INQUIRY COMMITTEE OF THE CANADIAN JUDICIAL COUNCIL
REGARDING THE CONDUCT OF
THE HONOURABLE MICHEL GIROUARD, S.C.J.

Members of the Inquiry Committee:

The Honourable J. Ernest Drapeau (Chairperson), Chief Justice of New Brunswick

The Honourable Glenn D. Joyal, Chief Justice of the Court of Queen's Bench of Manitoba

The Honourable Marianne Rivoalen, Associate Chief Justice (Family Division) of the Court of Queen's Bench of Manitoba

Bâtonnier M^{e} Bernard Synnott, Ad. E.

M^{e} Paule Veilleux

Counsel of record

Counsel for Justice Girouard:

Bâtonnier M^{e} Louis Masson, Ad. E., Jolicoeur Lacasse

Bâtonnier M^{e} Gérald R. Tremblay, Ad. E., McCarthy Tétrault

M^{e} Bénédicte Dupuis, Jolicoeur Lacasse

Counsel for the Inquiry Committee:

M^{e} Marc-André Gravel, Gravel Bernier Vaillancourt

M^{e} Emmanuelle Rolland, Audren Rolland

M^{e} Élie Tremblay, Gravel Bernier Vaillancourt

REASONS FOR DECISIONS ON PRELIMINARY MOTIONS
RENDERED FROM THE BENCH ON FEBRUARY 22, 2017

[1] Justice Michel Girouard was appointed to the Superior Court of Quebec on September 30, 2010.

[2] Justice Girouard was appointed to the judiciary after practicing law for twenty-five years in the Abitibi region, working in various areas of the law, including criminal law.

[3] In 2012, the Honourable François Rolland, then Chief Justice of the Superior Court of Quebec, filed a complaint with the Canadian Judicial Council, after being informed that a former drug trafficker, who later became a police informer, had identified Justice Girouard as a client of his while he was a lawyer.

[4] A Review Panel composed of Chief Justice J. Ernest Drapeau, Chief Justice Glenn D. Joyal and Justice Arthur J. LeBlanc was established. Following a summary review, the Review Panel determined that an Inquiry Committee should be constituted to further investigate the matter.

[5] As a result, the Council constituted a first Inquiry Committee composed of Chief Justice Richard Chartier, Chief Justice Paul Cramption and M^{e} Ronald Leblanc, Q.C. Following this first inquiry, a limited number of allegations of misconduct were upheld and remained at issue.

[6] In its report to the Canadian Judicial Council, the first Committee unanimously concluded that these allegations had not been proven[1].

[7] However, two of the three members of the first Committee found that the evidence given by Justice Girouard at the inquiry contained several "contradictions, inconsistencies and implausibilities"[2] giving rise to "deep and serious concerns"[3] about his credibility and integrity.

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[1] Report of the Inquiry Committee concerning the Honourable Michel Girouard to the Canadian Judicial Council (November 18, 2015) at paras. 176-178 [Report of the first Inquiry Committee concerning Justice Girouard].
[2] Report of the first Inquiry Committee concerning Justice Girouard, at para. 180.
[3] Report of the first Inquiry Committee concerning Justice Girouard, at para. 227.

[8] The majority of the first Committee was of the opinion that, during the inquiry, Justice Girouard engaged in misconduct incompatible with the due execution of the office of judge, and that such conduct undermined the integrity of the judicial system[4].

[9] As a result of Justice Girouard's misconduct, the majority of the first Committee recommended to the Council that Justice Girouard be removed from office[5].

[10] Chief Justice Chartier, for his part, dissented from the conclusions and recommendation of the majority. In his opinion, the concerns raised by the majority were predictable, and of the kind that can be expected in such a lengthy testimony dealing with events that occurred five years earlier[6]. In addition, Chief Justice Chartier expressed the opinion that a recommendation for removal could not be based on misconduct that was not included in the Notice of Allegations, and that Justice Girouard was entitled to respond to issues raised by the majority of the first Committee[7].

[11] In its report to the Minister of Justice of Canada, the Canadian Judicial Council recommended that Justice Girouard not be removed from office on the grounds of allegations set out in the final version of the Notice of Allegations. According to the Council, it did not consider the majority's conclusion that the judge attempted to mislead the Committee by concealing the truth during his testimony, because the judge was not formally advised that the specific concerns of the majority were a distinct allegation of misconduct to which he had to reply[8].

[12] In June 2016, the Canadian Judicial Council received a joint request from the Minister of Justice of Canada and the Minister of Justice of Quebec, pursuant to subsection 63(1) of the

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[4] Report of the first Inquiry Committee concerning Justice Girouard, at para. 240.
[5] Report of the first Inquiry Committee concerning Justice Girouard, at para. 242.
[6] Report of the first Inquiry Committee concerning Justice Girouard, at para. 247.
[7] Report of the first Inquiry Committee concerning Justice Girouard, at para. 270.
[8] Report of the Canadian Judicial Council to the Minister of Justice, April 20, 2016, at paras. 42-44.

Judges Act[9], asking the Council to hold an inquiry into Justice Girouard's conduct before the first Inquiry Committee[10].

[13] More specifically, the request arose from the findings of the majority of the first Committee, on the basis of which it recommend Justice Girouard's removal from office, because the Ministers were of the opinion that "these findings remain unaddressed"[11].

[14] This Committee was therefore constituted in September, 2016, in response to the request made by the Ministers.

[15] Subsequently, a letter sent to the Canadian Judicial Council by Ms L.C. was brought to the attention of the Committee, in which Ms L.C. called into question certain elements of the testimony given by Justice Girouard during the first inquiry (the "letter of denunciation").

[16] In accordance with section 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*[12], the Inquiry Committee engaged M^{e} Marc-André Gravel, of the law firm Gravel Bernier Vaillancourt, and M^{e} Emmanuelle Rolland, of the law firm Audren Rolland, to provide advice and to assist in the conduct of the inquiry.

[17] Justice Girouard, for his part, was represented by Bâtonnier M^{e} Louis Masson, Ad. E. and M^{e} Bénédicte Dupuis, of the law firm Jolicoeur Lacasse, and by Bâtonnier M^{e} Gérald R. Tremblay, Ad. E., of the law firm McCarthy Tétrault. Bâtonnier M^{e} Masson and Bâtonnier M^{e} Tremblay also represented Justice Girouard at the first inquiry.

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[9] R.S.C., 1985, c. J-1 [*Judges Act* or *Act*].
[10] June 13, 2016 letter from the Minister of Justice of Canada and the Minister of Justice of Quebec to the Canadian Judicial Council [Letter from the Ministers], at p. 2.
[11] Letter from the Ministers, at p. 1.
[12] SOR/2015-203 [*By-laws*].

[18] On December 23, 2016, in accordance with subsections 5(1) and 5(2) of the *By-laws*, the Inquiry Committee provided Justice Girouard with a Notice of Allegations containing two allegations setting out the areas of its inquiry:

> **First allegation:**
>
> Justice Girouard has become incapacitated or disabled from the due execution of the office of judge by reason of having been guilty of misconduct and having failed in the due execution of the office of judge (paragraphs 65(2)(b) and (c) of the *Judges Act*) during the inquiry held by the First Committee, particulars of which are as follows:
>
> a) Justice Girouard failed to cooperate with transparency and forthrightness in the First Committee's inquiry;
> b) Justice Girouard failed to testify with transparency and integrity during the First Committee's inquiry;
> c) Justice Girouard attempted to mislead the First Committee by concealing the truth.
>
> **Second allegation:**
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> Justice Girouard has also become incapacitated or disabled from the due execution of the office of judge by reason of having been guilty of misconduct and having failed in the due execution of the office of judge, by falsely stating before the First Committee that:
>
> a) He never used drugs;
> b) He never obtained drugs.[13]

[19] As we will see, Justice Girouard put forward a range of arguments, some of which are contradictory and lack seriousness.

[20] In a document entitled "*Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard*", dated January 13, 2017, Justice Girouard

[13] The second allegation was based on the letter of denunciation.

requested the following declarations and constitutional remedies from the Inquiry Committee:

> [TRANSLATION]
>
> **ALLOW** this motion for a stay of proceedings related to the inquiry concerning the applicant;
>
> **DECLARE NULL AND INVALID** the decision of the Minister of Justice of Canada to conduct an inquiry concerning the Honourable Judge Michel Girouard of the Superior Court of Quebec, in accordance with subsection 63(1) of the *Judges Act*, R.S.C., 1985, c. J-1;
>
> **DECLARE** inadmissible as being contrary to the doctrine of estoppel any procedure related to the inquiry concerning the applicant;
>
> **ISSUE** a declaration of disqualification of the members of the Inquiry Committee;
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> **ISSUE** a declaration of disqualification of the Honourable J. Ernest Drapeau and the Honourable Glenn D. Joyal;
>
> **ISSUE** a declaration that the *Canadian Judicial Council Inquiries and Investigations By-laws* SOR/2015-203 is inapplicable to this matter, which was commenced under the *Canadian Judicial Council Inquiries and Investigations By-laws* SOR/2002-371[14];
>
> **ORDER** that the *Notice of Allegations* be striken on the grounds of bias and lack of precision;
>
> **ISSUE** a declaration that the *Notice of Allegations* restates the same allegation as the one unanimously dismissed by the Inquiry Committee and, consequently, order a stay of proceedings in accordance with the doctrine of cause of action estoppel and issue estoppel;
>
> **MAKE** any other order deemed relevant or necessary to safeguard the rights of the applicant;

[14] This argument was not restated in oral submissions. The Committee will not deal with it, since section 14 of the 2015 *By-laws* provides that the 2002 *By-laws* continue to apply in respect of any inquiries or investigations that were commenced under those *By-laws*.

