings,  
Seminars and  
Conferences

**10.01** The Chairman of the Council is authorized to approve the attendance of federally appointed judges at meetings, seminars or conferences held for a purpose related to the administration of justice. A judge attending such a meeting, seminar or conference is entitled to be reimbursed for expenses incurred, pursuant to section 41(1) of the *Act*.

Finance  
Committee

**10.02** The Finance Committee shall prepare for the Executive Committee the Council's annual budget for presentation to the Commissioner for Federal Judicial Affairs.

Objects

**10.03** At each meeting of the Council the Finance Committee shall present a current report on the financial affairs of the Council. It shall also supervise the financial affairs and operations of the Council and its committees, and undertake such further financial assignments that the Council or its Executive Committee may direct.

#### **ARTICLE XI** *Amendment of By-Laws*

Amendments

**11.01** These by-laws may be amended by a majority vote of all the members of the Council upon notice in writing of the proposed amendment being given to the Executive Director not less than 30 days before the meeting of the Council where such amendment will be considered.

Notice

**11.02** Upon receiving any such notice the Executive Director shall forthwith, and not less than 10 days before such meeting, cause a copy thereof to be communicated to every member of the Council.

Waiving of  
Notice Period

**11.03** Notwithstanding articles 11.01 and 11.02 the notice period for a change to these by-laws can be waived by agreement of two-thirds of the members present at a meeting of the Council.

# A P P E N D I X G

## **Report of the Canadian Judicial Council to the Minister of Justice under ss.63(1) of the *Judges Act* concerning the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in *R. v. T. Th  berge*, October 1996**

The majority of the Canadian Judicial Council, consisting of:

Chief Justice Lamer (Chief Justice of Canada), Chief Justice Clarke (Nova Scotia), Associate Chief Justice Deslongschamps (Quebec), Associate Chief Justice Dohm (British Columbia), Chief Justice Esson (British Columbia), Chief Justice Fraser (Alberta), Chief Justice Glube (Nova Scotia), Chief Justice Gushue (Newfoundland), Chief Justice Hewak (Manitoba), Mr. Justice Hudson (Yukon Territory), Chief Justice Lemieux (Quebec), Chief Justice LeSage (Ontario), Chief Justice MacPherson (Saskatchewan), Chief Justice McEachern (British Columbia), Chief Justice McMurtry (Ontario), Associate Chief Justice Mercier (Manitoba), Chief Justice Moore (Alberta), Associate Chief Justice Morden (Ontario), Associate Chief Justice Oliphant (Manitoba), Associate Chief Justice Palmetter (Nova Scotia), Chief Justice Scott (Manitoba), and Associate Chief Justice Wachowich (Alberta),

is of the opinion that Mr. Justice Bienvenue has become incapacitated or disabled from the due execution of the office of judge and recommends that he be removed from the office of judge of the Superior Court of Quebec. The majority except Chief Justice McEachern rely on sections 65(2)(b),(c) and (d) of the *Judges Act*; their reasons are attached. In separate concurring reasons, which will follow at a later date, Chief Justice McEachern relies only on section 65(2)(d).

The following members of the Council dissent from this decision:

Chief Justice Bayda (Saskatchewan), Chief Justice Carruthers (Prince Edward Island), Associate Chief Judge Christie (Tax Court of Canada), Chief Justice Hickman (Newfoundland), Chief Justice Hoyt (New Brunswick), Chief Justice MacDonald (Prince Edward Island), and Associate Chief Justice Smith (Ontario).

for reasons to follow at a later date.

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Antonio Lamer  
Chairman  
September 20, 1996

## Reasons of all Majority Members except Chief Justice McEachern

We are in substantial agreement with the conclusions stated by the majority of the Inquiry Committee under the heading “Recommendation” in its report dated June 25, 1996, as follows:

If the judge’s meeting with the jury after the verdict [in which he made comments critical of its performance] had been an isolated occurrence, we would merely have expressed our disapproval of this violation of paragraphs 65(2)(b) and (c) of the *Act*, on the assumption that such an occurrence would not happen again. The judge’s remarks about women and his deep-seated ideas behind those remarks legitimately cast doubt on his impartiality in the execution of his judicial office. Yet impartiality is the essence of the office of judge. Accordingly, this violation led us to conduct a further analysis to determine whether Mr. Justice Bienvenue had become incapacitated or disabled from the due execution of the office of judge.

That analysis required us to review all the incidents that marked Tracy Théberge’s trial or occurred after that trial. We also particularly took account of Mr. Justice Bienvenue’s testimony at the inquiry. We find that the judge has shown an aggravating lack of sensitivity to the communities and individuals offended by his remarks or conduct. In addition — the evidence could not be any clearer — Mr. Justice Bienvenue does not intend to change his behaviour in any way.

Because of his conduct during all the incidents that marked Tracy Théberge’s trial, Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. In our view, this is the conclusion that would be reached by a reasonable and informed person.

Combining the test used by the Committee of the Canadian Judicial Council in the *Marshall* case and that applied by the Supreme Court to assess judicial impartiality and independence, we believe that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.

We are therefore of the opinion that Mr. Justice Bienvenue has breached the duty of good behaviour under section 99 of the *Constitution Act, 1867* and has become incapacitated or disabled from the due execution of the office of judge for the reasons set out in paragraphs 65(2)(b), (c) and (d) of the *Judges Act*:

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

and we recommend that he be removed from office.

We are, however, of the view that the question whether Mr. Justice Bienvenue breached the duty of good behaviour under s.99 of the *Constitution Act, 1867*, is one exclusively for consideration by Parliament. We have, therefore, only addressed the provisions of s.65 of the *Judges Act*.

The totality of the matters dealt with by the Inquiry Committee demonstrably support the majority Committee's conclusion that "Mr. Justice Bienvenue has shown an almost complete lack of sensitivity to the communities and individuals offended by his remarks." Interwoven throughout the evidence is a complete lack of appreciation by Mr. Justice Bienvenue of the duties and responsibilities of a judge.

It is important to note that the majority emphasized that:

In addition — the evidence cannot be any clearer — Mr. Justice Bienvenue does not intend to change his behaviour in any way.

No attempt has been made by Mr. Justice Bienvenue since the delivery of the report of the Inquiry Committee to indicate any intention on his part to, in fact, change his behaviour.

It is essential to the integrity of the administration of justice that the public have confidence in the impartiality of the judiciary. We agree with the majority of the Inquiry Committee that the public can no longer reasonably have such confidence in Mr. Justice Bienvenue.

## **Concurring Reasons of Chief Justice McEachern**

September 27, 1996

I agree with the recommendation of the majority of my colleagues that the Honourable Mr. Justice Bienvenue of the Superior Court of Quebec has become incapacitated or disabled from the due performance of his office of judge but I would limit the basis for this finding to s. 65(2)(d), that is to say by having been placed by his conduct or otherwise in a position incompatible with the due execution of his office.

The standard of proof in this matter is the civil standard of a balance of probabilities. Because of the importance of the issues, the grounds must be powerfully persuasive.

Applying that standard, I am unable to find that Mr. Justice Bienvenue is biased against Jewish persons. His unfortunate and entirely inaccurate comment about the Holocaust in the sentencing proceedings was a highly insensitive, inappropriate and very bad analogy that should not have been used to assist him to describe the nature of the offence with which he was dealing. I note that his apology to the Jewish community satisfied those organizations who reported, after meeting with the judge, that they observed no evidence of anti-Semitism in his attitude.

I depart from the reasons of the majority only because, with all possible deference and respect, I do not wish to base my concurrence on any grounds except the reasonable apprehension he has created, by his words and conduct, that he may permit his strongly held beliefs about the relative qualities of men and women to affect the decisions he may be called upon to decide in the course of his judicial duties.

To put it more bluntly, it is my view that in many cases that arise for decision in the course of the work of a busy court, litigants whose cases are assigned to Mr. Justice Bienvenue, both men and women, may reasonably apprehend, and be fearful, that in some cases he will stereotype women worse than men, and in other cases he will stereotype women better than men.

These simplistic views, when they intrude into legal proceedings, breach the fundamental equality requirements of the Constitution of Canada and the ordinary fairness expectations of litigants in our courts. I wish emphatically to record that there can be no reasonable expectation that judges must all have the same views about all matters. This case, however, crosses the line because Mr. Justice Bienvenue expressed, and later reaffirmed, his idiosyncratic views at a crucial stage in the sentencing proceedings he was conducting and thereby created a reasonable apprehension that his unusual views did play a part in reaching the sentence he imposed.

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Moreover, as the evidence shows, Mr. Justice Bienvenue made it clear that he still held firmly to such views at the time of the Inquiry hearings, and he thereby lent support to the reasonable apprehension created by his sentencing remarks that other litigants would risk unfairness in his court.

Because it is unnecessary to go further, I disavow reliance upon any of the other grounds apparently relied upon by the Inquiry Committee, singly or cumulatively, as sufficient grounds for a recommendation for removal even though it appears that Mr. Justice Bienvenue, in the closing days of the trial in question, was conducting himself in a manner other than what is expected of federally appointed judges. It is unnecessary to decide how those other grounds should be classified or what varying degrees of seriousness should be assigned to them.