SUBSIDIARILY,

DECLARE invalid provisions allowing the conduct of an inquiry in violation of Canadian constitutional principles;

ORDER the disclosure of evidence[15].

[21] Justice Girouard raised the following eight constitutional questions in opposition to this inquiry[16]:

[TRANSLATION]

a) Is the inquiry process, as amended by the Canadian Judicial Council in 2015, in compliance with current constitutional principles in Canada?

b) Is the decision by the Minister of Justice of Canada and the Minister of Justice of Quebec to challenge the Canadian Judicial Council's final recommendation in compliance with current constitutional principles governing judicial independence? Does this indirect challenge contravene constitutional principles governing judicial independence?

c) Did the Ministers of Justice exercise their discretionary authority in compliance with Canadian constitutional principles?

d) Does the Inquiry Committee act as a criminal court, an appellate court or a judicial review tribunal?

e) Is the infringement of the principle of separation in compliance with Canadian constitutional principles?

f) Is the effect of the implementation of the *Judges Act*, the *By-laws* and the *Handbook of Practice and Procedure* in compliance with Canadian constitutional principles governing judicial independence?

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[15] The Committee ordered that evidence in preparation for the hearing on the merits of the matter be disclosed as soon as possible, or no later than April 7, 2017 for M[e] Gravel and April 18, 2017 for Justice Girouard (transcript of hearing of February 22, 2017, at pp. 1006 (l. 22) to 1010 (l. 6) (in French only).

[16] *Avis de questions constitutionnelles* (in French only), dated January 26, 2017.

g) Does the implementation of these legislative and regulatory instruments result in undermining judicial independence and creating an investigative body that is structurally biased, since its members are investigators, prosecutors and judges?

h) More specifically, on the basis of reasons put forward to support the brief entitled "*Mémoire des faits et du droit*", is the procedure governing [the inquiry] since 2015 and 2016, as amended, in compliance with Canadian constitutional principles?

[22] In the *Avis de questions constitutionnelles*, dated January 26, 2017[17], Justice Girouard requested that the Inquiry Committee:

[TRANSLATION]

DECLARE INAPPLICABLE AND OF NO FORCE OR EFFECT on the grounds that they are invalid:

a. Subsection 63(1) of the *Judges Act*;

b. Subsections 2(1), 3(1), 3(2), 3(3) and section 4 of the *Canadian Judicial Council Inquiries and Investigations By-law* SOR/2015-203;

c. Sections 3.1, 3.2 and 3.3 of the *Handbook of Practice and Procedure of the Canadian Judicial Council Inquiry Committees*.

[23] In his *Requête en déclaration de nullité de la constitution du Comité d'enquête*, dated January 26, 2017, Justice Girouard also requested that the Inquiry Committee:

[TRANSLATION]

DECLARE INVALID the constitution of the Inquiry Committee of the Canadian Judicial Council on the grounds that all its members are disqualified by reason of an absence of impartiality;

[17] The *Avis de questions constitutionnelles* (in French only) was served on the Attorney General of Canada, provincial attorneys general, and the Canadian Judicial Council. No attorney general intervened. The Council, for its part, advised that it was at the disposal of the Inquiry Comittee to provide guidance on any issue that may arise during the hearings (but not to defend the constitutionality of the *By-laws*). Such guidance was not required.

DECLARE INVALID the appointment of the Honourable Chief Justice J. Ernest Drapeau and the Honourable Chief Justice Glenn D. Joyal as members of the Inquiry Committee on the grounds of [an absence of] impartiality[18].

[24] Finally, by virtue of his *Requête en rejet d'avis d'allégations, divulgation de la preuve et précisions*, dated January 26, 2017, Justice Girouard requested that the Committee:

[TRANSLATION]

REJECT the Notice of Allegations submitted in support of the request for an inquiry;

CONSEQUENTLY, that the Committee declare a **STAY OF PROCEEDINGS** with regard to the investigation commenced by the Inquiry Committee of the Canadian Judicial Council;

DISMISS the complaint filed against the Honourable Michel Girouard;

STRIKE FROM THE RECORD the email from the complainant (L.C.) dated July 25, 2016;

Consequently, **NOT PUBLISH** the letter dated July 25, 2016 on the Canadian Judicial Council's Web site[19];

SUBSIDIARILY, the Honourable Michel Girouard requests that the clarifications and documents stated in this motion be provided to him within the time limit and on the conditions stated in the motion[20].

[25] In order to simplify the reading of this report, we will refer to all these requests as the "preliminary motions".

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[18] Chief Justice Drapeau and Chief Justice Joyal dismissed the part of this motion related to allegations of bias on non-institutional grounds in two decisions dated January 31, 2017. The issue of institutional (or structural) bias remains. We will deal with it in these reasons.

[19] At the hearing, Justice Girouard verbally requested that this same letter be published on the Canadian Judicial Council's Web site. This request was denied in the Inquiry Committee's decision on the request to publish a document (in French only), dated February 20, 2017.

[20] The Inquiry Committee granted Justice Girouard's request for clarification, as a result of which an Amended Notice of Allegations was filed. See the Inquiry Committee's decision on the request for clarification regarding the Notice of Allegations, dated April 3, 2017 (in French only).

[26] In the following paragraphs, the Inquiry Committee will set out the reasons for its decisions on the preliminary motions, which it rendered from the bench on February 22, 2017, and that had not yet been reasoned.

I. ANALYSIS

[27] The judicial function is unique. Judges in Canada exercise important decision-making powers that can have serious consequences on the rights and obligations of individuals[21]. Given these powers, individuals, and society as a whole, have a right to expect a higher standard of conduct from judges, that is to say virtually irreproachable conduct, both in fact and in appearance[22]:

> The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently expressed by Professor Y.-M. Morissette:
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> [TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of "elites" in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others. ("*Figure actuelle du juge dans la cité*" (1999), 30 *R.D.U.S.* 1, at pp. 11-12)
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> In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167:
>
> The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

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[21] *Therrien (Re)*, [2001] 2 S.C.R. 3, [*Therrien*], at para. 108.
[22] *Therrien*, at para. 111.

[28] The integrity and impartiality of the judiciary are therefore key to the public's confidence in judges and in Canada's political system more broadly[23].

[29] Furthermore, judges must be independent, that is to say free from any external influence, including from the executive branch of government. Judicial independence is essential to the maintenance of the rule of law and is itself a guarantee of the public's confidence in the administration of justice[24].

[30] When reviewing the conduct of judges, the accountability of the judiciary must be reconciled with its independence. As confirmed by the Supreme Court of Canada in *Moreau-Bérubé v. New Brunswick (Judicial Council)*[25], the restraint that is placed on judicial independence, through a review process that renders judges accountable for their conduct, serves to preserve the integrity of the judiciary and confidence of the public in the system[26].

[31] The judicial conduct review process therefore raises questions that are not at issue when reviewing the conduct of other professionals[27].

[32] In this context, we feel it is useful to recall the inquiry process of the Canadian Judicial Council.

A. The Canadian Judicial Council's inquiry process

[33] The Canadian Judicial Council was established in 1971. It consists of the Chief Justice of Canada, who is the chairperson of the Council, the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof, the senior judges of the Supreme Court of the Yukon, the Supreme Court of the Northwest

[23] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 5.
[24] *Therrien*, at para. 110.
[25] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R 249, at para. 59.
[26] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 5.
[27] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 5.

Territories and the Nunavut Court of Justice, and the Chief Justice of the Court Martial Appeal Court of Canada[28]. The Council is responsible for investigating any complaint or allegation of misconduct made against a judge of a superior court[29].

[34] The process generally involves five stages: (1) receipt and preliminary review of the complaint; (2) review of the complaint by the Judicial Conduct Committee; (3) review of the conduct by the Review Panel; (4) review of the conduct by the Inquiry Committee; and (5) review of the conduct by the Council and report to the Minister of Justice.

First stage: Receipt of the complaint

[35] The Executive Director of the Canadian Judicial Council is responsible for the receipt of any complaint made against a federally appointed judge[30]. The Executive Director is not a member of the Canadian Judicial Council and is not a judge.

[36] If the Executive Director determines that the complaint warrants further consideration, it is referred to the Chairperson or one of the Vice-Chairpersons of the Judicial Conduct Committee of the Canadian Judicial Council[31].

Second stage: Review of the conduct by the Judicial Conduct Committee of the Canadian Judicial Council

[37] The Judicial Conduct Committee of the Canadian Judicial Council is a separate working group established by the Council. If the Chairperson or Vice-Chairperson of the Judicial Conduct Committee to whom the complaint was referred determines that the complaint on its

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[28] *Judges Act*, s. 59.
[29] *Judges Act*, s. 63.
[30] *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, s. 2.1 [*Review Procedures*].
[31] *Review Procedures*, s. 4.3.

face may be serious enough to warrant the removal of the judge, a Judicial Conduct Review Panel is established to decide whether an Inquiry Committee should be constituted[32].