## Reasons of the Minority by Chief Justice Bayda

October 1, 1996

The issue in these proceedings before the Canadian Judicial Council is whether, to use the words of the majority of the Inquiry Committee, “an individual who has been a judge for almost 20 years and whose integrity has not been questioned” did, by his conduct during a three-week murder trial, and by his conduct in speaking to the news media after the trial, demonstrate that he has become incapacitated or disabled from the due execution of his judicial duties and, for that reason, ought to be removed from office.

Section 65(2)(b), (c) and (d) of the *Judges Act* are the governing provisions:

65(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

...

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

They must be read in conjunction with and interpreted in the light of s. 99 of the *Constitution Act*:

99. The judges of the superior courts shall hold office during good behaviour but shall be removable by the governor general on address of the Senate and House of Commons.

The proceedings were initiated by a letter from the Minister of Justice of Canada to Council and a letter from the Minister of Justice of Quebec to Council requesting Council to inquire, pursuant to the *Judges Act*, into the conduct of the judge in question, Mr. Justice Bienvenue of the Superior Court of Quebec, during and after the murder trial of Ms. Tracey Théberge.

An Inquiry Committee established in accordance with the *Judges Act*, and comprising three members of Council and two lawyers appointed by the Minister of Justice of Canada, inquired into the judge’s conduct. They heard 19 witnesses including the judge, as well as submissions from independent counsel, and the judge’s counsel. The Committee considered the matter and prepared a majority and a minority report.

Four members signed the former and one the latter. The reports were filed with the Council. The majority made findings of fact and law and ultimately concluded as follows:

We are therefore of the opinion that Mr. Justice Jean Bienvenue has breached the duty of good behaviour under section 99 of the *Constitution Act, 1867* and has become incapacitated or disabled from the due execution of the office of judge for the reasons set out in paragraphs 65(2)(b),(c) and (d) of the *Judges Act*:

- having been guilty of misconduct,
- having failed in the due execution of that office,
- having been placed, by his conduct, in a position incompatible with the due execution of that office, and we recommend that he be removed from office.

After considering the two reports and further written submissions from both counsel, the Judicial Council reached a decision — not unanimous — to recommend to the Minister that Mr. Justice Bienvenue be removed from office for essentially the reasons given by the majority of the Inquiry Committee. The lack of unanimity has given rise to three reports by Council, one by the majority, excluding Chief Justice McEachern, one by Chief Justice McEachern supporting the majority decision, and this report by the minority. The Council did not hear any oral evidence or any oral submissions. Mr. Justice Bienvenue, although given the opportunity, did not appear before Council.

The majority of the Inquiry Committee made certain findings of primary fact which we accept. We do not, however, accept the Committee's crucial conclusory findings, either of law or fact. The findings of primary fact to which we refer are these:

1. the "Kleenex" remarks to a female juror;
2. certain uncomplimentary remarks about a parking attendant;
3. certain inappropriate comments to a female reporter concerning her attire;
4. remarks to a court official in the judge's private chambers about the jury's competence and about the accused's colour and sexual orientation;
5. meeting of the judge with the jurors after the verdict;
6. remarks by the judge during sentencing concerning women in general (and about men) and separate remarks concerning the victims of the Holocaust;
7. events that occurred after sentencing.

It is the sixth and seventh of these, insofar as they particularly concern women, that were the true focus of the Inquiry Committee and of Council. It is fair to say that the remarks about women were the catalytic force which precipitated the decision to recommend removal.

Had those remarks not been made, the improprieties of conduct reflected in the remainder of the primary facts (1 to 5) taken separately and cumulatively, would not have been a sufficient basis for the decision to recommend removal. They may have given rise to some form of sanction, perhaps even a severe disapproval, but not removal.

It is clear from the Committee's majority report that, while the majority did not brush aside these other improprieties, they were used mainly as a buttress to the conclusion the majority reached regarding the consequences that are to flow from the remarks concerning women in general. It is for these reasons that we will emphasize the aspect of the Committee's report that pertains to the remarks about women — remarks that none of us believes to be true or appropriate for use by a judge.

The judge said this about women in his sentencing remarks:

IT HAS always been said, and correctly so, that when — women — whom I have always considered the noblest beings in creation and the noblest (*sic*) of the two sexes of the human race — it is said that when women ascend the scale of virtues, they reach higher than men, and I have always believed this. AND it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.

ALAS, YOU ARE indeed in the image of these women so famous in history: the Delilahs, the Salome, Charlotte Corday, Mata Hari and how many others who have been a sad part of our history and have debased the profile of women. You are one of them, and you are the clearest living example of them that I have seen.

After the trial was completed the judge repeated some of these remarks several times to various news media. During the hearing before the Inquiry Committee the judge reaffirmed his belief in the truth of these remarks. The judge intimated that the genesis for the belief was his cultural and religious upbringing and the reality that a like belief has been held by many thinkers over the centuries. He made it quite clear that he would not readily be disabused of that belief.