Third stage: Review of the conduct by the Judicial Conduct Review Panel

[38] The role of the Judicial Conduct Review Panel is to determine if the matter may be serious enough to warrant the removal of the judge[33]. If so, the decision to constitute an Inquiry Committee is taken in accordance with subsections 63(2) and 63(3) of the *Judges Act*. In doing so, the Judicial Conduct Review Panel must prepare written reasons and a statement of issues to be considered by the Inquiry Committee[34].

[39] Pursuant to subsection 63(1) of the *Judges Act*, the Minister of Justice or the attorney general of a province may also request that an Inquiry Committee be constituted to investigate the conduct of a judge. In such a case, stages 1, 2 and 3 do not apply, since the constitution of the Inquiry Committee is mandated under the *Act*.

Fourth stage: Review of the conduct by the Inquiry Committee

[40] The Council designates 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 of Justice, constitute the Inquiry Committee[35]. Those who participated in an earlier stage of the complaint or allegation review process are not eligible to be members of the Inquiry Committee[36].

[41] An Inquiry Committee is deemed to have the powers of a superior court[37]. It must take into account the Judicial Conduct Review Panel's written reasons and statement of issues.

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[32] *By-laws*, ss. 2(1).
[33] *By-laws*, ss. 2(4).
[34] *By-laws*, ss. 2(7).
[35] *Judges Act*, ss. 63(3).
[36] *By-laws*, paras. 3(4)(a) and 3(4)(b).
[37] *Judges Act*, ss. 63(3).

However, the Inquiry Committee may consider any complaint or allegation pertaining to the judge that is brought to its attention[38].

[42] The Committee then sets out the scope of its inquiry in a notice of allegations provided to the judge[39]. The Committee is master of its own proceedings. However, it must conduct its inquiry in accordance with the principle of procedural fairness and complete it expeditiously[40]. It may engage legal counsel to provide advice and to assist in the conduct of the inquiry[41].

[43] After its inquiry, the Committee submits its report to the Canadian Judicial Council for review. The report must include a recommendation as to whether the judge should be removed from office[42].

[44] Within 30 days after the day on which the Inquiry Committee's report is received, the judge may make a written submission to the Canadian Judicial Council regarding the report[43]. Only the judge is entitled to make such a submission.

Fifth stage: Review of the conduct by the Council and report to the Minister of Justice

[45] A minimum of 17 members of the Council (excluding those who were invoved in the review of the complaint or allegation or who sat on the Inquiry Committee) must consider the Inquiry Committee's report and its recommendation[44]. However, the Council is not bound by the Inquiry Committee's recommendation. If the Council is of the opinion that the Inquiry

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[38] *By-laws*, ss. 5(1).
[39] *By-laws*, ss. 5(2) and *Handbook of Practice and Procedure of Canadian Judicial Council Inquiry Committees* [*Handbook*], s. 3.5 and 3.6. In our opinion, the term "accusation" used in the French version is a poor translation of the English term "allegation". Indeed, the inquiry process is purely inquisitorial. The Committee does not bring charges against a judge, but in fact makes allegations, that is to say factual premises that remain to be substantiated.
[40] *Judges Act*, s. 64, *By-laws*, s. 7, and *Camp v. Canada (Attorney General)*, 2017 FC 240, at para. 42 [*Camp*].
[41] *By-laws*, s. 4.
[42] Subsection 65(2) of the *Judges Act* sets out four grounds for removal of a judge: "(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 or her conduct or otherwise, in a position incompatible with the due execution of that office, [...]".
[43] *By-laws*, ss. 9(1).
[44] *By-laws*, ss. 10(2) and 11(2).

Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer the matter back to the Inquiry Committee with directions, although it has no obligation to do so[45].

[46] The Council then reports its conclusions to the Minister of Justice, including its recommendation as to whether the judge should be removed from office, and submits the record of the inquiry or investigation.[46]

[47] The Minister of Justice must then determine whether or not to ask the Senate and the House of Commons for a motion for removal of the judge, although the Minister is not bound by the Council's recommendation.

[48] The Canadian Judicial Council's inquiry does not affect 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[47].

[49] Thus, in accordance with susbsection 99(1) of the *Constitution Act, 1867*[48], a federally appointed judge can be removed only on a joint address of the Senate and the House of Commons.

B. Preliminary motions

[50] In order to facilitate analysis of the preliminary motions, we divided them into five main themes: 1) the motion to invalidate the request from the Ministers and the motion based on the doctrine of estoppel; 2) the motion regarding the Committee's authority to conduct an inquiry that goes beyond the request from the Ministers; 3) the motion regarding the nature and function of the inquiry conducted by the Committee; 4) the motion based on the

[45] *By-laws*, s. 12.
[46] *Judges Act*, ss. 65(1).
[47] *Judges Act*, s. 71.
[48] 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.

reasonable apprehension of structural or institutional bias; and 5) the motion regarding the constitutionality of enabling regulatory provisions and the inquiry process. So that it is easier to understand the text, the motions are identified as Sections 1, 2, 3, 4, and 5.

Section 1: The motion to invalidate the request from the Ministers and the motion based on the doctrine of estoppel

[51] Justice Girouard asks that the joint request from the Minister of Justice of Canada and the Minister of Justice of Quebec calling for an inquiry under subsection 63(1) of the *Judges Act* be declared null and invalid. He also asks that any procedure pertaining to the inquiry which concerns him be declared inadmissible as being contrary to the doctrine of estoppel[49]. Finally, he asks for a declaration that the Notice of Allegations simply restates the same allegation that was unanimously dismissed by the first Inquiry Committee and, consequently, an order for a stay of proceedings in accordance with the doctrine of cause of action estoppel and issue estoppel[50].

[52] These motions are dismissed for the following reasons.

[53] Subsection 63(1) of the *Judges Act* establishes the discretionary authority of the Minister of Justice of Canada and the provincial attorneys general to direct the Canadian Judicial Council to commence an inquiry into the conduct of a judge of a superior court, without having to go through the preliminary review procedure that applies to complaints made under subsection 63(2). Subsection 63(1) of the *Act*, like any other statutory provision, is deemed to be constitutional, which Justice Girouard did not refute. In fact, the constitutionality of this provision was confirmed by the Federal Court of Appeal in *Cosgrove*[51].

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[49] The doctrine of estoppel can ensue from a dispute between the same parties (cause of action estoppel) or an issue related to such a dispute (issue estoppel). Generally, if the dispute or issue has already been settled, the doctrine of estoppel prevents the dispute from being ruled on again or the issue from being decided on again.
[50] *Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard* (in French only).
[51] *Cosgrove v. Canadian Judicial Council*, [2007] 4 FCR 714, 2007 FCA 103 (CanLII) [*Cosgrove*].

[54] That being said, Justice Girouard rightly recalls that this discretionary authority is nevertheless not absolute[52]. As stated by the Federal Court of Appeal in *Cosgrove*, it must be exercised in good faith, objectively, independently, and in the public interest.

[55] In this regard, the Minister of Justice of Canada and the provincial attorneys general are entitled to the benefit of a presumption that they have fulfilled their obligation to respect these standards[53]:

> [51] The most important constraint, in my view, flows from the traditional constitutional role of Attorneys General as guardians of the public interest in the administration of justice. Attorneys General are constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest: *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; The Hon. Ian G. Scott, "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s", (1989), 39 U.T.L.J. 109 at page 122; The Hon. J.C. McRuer, *Royal Commission of Inquiry into Civil Rights*, Report No. 1, vol. 2, c. 62 (Toronto: Queen's Printer, 1968) at page 945; The Hon. R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at page 7. Attorneys General are entitled to the benefit of a rebuttable presumption that they will fulfil that obligation. [Emphasis added]

[56] It is therefore up to those who call into question the exercise of this authority to provide sufficiently convincing evidence to refute this presumption of validity. In this case, Justice Girouard has not met the burden of proof.

[57] On the face of it, the request from the Ministers of Justice is motivated by concerns directly related to Justice Girouard having become incapacitated or disabled form the due execution of the office of judge within the meaning of subsection 65(2) of the *Judges Act*. As previously stated, there is no evidence to doubt the good faith of the Ministers of Justice or to

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[52] *Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard*, at para. 30 (in French only).
[53] *Cosgrove*, at para. 51.

believe that their request was made for an improper motive or for considerations extraneous to the objectives of the *Judges Act*.

[58] In addition, Justice Girouard criticizes the Ministers of Justice for interfering in the decision-making process of the Canadian Judicial Council and for triggering a mechanism similar to an appeal or an application for judicial review of the Council's report[54].

[59] In this regard, Justice Girouard's arguments are not convincing.

[60] Indeed, these arguments rest on an ill-founded premise, namely that the Council's report may have ultimately determined the purpose of the request from the Ministers of Justice. But that is not the case at all.

[61] It is appropriate to quote in full the paragraphs from the Council's report setting out the findings of the majority and minority of the first Inquiry Committee regarding Justice Girouard's testimony:

> [42] In this Report, we do not consider the majority's conclusion that the judge attempted to mislead the Committee by concealing the truth and that such conduct places him in a position incompatible with the execution of his office. The Council takes this approach because the judge was not informed that the specific concerns of the majority were a distinct allegation of misconduct to which he must reply in order to avoid a recommendation for removal.
>
> [43] Because the judge was entitled to this kind of notice and did not get it, the Council does not know whether the majority's concerns would have been resolved had it received an informed response to them from the judge.
>
> [44] Because we do not know if the majority's concerns would have been resolved, the Council, itself, cannot act upon the majority's concerns as if they were valid.

[54] See Justice Girouard's brief on preliminary motions [Justice Girouard's brief], at paras. 25 and 33-75 (in French only).

> [45] Although unnecessary for purposes of our conclusions, we also observe that the majority's comments present a clear conundrum. It would seem that either (1) there was no drug transaction or (2) the judge misled the Committee and there was a drug transaction. The majority's reasoning does not resolve this apparent paradox.
>
> [46] In light of this conundrum, and considering that all three members of the Committee concluded that there was not sufficient evidence to establish allegation number 3 that "on September 17, 2010, while his application for appointment as a judge was pending, and more specifically two weeks before his appointment on or about September 30, 2010, Me Girouard allegedly purchased an illicit substance from Yvon Lamontagne, who was also his client.", and in light of the minority conclusion about the judge's credibility, we would in any event have been unable to act on the majority's findings. [Emphasis added]

[62] It appears from the aforementioned paragraphs, and more specifically from paragraphs 42 to 44, that the Council expressly decided not to "consider", that is to say not to decide on the findings of the majority of the first Inquiry Committee that Justice Girouard attempted to mislead the Committee, thus placing him in a position incompatible with the execution of his office. The Council explained that its decision was based on the fact that the concerns raised by the majority should have been the subject of a distinct allegation of misconduct. Such an approach, however, in no way infers that the findings of misconduct made by the majority of the first Inquiry Committee in its report may not constitute grounds for a recommendation for removal from office within the meaning of subsbection 65(2) of the *Judges Act*, if such findings are not dismissed following explanations that Justice Girouard will have the opportunity to provide.

[63] It should be noted that, in so deciding, the Council accepted Justice Girouard's argument that the recommendation for removal made by the majority of the first Inquiry Committee was *ultra petita* because it was founded on concerns: 1) that were not included in the Notice of Allegations which were to be considered by the first Inquiry Committee; and 2) to which Justice Girouard did not have the opportunity to respond[55].

[55] Submission made by the Honourable Michel Girouard to the Canadian Judicial Council following the report of the first Inquiry Committee and its appendices.

[64] In keeping with this approach, the Council accepted only the first Inquiry Committee's findings on the specific allegations contained in the Notice of Allegations and that Justice Girouard had the opportunity to respond to, and recommended that Justice Girouard not be removed from office on the basis of these allegations that had not been proven.

> CONCLUSION
>
> [47] The Council accepts the unanimous conclusion of the Inquiry Committee that the allegation that the Judge purchased drugs from Yvon Lamontagne has not been proven on a balance of probabilities.
>
> [48] The Council accepts the Inquiry Committee's unanimous conclusion that allegations 1, 2, 4 & 6 should not be pursued because they cannot be proven. Allegations 5, 7 and 8 have been withdrawn.
>
> [49] The Council recommends to the Minister of Justice, pursuant to section 64 of the *Judges Act*, that the Judge not be removed from office on the basis of these allegations. [Emphasis added]

[65] It appears clearly from these paragraphs that, in its conclusions, the Council did not consider what the majority used as a basis for its recommendation for removal. The Council made no finding regarding Justice Girouard's conduct during the inquiry. In other words, the Council's report in no way resolved the new allegations that are currently before our Inquiry Committee pursuant to the Notice of Allegations that it prepared[56].

[66] Furthermore, Justice Girouard's argument that paragraphs 45 and 46 of the Council's report definitively resolve these allegations should be rejected. As clearly stated in the opening sentence of paragraph 45 ("Although unnecessary for purposes of our

[56] During oral submissions, Justice Girouard attempted to draw a parallel between allegation 7 in the Amended Notice of Allegations of April 22, 2015 submitted to the first Inquiry Committee and later withdrawn by the Independent Counsel, and the subject of our inquiry. However, this allegation, quoted at paragraph 36 of the first Inquiry Committee's report, was based on facts that occurred in 2013, whereas the subject of our inquiry concerns Justice Girouard's testimony before the first Inquiry Committee in May 2015. Therefore, they are distinct allegations and there can be no estoppel in this regard.

conclusions..."), such an argument is *obiter dictum* and, therefore, cannot create an estoppel[57], no matter how it is interpreted.

[67] Incidentally, as indicated in the statement of facts, the Notice of Allegations in the matter at hand also contains a second allegation based on the letter of denuciation. For purposes of this discussion, it is sufficient to note that the facts alleged in the letter of denunciation were unknown to the first Inquiry Committee or the Council during the drafting of its report, such that there can be no estoppel in this regard.

[68] In addition to the above, it should be emphasized that sections 63 to 65 of the *Judges Act* in no way confer an adjudicative function on the Canadian Judicial Council with respect to the issue of removal. The Council does not make a binding decision; it only has the power to make a recommendation[58]:

> Even if it were a judicial power which those two Houses were given under section 99, sections 63-65 of the *Judges Act* do not confer an adjudicative function on the Canadian Judicial Council or its committees. It is true that a council can cause a committee to carry out an inquiry as to whether a judge should be removed, but ultimately all that the Council can do is to "recommend" to the Minister of Justice that the judge be removed from office. The power to recommend is not the power to make a binding decision: *Thomson v. Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 S.C.R. 385. It is surely a central requirement of adjudication that the tribunal in question have the power to make a binding decision. Parliament has not conferred that authority on the Canadian Judicial Council or its Inquiry Committee and therefore, even if Parliament can be said to have an adjudicative function, it has not delegated it. [Emphasis added]

[69] In that sense, it is a process that, although very important, is fundamentally preliminary in nature[59].

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[57] Donald J. LANGE, *The Doctrine of Res Judicata in Canada*, 4th edition, Markham, Ont. LexisNexis, 2015, at p. 55. See also *Dugas v. Gaudet et al.*, 2016 NBCA (CanLII), at para. 128.
[58] *Gratton v. Canadian Judicial Council*, [1994] CanLII 3495, [1994] 2 FCR 769, at p. 24. See also *Taylor v. Canada (Attorney General)*, [2002] 3 FCR 91, 2001 FCT 1247 (CanLII), at para. 49.
[59] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 51.

[70] It follows that the report prepared by the Canadian Judicial Council in accordance with section 65 of the *Judges Act* cannot be likened to a decision that definitively settles a dispute. The arguments based on the doctrine of cause of action estoppel come up against this second difficulty, with the understanding that this doctrine can apply only to a decision that is final and binding[60]. Therefore, Justice Girouard's argument that the request from the Ministers [TRANSLATION] "ignores the unanimous conclusions of the final report which is the only one that is binding"[61] (emphasis added) is doubly ill-founded. Consequently, his claim that the doctrine of cause of action estoppel applies to the Council's report to the Minister and thus precludes from holding an inquiry on any alleged misconduct prior to the report must be rejected.

[71] Subsidiarily, Justice Girouard argues that the doctrine of issue estoppel applies to paragraphs 45 and 46 of the Council's report. According to this argument, the Council would have declared inadmissible the findings of the majority of the first Inquiry Committee that underlie the Ministers' request for an inquiry.

[72] With respect, the Council did not rule on the issue of whether it should recommend Justice Girouard's removal on the basis of the reasons that led the majority of the first Inquiry Committee to recommend such an action. Therefore, the doctrine of issue estoppel does not apply.

[73] The remarks contained in paragraphs 45 and 46 of the Council's report are *obiter dictum* and, as previously stated, the doctrine of issue estoppel has no application in such circumstances.

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[60] *R. v. Mahalingan*, [2008] 3 S.C.R. 316, 2008 SCC, at para. 112; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254.

[61] *Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard*, at para. 8 (in French only).

[74] Moreover, while claiming failure to respect the purported [TRANSLATION] "enforceability" of the Council's report, counsel for Justice Girouard argued during oral submissions that the Minister of Justice was not bound by the Council's recommendation and could have called for Justice Girouard's removal from office notwithstanding this recommendation. Suggesting that such an action would have caused [TRANSLATION] "a general outcry", he described the joint request from the Ministers of Justice as [TRANSLATION] "a backhanded approach" that raises [TRANSLATION] "very serious questions" about the good faith of such an exercise[62].

[75] In addition to the obvious contradictions between these arguments, there is absolutely no basis for such prognostications. Firstly, the fact that other approaches were available does not, in and of itself, render illegal the option exercised by the Ministers.