The first point to note is that the misconduct alleged against the judge consists of words spoken by the judge in the context of a judicial proceeding. It is important to keep that context in mind. A judge performing his or her judicial function acts in a very different capacity from a judge who chooses to speak extra-judicially on a certain subject. A judge performing his or her judicial function needs to examine all sides of a particular question, not only the side favoured by one party to the proceeding or the side favoured by a large segment of the population who may have an interest in the proceeding. He or she needs to give full consideration to *individual* interests and should, generally speaking, be more concerned with protecting those individual interests than with pursuing communal goals. The area of communal goals is better left to the legislature whose job it is to enunciate general policy and enact the means to achieve the policy goals, and to the executive branch of government whose job it is to carry into effect such legislative policy.

In the course of examining all sides of a question and giving full consideration to individual interests, a judge is apt to play the role of a devil's advocate, to think out loud and to use language — sometimes appropriate, sometimes inappropriate — that one side or some segment of society may find unacceptable. For example — a judge may feel it necessary in the interests of justice, to tell a litigant that he or she is an “unmitigated liar” or that society will no longer put up with the litigant’s “brutal propensities” or “lawless attitude” and so on. Anyone familiar with judicial proceedings will readily recognize this sort of exercise and ought to be very loathe to restrict judges from engaging in it.

Moreover, it is important and sometimes essential that a judge speak his or her mind, giving full reasons for reaching a decision. Not only is this important to litigants it is also important to courts of appeal reviewing the judge’s decision. They ought to be in a position of some certainty if they are to rule on whether a judge erred in his or her conclusions and if so where the error occurred. Any restriction that inspires judges to keep their reasons to themselves, generally speaking, should be discouraged, as it does not auger well for the administration of justice. And lastly, in this respect, it is important to keep in mind that remarks made in the course of a judicial proceeding are subject to the scrutiny of a court of appeal and any injustice created by reason of a judge’s unacceptable belief is correctable.

It logically follows that from the standpoint of disciplinary consequences which ought to flow from a judge’s improper remarks, remarks made during judicial proceedings ought not to be judged as harshly as those made extra-judicially. That, of course, does not mean a judge can with impunity say whatever he or she wants during a judicial proceeding, but it does mean that the boundaries are different for the two contexts. Did the judge cross the boundary in the present case? It is necessary to consider this question from two perspectives: substance and perception.

In our respectful view the belief voiced by the judge reflected a predilection or predisposition, even a bias perhaps, regarding both men and women that is unacceptable to many people in our society and actually repugnant to some, perhaps many. The basic question that needs to be examined is this: What effect, if any, does the “having” of this predilection, predisposition, or bias by a judge, have upon the ability and the capacity of a judge to perform his or her judicial functions?

Every judge knows, and every reasonably informed person not a judge who approaches the issue objectively ought to know, that like every other member of the human species all judges have certain predilections. Judges are not — and society does not want them to be — intellectual eunuchs devoid of any philosophy of life, of society, of government or of law and a judge’s world is the same as the public’s — a world of realism rather than a world of idealism. The critical question is not: Does the judge have a predilection? Rather the critical question is: Is the judge able and prepared to set the predilection aside and not *put it to work* in the exercise of his or her judicial functions?

Where the misconduct alleged against a judge centres on some unacceptable predilection the judge is said to have, what is the threshold for determining whether the judge is guilty of misconduct, or has failed in the due execution of the office of a judge, or has been placed in a position incompatible with the due execution of this office? The threshold is not whether there is proof the judge in fact *has* that predilection. Nor is the threshold whether the judge is able or intends to shed the predilection. Shedding the predilection or not shedding it is still a question of “having” or “not having” the predilection. The threshold has to go beyond “having.” It is whether there is proof the judge has in fact recurringly in the past *put the predilection to work* to the detriment of litigants or in all likelihood intends in the future to recurringly put it to work to the detriment of litigants.

If merely “having” a predilection were sufficient, it is not difficult to envision consequences resembling kafkaesque scenarios, and questions that are downright disturbing. Would judges’ past writings, speeches, judgments, etc. be scrutinized to detect evidence of certain kinds of unacceptable predilections? Would the results produce a proliferation of Inquiry Committees looking into the “conduct” of misspoken judges? Would some sort of “thought” police become a reality? Would judgments need to be tailored and crafted with care and precision heretofore not imagined? Does society want its judges to become easier shooting targets for certain disenchanting segments of society? Does the making of judges into easier shooting targets enhance or diminish the administration of justice in the eyes of the reasonably informed members of society? Will judges be prompted to cull from their judicial vocabularies such Shakespearian phrases as “pure as Caesar’s wife,” and such pedestrian everyday expressions as “christian charity” or “godlike features” which, until now, have simply rolled off one’s tongue?

Our form of democratic society envisages a judiciary unfettered in its ability to think and unhobbled in its capacity to hold views that do not accord with those of the mainstream. To be removed from office for merely “having” a predilection or predisposition or bias flies in the face of the legitimacy of that unfettered and unhobbled judiciary.

The next question which needs to be examined is this: What is the proof in the present case of Mr. Justice Bienvenue’s “having” the predilection *and* “putting it to work to the detriment of litigants.” When he spoke the impugned words in the course of sentencing, he clearly affirmed that he had the predilection. When he spoke to the media in the days after the trial he reiterated the words. This amounted to nothing more than a re-affirmation that he has the predilection. When confronted before the Inquiry Committee he again re-affirmed he has the predilection. He also confirmed that he either would not or could not readily shed it. But as noted, not shedding it does not put the analysis past the “having” stage. The threshold stage is putting the predilection to work to the detriment of litigants.

Is there proof that Mr. Justice Bienvenue put this predilection to work before the Théberge case took place? The answer is *no*. The only evidence in this regard is that upon which the Inquiry Committee found Mr. Justice Bienvenue to be “an individual who has been a judge for almost 20 years and whose integrity has not been questioned.” It must be remembered that the terms of reference of the Inquiry Committee did not include an investigation of Mr. Justice Bienvenue’s conduct preceding the Théberge case.

Is there proof that Mr. Justice Bienvenue put the predilection to work in the Théberge case to the detriment of Ms. Théberge? Again, in our respectful view, the answer is *no*. The Committee made no finding of fact that would assist in this respect. The only item of evidence that may be interpreted as tending to show that predilection at work is the decision by Mr. Justice Bienvenue to impose a 14-year parole ineligibility on Ms. Théberge’s life sentence despite the jury’s recommendation of the minimum 10-year period of ineligibility. Whether it is *possible* for that circumstance to be interpreted as the predilection at work is one thing. Whether *in fact* it should be interpreted that way is quite another. There is not the slightest indication that given the viciousness of the killing the judge would not have made an identical ruling had the offender been a male rather than a female. Even if the judge’s ruling can be shown to be the predilection at work, this is only one instance of that happening. One instance is hardly evidence of recurrence. Furthermore, the way to correct that one instance is — as has been done — to refer this justiciable matter to the Court of Appeal. That is where the matter rightfully belongs. This one instance is hardly a matter for the Canadian Judicial Council to use as a spearhead for a recommendation consisting of the draconian step of an irrevocable removal of the judge from office.

That leaves for determination the presence of proof of whether Mr. Justice Bienvenue intends in the future to “recurringly put the predilection to work to the detriment of litigants.” In our respectful view there is not the slightest evidence of the judge’s future intent in respect of putting his predilection to work. There is, as noted earlier, evidence of his inability or disinclination to shed his predilection (perhaps even evidence of his reluctance to express contrition) but, also as noted, all that is evidence of “having” not of “putting the predilection to work” — a distinctly different factor. When the Inquiry Committee found “In addition — the evidence could not be any clearer — Mr. Justice Bienvenue does not intend to change his behaviour in any way,” it must have confused “behaviour” with “having.” It could not have been referring to “putting the predilection to work” because there was no evidence of his “putting the predilection to work” in the past. And since there was no evidence it makes no sense to talk about “no change” to that “behaviour.” The Committee was obviously confusing “having” with “behaviour” or referring to some other kind of behaviour. There is no presumption in law or in the realm of common sense that having a predilection and being disinclined or unable to shed it will automatically mean that the judge will put the predilection to work to the detriment of the litigants either at every opportunity or from time to time. To make the presumption in this case is unfair to Mr. Justice Bienvenue and puts at risk every other judge in the country against whom a like presumption might be made in respect of whatever general predisposition

it is the judge may have. The presumption that ought to be made is that the judge, as judges have been doing from time immemorial, will engage his or her professionalism and will set aside such predispositions as often as is required. The presumption should prevail unless there is evidence to the contrary.

In summary it is our respectful view the majority of the Inquiry Committee made two critical interrelated errors.

The first is this: The majority did not make the crucial distinction between “having” a predilection and “putting it to work to the detriment of litigants.” This is evident in at least two conclusory findings made by the Committee:

Because of his [having] ideas about both women and men, Mr. Justice Bienvenue’s impartiality in the execution of his judicial office has legitimately been called into question.

. . .