[76] Secondly, as previously stated, by deciding not to follow the recommendation of the majority of the first Inquiry Committee, the Council accepted Justice Girouard's argument that he was not given the opportunity to respond to allegations made against him. In our view, the request from the Ministers to hold an inquiry goes along the same lines and, in fact, gives Justice Girouard the opportunity to respond to the new allegations in an informed manner. Moreover, the concern for fairness towards Justice Girouard is clearly expressed in the request from the Ministers[63]:

> In light of the foregoing, we have concluded that the best course of action that is consonant with the important purpose of the judicial discipline process, that affirms the critical role of integrity in ensuring public confidence in a judge's ability to discharge his or her functions, and that is fair to Justice Girouard in the circumstances is to request, pursuant to s. 63(1) of the *Judges Act*, that an inquiry be held into the findings of the majority of the Inquiry Committee that prompted it to recommend Justice Girouard's removal from office. [Emphasis added].

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[62] Transcript of hearing of February 20, 2017 (oral submissions by M[e] Tremblay), at pp. 395-397 (in French only).
[63] Letter from the Ministers, at p. 2.

[77] As previously indicated, there is no evidence in the record to question the motivation behind the request from the Ministers.

[78] Finally, with respect to paragraph 46 of the Council's report, it is important to clearly understand the reasoning of the majority of the first Inquiry Committee. The majority concluded that it could not rely on its rejection of Justice Girouard's testimony as evidence supporting the allegation that the video recording of September 17, 2010 showed him purchasing an illicit substance. In so doing, the majority, rightly or wrongly, applied a well-established principle in criminal trials to an administrative inquiry procedure[64]. Nevertheless, the majority concluded that this principle did not preclude it from finding serious misconduct based on the negative inferences it drew from Justice Girouard's testimony. In this regard, we find no contradiction or inconsistency between these conclusions.

[79] The motions to invalidate the joint request from the Minister of Justice of Canada and the Minister of Justice of Quebec as well as the motions based on the doctrine of estoppel (cause of action estoppel or issue estoppel) are therefore dismissed.

[80] On the basis of the reasons set out above, the following question can be answered:

Did the Ministers of Justice exercise their discretionary authority in a unreasonable manner?

No. Justice Girouard did not disprove the presumption of compliance with their obligations.

[81] The following constitutional questions submitted by Justice Girouard can also be answered on the basis of the reasons set out above:

Did the Ministers of Justice exercise their discretionary authority in compliance with Canadian constitutional principles?

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[64] *R. v. Hibbert*, [2002] 2 S.C.R. 445 and *R. v. Nedelcu*, [2012] 3 S.C.R. 311.

Yes. In the matter at hand, there is no evidence on the record to support the conclusion that the request for an inquiry was made for an improper motive and without consideration for the public interest and the importance of public confidence in the judicial process.

The presumption of validity of the request from the Ministers has not been refuted.

Is the decision by the Minister of Justice of Canada and the Minister of Justice of Quebec to challenge the Canadian Judicial Council's final recommendation in compliance with current constitutional principles governing judicial independence? Does this indirect challenge contravene constitutional principles governing judicial independence?

This question is based on a false premise. The Ministers' request for an inquiry does not constitute a challenge to a decision of the Canadian Judicial Council.

Furthermore, the Canadian Judicial Council does not render a decision; it makes a recommendation.

Finally, the Council did not decide on the issues raised in the Notice of Allegations, in the matter at hand.

Does the Inquiry Committee act as a criminal court, an appellate court or a judicial review tribunal?

No. The Inquiry Committee does not act as an appellate court or a judicial review tribunal. It conducts an inquiry. The suggestion that the Inquiry Committee acts as an appellate court or a judicial review tribunal of the Council's final report lacks seriousness.

[82] Finally, the following question related to the motion based on the doctrine of estoppel can be answered on the basis of the reasons set out above:

Has the Canadian Judicial Council already disposed of the request from the Ministers and the two specific allegations contained in the Notice of Allegations, such that there is issue estoppel or cause of action estoppel?

The answer is no.

Section 2: The motion regarding the Committee's authority to conduct an inquiry that goes beyond the request from the Ministers

[83] As previously stated, the Minister of Justice of Canada and the Minister of Justice of Quebec requested that the Canadian Judicial Council hold an inquiry into the findings of the majority of the Inquiry Committee which led it to recommend that Justice Girouard be removed from office.

[84] This request was made pursuant to subsection 63(1) of the *Judges Act*, which allows the federal Minister of Justice or the attorney general of a province to order the conduct of an inquiry, without having to go through the usual review process under subsection 63(2):

> **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 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.

[85] As part of this new inquiry, a Notice of Allegations was provided to Justice Girouard. The Notice contains two allegations of misconduct.

[86] The first allegation was developed in accordance with the request from the Ministers.

[87] As for the second allegation, it is based on the letter of denuciation sent to the Canadian Judicial Council on July 25, 2016.

[88] The person who wrote the letter makes serious claims which, if substantiated, imply that Justice Girouard may have given false testimony before the first Inquiry Committee, by claiming that he never obtained drugs and that he never used drugs while he was a lawyer.

[89] According to Justice Girouard, the Inquiry Committee exceeded its authority by adding the second allegation to the Notice of Allegations. Without recognizing the validity of the Ministers' approach, Justice Girouard argues that the first allegation is the only one that he should have to defend himself against, on the grounds that the procedure used by the Ministers cannot be based on a letter of denuciation sent after the request for an inquiry was made on June 13, 2016[65]. According to Justice Girouard, the Ministers' request for an inquiry pursuant to subsection 63(1) of the *Judges Act* cannot be used to circumvent the requirement for a preliminary review of the letter of denunciation arising from subsection 63(2)[66].

[90] In this regard, we are of the opinion that these arguments come up against subsection 5(1) of the *By-laws*, which expressly provide that the Inquiry Committee may consider any complaint that is brought to its attention:

> 5 (1) The Inquiry Committee may consider any complaint or allegation pertaining to the judge that is brought to its attention. In so doing, it must take into account the Judicial Conduct Review Panel's written reasons and statement of issues. [Emphasis added]
>
> It goes without saying that the part which is not underlined does not apply to an inquiry held at the request of the Minister.

[65] Justice Girouard's brief, at para. 123 (in French only).
[66] Justice Girouard's brief, at para. 125 (in French only). Furthermore, Justice Girouard also claims that the letter of denunciation cannot be used as a late pretext for giving the Committee a power that it does not have: Justice Girouard's brief, at para. 124 (in French only). As stated in the previous section regarding the motion to invalidate the decision of the Ministers, the Committee is of the opinion that it has the authority to proceed with this inquiry.

[91] In addition, section 3.5 of the *Handbook* provides as follows:

> The Committee normally limits itself to the "Statement of Issues" identified by the Judicial Conduct Review Panel (or to the contents of the request of the Minister or an Attorney General pursuant to s. 63(1) of the *Act*). However, the Committee may determine that some allegations do not warrant further consideration or that additional issues require consideration and examination by the Committee, provided that proper notice is given to the judge at all times. [Emphasis added]

[92] The Committee therefore has the discretionary authority to conduct its inquiry as it deems appropriate and may consider additional issues, provided that proper notice is given to the judge whose conduct is the subject of the inquiry. Such a notice was given to Justice Girouard.

[93] Moreover, the possibility of adding new allegations during the course of an inquiry commenced pursuant to subsection 63(1) of the *Judges Act* is not new. Like the current *By-laws*, the previous version of the *Canadian Judicial Council Inquiries and Investigations By-laws*, in force from 2002 to 2015, provided at subsection 5(1) that the Inquiry Committee could consider any complaint brought to its attention[67]:

> 5 (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention. [...]

[94] Also, the *Policy on Inquiry Committees*, which was in effect under the previous *By-laws*, expressly provided that the scope of the inquiry could be broadened[68]:

> [...] There may be additional allegations about the judge's conduct that were not contained in the initial complaint or a request under section 63(1) of the *Act*. For example, these could come to light as a result of publicity given to the forthcoming hearings or in the course of Counsel's preparation for them. Subject to the Committee's direction, and subject to fair and proper notice to the judge, such additional allegations

[67] SOR/2002-371 [*2002 By-laws*].
[68] *CJC Policies regarding Inquiries* (*Policy on Inquiry Committees*), at p. 1.

> could be included in the scope of the inquiry. The Committee may also direct the Independent Counsel to explore additional issues and present additional evidence. The Committee may also act on its own to explore additional issues. [Emphasis added]

[95] Justice Girouard also claims that the letter of denunciation has no probative value, since it was not subjected to the usual complaints review procedure[69]. He asks that the complaint based on the letter of denunciation be dismissed, that the letter of denunciation be stricken from the record, and that any mention of the letter be deleted from the Notice of Allegations[70].

[96] Yet, the letter of denunciation was received by the Executive Director of the Canadian Judicial Council, who then brought it to the attention of the Inquiry Committee. M^{e} Marc-André Gravel met with the person who wrote the letter before the Notice of Allegations was prepared. By counsel for Justice Girouard's own admission at the hearing, this [TRANSLATION] "closed the matter"[71].

[97] Finally, it is important to emphasize that Justice Girouard obtained a copy of the letter of denunciation and of the entire recording of the meeting between M^{e} Gravel and the person who wrote the letter[72]. He will have the opportunity to submit his views on the admissibility and the probative value of these exhibits during the hearing on the merits. In addition, if the person who wrote the letter testifies, Justice Girouard will have the opportunity to cross-examine her.