Like anyone else, a judge can have a bad day. In this case, the breaches of ethics brought to our attention — *the judge’s repeated remarks about women* and the comments he made to the jurors after their verdict — are serious and, as with the other incidents alleged against him, have not been retracted by him. We are therefore not dealing here merely with strong language. (italics added)

The second is this: The majority found that having a predilection and being unable or disinclined to shed it is the same as putting the predilection to work. Alternatively the majority applied a presumption that being unable or disinclined to shed the predilection is automatically followed not by a setting aside of the predilection but by putting the predilection to work to the detriment of litigants.

In our respectful view the majority of this Council repeated those same two errors. In its report it says, “No attempt has been made by Mr. Justice Bienvenue since the delivery of the report of the Inquiry Committee to indicate any intention on his part to, in fact, change his behaviour.” (One gets the distinct impression the majority would have been prepared to absolve Mr. Justice Bienvenue had he shown some contrition or expressed penitence.) Although it is not entirely clear, it would appear that when the majority of Council speaks of “behaviour” they mean “having” the predilection concerning women. When they speak of “change” they mean shedding the predilection concerning women. By “behaviour” they do not mean and could not mean “putting the predilection to work” because there is no evidence of the predilection being put to work in the past. The corollary, of course, is that there could be no “change” to “putting the predilection to work.”

The foregoing analysis deals primarily with the issue from the perspective of *substance*. From that perspective, the basic question should properly read: What effect, if any, does the “having” of the predilection by a judge, have upon the *actual* ability and the *actual* capacity of a judge to perform his or her judicial function? The answer as we have seen is none.

From the perspective of *perception* the basic question becomes: What effect, if any, does the “having” of the predilection by a judge have upon the *perceived* ability and the *perceived* capacity of a judge to perform his or her judicial function? The majority of the Committee reached this conclusion:

Because of his conduct during all the incidents that marked Tracy Th  berge’s trial, Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. In our view, this is the conclusion that would be reached by a reasonable and informed person.

Combining the test used by the Committee of the Canadian Judicial Council in the *Marshall* case and that applied by the Supreme Court to assess judicial impartiality and independence, we believe that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, viewing the matter realistically and practically — and having thought the matter through — would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.

The majority of Council agreed.

With the greatest of deference to both the majority of the Committee and the majority of Council we strongly disagree that a reasonable and informed person would assess the remarks concerning women in this harsh fashion and would in the end have the complete lack of confidence and the reasonable apprehension described by the majority of the Committee (and agreed with by the majority of the Council) to the point where he or she would vote to remove Mr. Justice Bienvenue from office.

A reasonable and informed person by definition would make the assessment and view all of the issues objectively. That means the person would need to set aside any biases, predilections or predispositions he or she had, and not “put them to work” in making the assessment. A reasonable, informed and objective person would need to consider a series of relevant factors and would likely ask and answer questions such as these:

1. Is having a predilection enough to render a judge incapable, or must there be more? For example, must there be a “putting to work” of the predilection? We have already seen where “having” alone leads. A reasonable, informed, objective person should easily be able to come to the same conclusion.
2. Where did Mr. Justice Bienvenue get these ideas? A reasonable, informed and objective person would know that the ideas reflected in Mr. Justice Bienvenue’s words have been around for centuries. One does not need to be a biblical scholar to know that both the Old and New Testaments are replete with thinking not unlike that reflected in Mr. Justice Bienvenue’s words. If he was brought up in a Judeo-Christian culture, and he apparently was, it is not difficult to understand why he would think this way.

He, of course, is far from alone in having these outdated beliefs. Some institutions in our society continue to promote this sort of thinking.

A reasonable, informed and objective person will quickly recognize that Mr. Justice Bienvenue is continuing to trade in a variant of the stereotypical view about the essential personalities and characteristics of men and women. The view, once orthodox and mainstream was universally held by leaders and other members of society including our law makers — parliamentarians and judges — and our appointers of judges. It found expression in our many institutions such as our schools and churches, in our many intellectual, social, cultural and sport associations, and, in our laws — both statutory and judge-made. To quickly remind oneself of the type of laws that prevailed, one needs only to read such recent decisions by the Supreme Court of Canada as *R. v. Seaboyer*, [1991] 2 S.C.R. 577 and *R. v. Butler*, [1992] 1 S.C.R. 452 and some custody cases espousing principles, as for example those embodied in the “tender years doctrine” (see *Talsky v. Talsky*, [1976] 2 S.C.R. 292).

The stereotypical view is the progenitor of what is now considered idiosyncratic thinking and a bias, predisposition or predilection unfavourable to women. A reasonable, informed and objective person who encounters someone in authority who is continuing to trade in the view may be concerned, disappointed, perhaps even surprised. But given the view’s recent pervading, universal, long-term reign and its continuing currency in some circles, he or she would hardly be “shocked” — to borrow a term from the *Marshall* test referred to by the Committee.