[98] On the basis of the reasons set out above, the following question can be answered:

Is the addition of a supplementary allegation related to the denunciation by L.C. allowable under the *Judges Act,* the *By-laws* and the *Handbook*?

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[69] Justice Girouard's brief, at para. 125 (in French only).
[70] *Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard* (in French only).
[71] Transcript of hearing of February 20, 2017, at p. 349 (l. 23-24) (in French only).
[72] At the hearing, Justice Girouard confirmed that he would not raise the issue of the lateness of this disclosure: Transcript of the hearing of February 20, 2017, at pp. 303 (l. 5) and 304 (l. 4) (in French only).

The answer is yes.

Section 3: The motion regarding the nature and function of the inquiry conducted by the Inquiry Committee

[99] The nature and function of the inquiry conducted by the Inquiry Committee are at the heart of the arguments raised in this case. Is it an adversarial proceeding, where parties are generally masters of their own procedure and the role of the judge is more or less limited to weighing the evidence and adjudicating the dispute? Or is it instead an inquisitorial proceeding aimed at the search for truth, in which the Committee, "through its own research, and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it"[73]?

[100] As previously stated, neither the Canadian Judicial Council nor, obviously, this Inquiry Committee exercise an adjudicative function with respect to the issue of removal. In this regard, subsection 8(1) of the *By-laws* is unequivocal: the power of the Inquiry Committee is limited to setting out its factual findings and its conclusions about whether to recommend the removal of the judge from office.

[101] As stated by the Inquiry Committee in the matter of *Flahiff*[74]:

> An inquiry committee does not adjudicate disputes between parties. It does not render a legally enforceable decision. It merely carries out an investigation.

[73] *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, 1995 CanLII 49 (SCC) [*Ruffo*], at para. 73.
[74] Decision of Inquiry Committee Established by the Canadian Judicial Council to Conduct a Public Inquiry concerning Mr. Justice Robert Flahiff, April 9, 1999.

[102] The inquisitorial nature of the process of an Inquiry Committee constituted under the *Judges Act* has been confirmed several times by the courts, including recently by the Federal Court in the matter of *Douglas*[75]:

> [117] In this instance, the Inquiry Committee stressed in its May 15, 2012 ruling that its purpose and function were fundamentally different from those of a trial court, and that a judge facing a conduct inquiry is not entitled to, and cannot expect the same procedural safeguards as a litigant in a trial court. The process is not that of an adversarial judicial proceeding but inquisitorial in nature, the Committee found. This approach appears to have been consistently taken by each of the Inquiry Committees since the CJC was established. It is also consistent with that stated by the Court in *Taylor v. Canada (Attorney General)*, 2001 FCT 1247 (CanLII), [2002] 3 FC 91, at paragraph 49: "[…] Sections 63 and 65 of the *Judges Act* do not confer an adjudicative function on the Council or its committees." [Emphasis added]

[103] In addition, paragraph 60(2)(c) of the *Judges Act* provides that, in furtherance of its objects, the Council may "make the inquiries and the investigation of complaints or allegations described in section 63". Furthermore, it follows from subsections 63(1) to 63(6) of the *Judges Act* that the legislature wanted the Council to conduct the inquiry[76].

[104] The significant latitude given to the Canadian Judicial Council and the fact that it has no adjudicative authority suggest that the legislature intended that the judicial conduct review process be similar to a commission of inquiry. It is not a dispute between, on the one hand, the Council or the Inquiry Committee and, on the other hand, the judge whose conduct is the subject of a Notice of Allegations.

[105] As previously stated, Justice Girouard expresses certain recriminations related to the nature of the inquiry process which, in his view, is akin to [TRADUCTION] "a substitute for

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[75] *Douglas v. Canada (Attorney General)*, 2014 FC 299 (CanLII), at para. 117.
[76] Section 3.6 of the *Handbook* stipulates that a detailed notice of allegations is prepared and provided to the judge by the Inquiry Committee.

an inquiry of a criminal nature"[77]. Justice Girouard therefore asks that the Committee reject the Notice of Allegations and, consequently, declare a stay of proceedings against him.

[106] The Inquiry Committee has no power to impose penalties of any kind. It cannot establish civil liability or criminal guilt on the part of the judge. The same goes for the Council after receiving the Committee's report. Thus, whatever the outcome of the process, it is certain that it does not expose the judge who is the subject of the inquiry to penalties of a criminal nature.

[107] Justice Girouard's arguments are essentially focused on the wording of the Notice of Allegations given on December 23, 2016.

[108] Justice Girouard rightly points out that the French version of the Notice is entitled "*Avis d'allégations (accusations)*" (emphasis added). In his opinion, the fact that the word "*accusations*" appears in the title demonstrates that the Notice is in the nature of [TRANSLATION] "an indictment"[78].

[109] The Notice of Allegations was prepared in accordance with section 64 of the *Judges Act*, subsection 5(2) of the *By-laws* and section 3.6 of the *Handbook*.

[110] The French version of subsection 5(2) of the *By-laws* requires the Inquiry Committee to inform the judge of all "*plaintes ou accusations*" made against the judge, while the English version of the *By-laws* uses the terms "*complaints or allegations*" (emphasis added) to express the same idea[79].

[111] Section 3.6 of the *Handbook* simply uses the same the terms as those contained in the *By-laws*. Thus, the French version of the *Handbook* states that an "*avis détaillé des accusations*"

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[77] *Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard*, at p. 17 (in French only).
[78] Justice Girouard's brief, at para. 100 (in French only).
[79] These terms are the same as those used in the English and French versions of subsection 63(2) of the *Judges Act*.

be prepared and provided to the judge, whereas the English version instead refers to a "*detailed notice of allegations*".

[112] The insertion of the word "*accusations*" between parentheses in the title of the French version of the Notice of Allegations is explained by this dissimilarity between the terms used in the French and English versions of the *By-laws* and the *Handbook*.

[113] Whatever one may think about the use of the French term "*accusation*" to convey the meaning of the English word "*allegation*", it does not change anything. The Notice of Allegations only serves to detail allegations, that is to say statements that entirely remain to be proven.[80]

[114] Justice Girouard is also critical of the fact that the French version of the Notice of Allegations contains a series of "*ATTENDU*" ("*WHEREAS*" in the English version). He views this manner of framing the Notice as a veritable indictment against him. However, this preamble only serves to contextualize the allegations made against Justice Girouard. Besides, it should be noted that the use of "*ATTENDU*" confirms that the allegations remain to be proven.

[115] In short, the Inquiry Committee acted entirely in accordance with its inquisitorial function and enabling statutes, and it cannot be concluded that its process is similar to that of a criminal court.

[116] On the basis of the reasons set out above, the following constitutional question can be answered:

Does the Inquiry Committee act as a court?

The answer to this question is no.

[80] Moreover, this is also true of a "charge" in a criminal proceeding. The charge remains to be proven.

[117] The following question can also be answered:

Can the Inquiry Committee of the Canadian Judicial Council conduct a substitute for an inquiry of a criminal nature?

The process followed by the Inquiry Committee is inquisitorial in nature. It is dedicated to the search for truth, with due regard for the public interest and judicial independence; it is not in any way a substitute for an inquiry of a criminal nature.

Section 4: The motion based on the reasonable apprehension of structural or institutional bias

[118] Judicial impartiality is an essential condition for exercising judicial power and an integral part of our democracy[81].

[119] In *R. v. Lippé*, the Supreme Court of Canada recognized the possibility of a reasonable apprehension of bias for so-called structural or institutional reasons:

> Notwithstanding judicial independence, there may also exist a reasonable apprehension of bias on an institutional or structural level. Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect (*Valente, supra*, at p. 687), so too must the requirement of judicial impartiality. I cannot interpret the *Canadian Charter* as guaranteeing one on an institutional level and the other only on a case-by-case basis. [...]
>
> The objective status of the tribunal can be as relevant for the "impartiality" requirement as it is for "independence". Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasonable

[81] *Valente v. The Queen*, [1985] 2 S.C.R. 673, 1985 CanLII 25 (SCC), at p. 689.

> apprehension of bias on an institutional level, the requirement of impartiality is not met. [...][82]

[120] According to Justice Girouard, the situation which prevails in the matter at hand directly undermines the principle of structural judicial independence[83].

[121] More specifically, Justice Girouard argues that each of the three following elements gives rise to a structural (or institutional) apprehension of bias, namely: 1) the fact that Chief Justice Drapeau and Chief Justice Joyal participated in the Review Panel prior to the constitution of the first Inquiry Committee; 2) the fact that the Notice of Allegations was prepared by the Inquiry Committee; and 3) the fact that the formal requirement for an Independent Counsel was eliminated following the adoption of the 2015 *By-laws*.

[122] According to Justice Girouard, these elements violate the rule of procedural fairness set out at paragraph 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c. 44:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> [...]
>
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

[123] In order to determine whether or not there is appearance of bias, the Committee must ask whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias[84].

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[82] *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 140 [*Lippé*]
[83] Justice Girouard's brief, at para. 82 (in French only).

a) Chief Justice Drapeau and Chief Justice Joyal were members of the Review Panel prior to the constitution of the first Inquiry Committee regarding the conduct of Justice Girouard

[124] According to Justice Girouard, Chief Justice Drapeau and Chief Justice Joyal should be excluded from any participation in this Inquiry Committee because of their involvement in the Review Panel prior to the constitution of the first Inquiry Committee.