3. But this is 1996, is it right for judges to have these kinds of outmoded views and beliefs? The answer is no, but the shift from what was orthodox and mainstream to what is now unorthodox and passé is an evolutionary one, not a precipitous one reminiscent of a revolution. It is only in relatively recent times that the evolution has been making progress. Some judges were quick to adjust and adapt. Others have not been so quick. In order to consummate and complete the evolution now well underway should one resort to a “sledge hammer” approach to beat into submission the remaining judges who still think that way? Or should one opt for a more sophisticated and in the end a more practical approach respecting Mr. Justice Bienvenue and the remaining judges? A reasonable, informed and objective person would have no difficulty in answering the first question in the negative and the second in the affirmative.
4. Is there some way other than removal from office that one could use to ensure that Mr. Justice Bienvenue does not continue to trade in his stereotypical belief (thereby running the risk of putting his predilection to work)? Social context education is clearly a viable avenue and in the end a very real practical approach. There was no evidence before the Committee or before Council that Mr. Justice Bienvenue has been putting his predilection to work during the past twenty years he has been a judge. (As noted his past conduct before the Théberge trial took place was not before the Committee or

Council.) With proper and repeated education, there should be very little difficulty ensuring his predilection is not “put to work.” Indeed with proper education and time he may even become convinced that his belief is bad, and should that occur one would not need to be concerned about his putting to work the predilection it reflects. A reasonable, informed and objective person would likely conclude that it is much too early to say that he is so irredeemable that one should metaphorically “put him behind bars and throw away the key.”

5. Does the fact the words were spoken by Mr. Justice Bienvenue in court and not extra-judicially make a difference? A reasonable, informed and objective person would after reflection conclude that there is a difference, for the reasons outlined earlier. He or she would conclude that any injustice resulting from the words spoken on this one occasion should properly be dealt with by a court of appeal and not by a disciplinary body. Had there been a pattern of such conduct — a recurrence — the matter might need to be viewed in a different light. But there is no evidence of such a pattern.
6. Does the removal of one judge for speaking unacceptable words solve what may be a minor (in terms of numbers) institutional problem? In the decision to remove the judge in these circumstances, is there an element of “judicial cleansing,” something in the nature of a “judicial crucifixion” in expiation of past and future “sins of the judiciary,” a purported reconciliation of the judiciary with the public? One would hope not but one is not entirely sure.
7. Does removing Mr. Justice Bienvenue for “having” a predilection affecting men and women mean that other judges having other predilections, such as predilections favourable or unfavourable towards abortion, environmental despoiling, big business, the media, governmental bureaucracy, gambling, gun control and so on, ought also to be removed? Would it make any difference if the judge not only held a predilection concerning a subject matter but a bias against the persons involved with the subject matter (e.g. abortionists, pro-lifers, polluters, bureaucrats, gamblers, etc.)? Were the answers to the first and perhaps the second question “yes” the ranks of the judiciary would be depleted quite dramatically. A reasonable, informed and objective person would appreciate the total undesirability of the consequence to society of removal for having such predilections and biases but, more important, would conclude that judges should be presumed to be able and willing to set aside their predilections and biases.

This series of questions is not intended as an exhaustive list. There are other questions that may need to be considered. In the result we are confident that a reasonable and informed person, viewing and assessing the circumstances objectively would not acquire an apprehension and a lack of confidence of the type described by the majority of the Committee and the majority of Council.

It is unfortunate that the majority of the Committee treated itself as a court and the proceedings before it as a court proceeding where there is a *lis inter partes* rather than as a tribunal with no *lis* before it but whose primary role was a search for truth (as the Supreme Court of Canada held in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267).

Had the Committee not overlooked this aspect of its *raison d'être* it would not have excluded a consideration of the results of a poll Mr. Justice Bienvenue's counsel sought to introduce. We, as members of Council, would very much have liked to interpret the results of that poll for ourselves rather than have been left in the dark. The poll may have been a better source of information than the editorial writers for some of the Quebec press whose views were readily available to all Council members.

The majority of the Committee in its report said this: "Under the Act, this Committee is responsible for assessing the judge's conduct." The Committee seemed to overlook the fact that s. 65(2) of the *Judges Act* places that responsibility on Council. As Council members, we would have appreciated any help we could get, including poll results, to which we could have ascribed whatever weight we thought proper, in order to make a proper assessment of the state of the public's confidence in the judiciary and public's apprehension or lack of it, concerning Mr. Justice Bienvenue.

In our respectful view too much emphasis was placed by the majority of both the Committee and the Council upon what judges think the public's reaction ought to be rather than upon what the public's reaction actually was. In a matter as serious as the one concerning the removal of a judge, the public whose judges we are, ought to have more direct say, even at this stage of the proceedings, about what is their apprehension of bias and their lack of confidence or otherwise in the judiciary.