[125] As Justice Girouard argued in oral submissions, paragraph 3(4)(c) of the *By-laws* specifically provides that members of the Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted are not eligible to be members of the Inquiry Committee[85]:

> 3. [...] (4) The following persons are not eligible to be members of the Inquiry Committee:
>
> [...]
>
> (c) a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted.

[126] However, we are of the opinion that a reasonable interpretation of paragraph 3(4)(c) of the *By-laws* leads to the conclusion that it applies to an Inquiry Committee whose mandate is to investigate issues identified by the Review Panel. Therefore, it does not apply at all to the matter at hand, since the request for an inquiry made by the Ministers in June 2016 triggered a new inquiry dealing with issues separate from those that were reviewed by Chief Justice Drapeau and Chief Justice Joyal within the context of the Review Panel which considered the

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[84] *Lippé* at p. 114 and *Therrien* at para. 102.

[85] In his brief and at paragraph 92 of his *Requête en déclaration de nullité de la constitution du Comité d'enquête* (in French only), Justice Girouard wrote that [TRANSLATION] "the formal elimination from the *By-laws* of the statutory exclusion of members of the Review Panel who become ineligible to participate in subsequent stages gives rise to a reasonable apprehension of bias." This argument was not restated in oral submissions, Justice Girouard citing instead paragraph 3(4)(c) of the *By-laws* to support his position.

complaint made by the former Chief Justice of the Superior Court of Quebec, the Honourable François Rolland.

[127] Indeed, the request from the Ministers is aimed at allegations of misconduct related to Justice Girouard's testimony before the first Inquiry Committee in 2015. It relates to conduct that occurred subsequent to the work of the Review Panel that Chief Justice Drapeau and Chief Justice Joyal were members of. In its report, the Review Panel made no finding regarding Justice Girouard's credibility; moreover, Chief Justice Drapeau and Chief Justice Joyal evidently could not have formed an opinion regarding a conduct that occurred subsequent to the Review Panel's report, which would be obvious to any reasonable and informed observer.

[128] Ultimately, we cannot conceive that such an observer would have a reasonable apprehension of bias because of the fact that the *Judges Act* and the *By-laws* do not exclude members of a Review Panel that considered distinct allegations from participating in an Inquiry Committee investigating new allegations, even if they involve the same judge.

b) Preparation of the Notice of Allegations by the Inquiry Committee

[129] Justice Girouard also suggests that the fact that the Notice of Allegations was prepared and signed by the Inquiry Committee gives rise to a reasonable apprehension of bia. He claims that, in so doing, the Inquiry Committee acts as investigator, prosecutor and judge, which should lead to the disqualification of all its members[86]. He also claims that it violates the principle of separation.

[130] In the matter at hand, the standard of impartialiy that applies to the judicial conduct review process must take into account the investigative and inquisitorial nature of the

[86] Justice Girouard's brief, at para. 121 (in French only).

process. As an investigator, the Inquiry Committee can be more actively involved in presenting evidence than a court could in a judicial or quasi-judicial context[87]:

> [22] Good investigators, just like fine bloodhounds, are driven by suspicions which they seek to confirm so that the file can be closed, or to dispel so that the search can pursue other tracks. In so doing, investigators can and often will create an appearance of bias. Commissioners, therefore, through their questions and interventions and those of their counsel who closely examine witnesses, may one day give the impression of being prejudiced against a person who or group that is receiving particular attention from the commission at that time. However, the next day, when the commission has focused its attention on someone else, it is that person who will then be inclined to believe that the commissioner is prejudiced against him or her. Nevertheless, that is the nature of investigations.
>
> [23] Suspicions, information, speculations, beliefs, doubts, reasonable grounds to believe, extrapolations and confirmations, to name but a few of the stages investigators go through, are part of their everyday experience. That is why the nature and complexity of inquiries and the properties of their attendant powers mean that a Commissioner's inquisitorial process cannot be held to the same standard of bias as is applied to the adversarial process in which, contrary to commissioners whose primary and essential function is to seek out, find and gather evidence, courts only weigh the evidence the parties already have in hand and have submitted to the court to be assessed.

[131] In preparing the Notice of Allegations, the Inquiry Committee acted in accordance with statutory requirements, in keeping with its mandate to search for truth and in compliance with the duties and functions of an Inquiry Committee[88]:

> Commissioners of inquiry are called to investigate very complex matters in a short time frame and often in a very difficult context. Although they are acting in the public interest in pursuing their mandate, their role is not to arbitrate or adjudicate. <u>They are investigators, and they take an active role with respect to the gathering, compiling and preservation of evidence. […] Commissions of inquiry may be called to intervene directly, actively and substantially in the course of hearings, for example, by directing the</u>

[87] *Gagliano v. Gomery*, 2011 FCA 217 (CanLII) [*Gagliano*], at paras. 22-23. See also *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 16.
[88] Simon RUEL, *The Law of Public Inquiries in Canada*, Toronto, Carswell, 2010, at p. 138.

> lines of inquiry and questioning witnesses, to clarify inconsistencies, to distinguish relevant from irrelevant evidence or to maintain order. The extent of such interventions would not be acceptable in the judicial context. Those considerations suggest a lower degree of impartiality. [Emphasis added]

[132] Furthermore, it should be recalled that, in the matter at hand, the Inquiry Committee is neither the "denunciator" nor the "prosecutor". Indeed, the Notice of Allegations only restates the fundamental statements contained in the request made by the Ministers of Justice and the letter of denuciation brought to the attention of the Council and the Inquiry Committee. The Notice of Allegations prepared by the Inquiry Committee only serves to establish the parameters of the inquiry. The allegations remain to be proven.

[133] As established in caselaw, the overlapping of investigative and recommendation functions (with no binding effect) alone cannot give rise to a reasonable apprehension of institutional bias[89].

c) Elimination of the Independent Counsel

[134] Justice Girouard considers that a reasonable apprehension of bias arises from the fact that the formal requirement for an independent counsel was eliminated as a result of the reform of procedural rules in 2015.

[135] Section 3 of the *2002 By-laws* provided that an independent counsel was responsible for presenting all relevant evidence, both favourable and unfavourable to the judge, in an impartial manner and in accordance with the public interest:

> 3 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee shall appoint an independent counsel, who shall be a member of the bar of a province having at least 10 years standing and who is recognized within the legal community for their ability and experience.

[89] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781; *Gagliano*.

> (2) The independent counsel shall present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings.
>
> (3) The independent counsel shall perform their duties impartially and in accordance with the public interest[90].

[136] However, it should be recalled that the independent counsel was not entirely independent, in that the Inquiry Committee could direct the independent counsel to explore additional issues and present additional evidence[91]. In addition, the Inquiry Committee could also act on its own to explore additional issues[92].

[137] In 2015, the *2002 By-laws* were amended to eliminate the formal requirement for an independent counsel[93]. Section 4 of the *By-laws* now provides that:

> 4. The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry.

[138] Also, sections 3.2 and 3.3 of the *Handbook* provide that:

> 3.2 The Committee may engage one or more legal counsel to assist in marshalling the evidence; interview persons believed to have information or evidence bearing on the subject-matter of the Inquiry; assist in the Committee's deliberations; conduct legal research; provide advice to Committee members on matter of procedure and on any measures necessary to ensure the impartiality and fairness of the hearing.
>
> 3.3 Legal counsel and other persons engaged by the Committee have no authority independent of the Committee and are bound at all times by the authority and rulings of the Committee.

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[90] Section 4 of the *2002 By-laws* also stipulated that "The Inquiry Committee may engage legal counsel to provide advice and other assistance to it."
[91] *CJC Policies regarding Inquiries* (*Policy on Inquiry Committees*).
[92] *CJC Policies regarding Inquiries* (*Policy on Inquiry Committees*).
[93] The Inquiry Committee being master of its own proceedings, nothing prevents it from engaging an independent counsel or directing one of its counsel to act as an independent counsel.

[139] According to Justice Girouard, this amendment gives rise to an apprehension of bias and renders unconstitutional the inquiry process and its enabling provisions. In order to illustrate that an independent counsel is important in the public interest and in protecting the constitutional rights of a judge who is the subject of an inquiry, Justice Girouard relies particularly on the Canadian Judicial Council's former *Policy on Independent Counsel*:

> Policy on Independent Counsel
>
> The central purpose for establishing the position of Independent Counsel is to permit such counsel to act at "arm's length" from both the Canadian Judicial Council and the Inquiry Committee. This allows Independent Counsel to present and test the evidence forcefully, without reflecting any predetermined views of the Committee or the Council. The Inquiry Committee relies on Independent Counsel to present the evidence relevant to the allegations against the judge in a full and fair manner.
>
> The role of Independent Counsel is unique. Once appointed, Independent Counsel does not act pursuant to the instructions of any client but acts in accordance with the law and counsel's best judgement of what is required in the public interest. This is an important public responsibility that requires the services of Counsel who is recognized in the legal community for their ability and experience.
>
> [...]
>
> The public interest requires that all of the evidence adverse to the judge, as well as that which is favourable, be presented. This also may require that evidence, including that of the judge, be tested by cross-examination, contradictory evidence or both. This should be done in a fair, objective and complete manner.
>
> [...]