To this point we have dealt only with the remarks concerning men and women and have not dealt with any of the other improprieties found by the Committee. In our respectful view those other improprieties — the buttress for the decision to remove — when put into the crucible of scrutiny either separately or cumulatively fare no better than the remarks concerning men and women — the main pillar for the decision to remove. If the main pillar falls, the buttresses either fall or are considerably diminished in importance from the standpoint of a decision to remove.

The only conduct other than the remarks concerning women and men that could possibly fall into a category serious enough to consider removing a judge from office were the remarks concerning Jews and the Holocaust.

It is clear from the evidence considered by the Committee that these remarks, after due explanation and apology by Mr. Justice Bienvenue, did not raise in the minds of those most closely affected by them the lack of public confidence in the judiciary or the apprehension of bias held by the Committee to have been raised by the other improprieties. Although the remarks were flagrantly insensitive, hurtful, and grossly inappropriate, the Committee did not find any misconduct on the part of Mr. Justice Bienvenue attributable to the remarks concerning Jews and the Holocaust. In our respectful view this was a proper finding. By making no reference to this matter in its report the majority of Council appears to have agreed with the Committee's finding as well.

In view of the decision reached by the majority of Council it was not necessary for us, the minority, to consider whether Mr. Justice Bienvenue's conduct, taken as a whole, during the trial of Ms. Théberge ought to attract some sanction other than removal from office. And we, of course, make no finding in that respect. We are, however, prepared to say that, given the primary facts found by the Committee, we found the conduct of Mr. Justice Bienvenue, taken as a whole, unacceptable, insensitive, and of a type that we do not at all condone.

Before closing we desire to raise three procedural questions that were not put before either the Inquiry Committee or Council. We raise the questions not because we have made any decisions relating to them (we have not) but as suggestions for Council to consider sometime in the future in an effort to improve our disciplinary procedures.

One wonders whether the Inquiry Committee, essentially a fact finding, investigative tribunal, would not have been well advised, given the circumstances of the present case, to canvass the entire federally-appointed judiciary to seek the judiciary's opinion on the relevant questions of the public's lack of confidence and reasonable apprehension and the resultant incapacity or disability of the judge to further perform his judicial functions. As a fact finding body with no *lis* before it, is not the Committee (and ultimately Council) entitled to all the intelligent help it can get on issues like these? The results of the "canvass" would simply have been another "primary fact" available to the Committee and Council to consider. The results would not have been determinative. Rules of evidence governing court procedure should not hold sway where no *lis* is involved. Somehow it does not seem right or advisable for the Committee or Council to arrogate to itself all the wisdom necessary to decide an issue as troubling and as far reaching as the removal of a long-serving federally-appointed judge, particularly where the service is described as "with integrity." Moreover, is there not a similarity in process between a canvass of approximately 950 judges and a vote of 399 members of the House of Commons and the Senate acting under s. 99 of the *Constitution Act*?

The second suggestion pertains to the Committee's power, right, or obligation to recommend removal. There is some doubt whether it has this power, right, or obligation under the *Act*. If the Committee does have it, perhaps it should not. Council members considering any disciplinary measure as serious as removal should approach the issue with a completely open mind and should not feel strait-jacketed by a Committee's recommendation. Perhaps the Committee ought to be what the law says it ought to be, namely, a fact finding, investigative body, leaving it to Council to decide whether any sanctions or further steps should flow from the facts found by the Committee. Perhaps the Committee should be entitled to say: "We think there is nothing here for Council to consider" or "we think there is something here for Council to consider," in much the same way that a judge sitting on a preliminary inquiry finds that there is sufficient evidence for a matter to proceed to trial or that there is no sufficient evidence.

It may well be that Council's position in relation to the Minister of Justice and Parliament should be similar to the position we suggest for the Committee in relation to Council.

The third suggestion relates to the composition of the Inquiry Committee provided for in s. 63(3) of the *Judges Act*. This subsection vests in the Minister of Justice for Canada the power to appoint to the Inquiry Committee "such members, if any, of the bar of a province, as may be designated by the Minister." Apart from the constitutional issue which the presence of such a power raises (considered in the *Gratton* inquiry), there is some question about the propriety — from the standpoint of fairness — of the Minister's having or exercising such a power where the Minister instituted the inquiry pursuant to s. 63(1). It is unusual to say the least for a complainant to have the power to appoint a percentage — in the present case 40% — of the adjudicators or assessors who are required to examine and rule upon certain issues arising out of the complaint while the person complained against has no such similar power.

These three suggestions raise issues that we think ought to be explored further.