[140] It is true, as Justice Girouard points out, that a reasonable apprehension of bias can arise from the fact that a lawyer may be called upon to play several roles within an administrative organization[94].

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[94] Guy RÉGIMBALD, *Canadian Administrative Law*, 2nd edition, LexisNexis Canada Inc., 2015, at p. 407.

[141] In the matter of *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool),*[95] the Supreme Court of Canada made the following comments on the issue:

> 60. [...] The fact that the Régie, as an institution, participates in the process of investigation, summoning and adjudication is not in itself problematic. However, the possibility that a particular director could, following the investigation, decide to hold a hearing and could then participate in the decision-making process would cause an informed person to have a reasonable apprehension of bias in a substantial number of cases. It seems to me that, as with the Régie's jurists, a form of separation among the directors involved in the various stages of the process is necessary to counter that apprehension of bias. [Emphasis added]

[142] However, as previously explained, the Inquiry Committee has no adjudicative function. Therefore, the adjudicative process referred to in the above-mentioned decision is not at issue. At the risk of repeating ourselves, the Inquiry Committee plays an inquisitorial role and has broad investigative powers, under the *Judges Act*, to carry out its mandate to search for truth.

[143] In fact, the existing procedure bears some similarities with the procedure established in Quebec under the *Courts of Justice Act*, which provides, at section 281, that the *Conseil de la magistrature du Québec* may retain the services of an advocate to assist the committee in the conduct of its inquiry[96]. Pursuant to section 22 of the *Règles de fonctionnement concernant la conduite d'une enquête*, such an advocate advises the committee and intervenes under the authority of its chairperson. Together with the committee and its chairperson, he is involved in preparing the inquiry and oversees the presentation evidence before the committee.

[144] In *Therrien*, the Supreme Court of Canada confirmed that such a model, in which counsel responsible for presenting the case acts under the direction of the inquiry committee, does not give rise to any reasonable apprehension of bias:

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[95] *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 60. See also *Métivier v. Mayrand*, 2003 CanLII 32271 (QC CA).
[96] *Courts of Justice Act*, CQLR c. T-16, s. 281.

[102] The appellant's final argument is that there is the appearance of institutional bias, since the committee of inquiry uses the services of counsel who acts as both judge and party. [...] I will now examine the situation raised by the appellant.

[103] Under s. 281 *C.J.A.*, the Conseil may retain the services of an advocate or of another expert to assist the committee in the conduct of its inquiry. My comments in *Ruffo*, *supra*, regarding the nature of the mandate assigned to the committee of inquiry provide some insight that is useful for disposing of this question. Thus, at paras. 72-74, I said:

> Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.
>
> In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the *CJA* confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.
>
> Moreover, it is for this purpose and in order to conduct the inquiry for which it is responsible that the Conseil may retain the services of an advocate, as provided by s. 281 *CJA*.
>
> This passage clearly shows that the committee's purpose is not to act as a judge or even as a decision-maker responsible for settling a dispute; on the contrary, it is to gather the facts and evidence in order, ultimately, to make a recommendation to the Conseil de la magistrature. It also illustrates the intention of avoiding the

> creation of an adversarial atmosphere between two opponents each seeking to prevail. When there was no judge or parties, counsel for the committee could not have been in a conflict of interest. For instance, when he examined and cross-examined the witnesses he was not acting as a prosecutor, but rather was providing the committee with help and assistance in carrying out the mandate assigned to it by the statute.
>
> [104] I would also add that the committee's recommendation is not final with respect to the outcome of the disciplinary process, which then falls within the jurisdiction of the Court of Appeal and thereafter, if applicable, the Minister of Justice: *Ruffo*, *supra*, at para. 89. Accordingly, the role played by the independent counsel neither violates procedural fairness nor raises a reasonable apprehension of bias in a large number of cases in the mind of an informed person viewing the matter realistically and practically, and having thought the matter through. [Emphasis added]

[145] In the matter at hand, section 4 of the *By-laws* is identical to section 281 of the *Courts of Justice Act*. In addition, it should be emphasized that, despite the nature of his mandate, M[e] Gravel obviously is still required to maintain his professional independence[97].

[146] At the hearing, Justice Girouard put forward a new argument to the effect that eliminating the independent counsel gives rise to an untenable uncertainty. Relying on a document from the Department of Justice dated June 2016, entitled *Possibilities for Further Reform of the Federal Judicial Discipline Process*, he argues that, from the perspective of the general public and of the judge who is the subject of an inquiry, the elimination of the formal requirement for an independent counsel provides less clarity and predictability as to how inquiry committee proceedings can be expected to unfold[98].

[147] Justice Girouard claims that this uncertainty arises from the fact that each Inquiry Committee governed by the new *By-laws* can give its counsel any directions that it deems necessary. Thus, in the matter of *Camp*, the Inquiry Committee gave directions implementing a model very similar to the independent counsel regime. On the other hand, in this case, the

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[97] *Code of Professional Conduct of Lawyers*, chapter B-1, r. 3.1, s. 13.
[98] *Possibilities for Further Reform of the Federal Judicial Discipline Process*, at p. 28.

Inquiry Committee had not, until quite recently, given any formal directions to counsel that have been engaged. What decision will a future Inquiry Committee take? According to Justice Girouard, this uncertainty fails to safeguard the rights of judges who are the subject of an inquiry[99].

[148] In our opinion, the new procedure is preferable to the old one, since it provides the flexibility required to pursue the search for truth efficiently, while respecting the rights of the juge.

[149] The matter of *Camp* is a good example of the wisdom of giving the Inquiry Committee the necessary leeway to carry out its duties at every stage of the process, according to the circumstances of the case. It should be recalled that, in the matter of *Camp*, the judge acknowledged the alleged misconduct. The debate was only about the consequences of the misconduct[100]. That is not the case in the matter at hand. The scope of the Committee's inquiry is broader.

[150] In the matter at hand, the Inquiry Committee did not consider it advisable to give formal directions at the preliminary motions stage, since the hearing on the merits has not yet begun. It should be recalled that, at this preliminary stage, full procedural protection is not required[101]:

> The current federal judicial conduct review process is investigative in its nature, which influences the procedural guarantees required at various stages of the process. Full procedural protection will not be warranted at the preliminary stages of the investigative process, particularly if the process remains confidential. However, the closer the review process approaches a possible recommendation for removal of the judge, the more stringent the procedural protections should be. [Note omitted]

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[99] Transcript of the hearing of February 22, 2017 (oral submissions by M[e] Tremblay), at pp. 878 and following (in French only).
[100] See Justice Camp's *Notice of Response*, dated July 4, 2016.
[101] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 14.

[151] The preliminary motions stage having now been completed, the Inquiry Committee gave directions to counsel on March 20, 2017 regarding the next stages of the process, particularly the hearing on the merits scheduled for the week of May 8, 2017 and, if necessary, the week of May 15, 2017[102].

[152] For the reasons set out above, we are of the opinion that Justice Girouard has not established that there is a reasonable apprehension of bias on an institutional or structural level within the meaning of the test adopted in *Lippé*.

[153] The following constitutional questions submitted by Justice Girouard can be decided on the basis of the reasons set out above:

Is the infringement of the principle of separation in compliance with Canadian constitutional principles?

The premise that the principle of separation has been breached does not hold, considering that the Inquiry Committee's mandate is to investigate. The process is not adversarial in nature; the overlapping of investigative and recommendation functions is specific to investigative bodies established by the legislature.

Does the implementation of these legislative and regulatory instruments result in undermining judicial independence and creating an investigative body that is structurally biased, since its members are investigators, prosecutors and judges?

No. Members of the Inquiry Committee are neither prosecutors nor judges having decision-making power regarding the issue of removal. Members of the Inquiry Committee prepare a "Notice of Allegations" that remain to be proven during the hearing on the merits. The Inquiry Committee renders no decision on the merits and does not function in a context of litigation; its mandate is to conduct an inquiry and submit a report

[102] The Inquiry Committee acknowledges that it is essential, both in the interests of the judge who is the subject of the inquiry and for maintaining public confidence in the process, that judicial disciplinary proceedings be dealt with expeditiously. See *Camp* at para. 42.

setting out its findings and its conclusions about whether to recommend the removal of the judge from office.

Section 4: The motion regarding the constitutionality of enabling regulatory provisions and the inquiry process

[154] Justice Girouard asked the court to declare subsection 63(1) of the *Judges Act*, subsections 2(1), 3(1), 3(2), 3(3) and section 4 of the *By-laws*, and sections 3.1, 3.2 and 3.3 of the *Handbook* inapplicable and of no force or effect on the grounds that they are invalid.

[155] According to Justice Girouard, the inquiry process established in 2015 following the amendment of the *By-laws* and the coming into force of the *Handbook* violates jurisprudential rules ensuring judicial independence and other fundamental principles of law that were developed over almost two decades and, more specifically, in the matters of *Ruffo*, *Therrien* and *Douglas*[103].

[156] In this regard, the fact that a court has identified an element likely to support the conclusion that the principle of procedural fairness is respected does not mean that it is a *sine qua non* condition for the constitutionality of a regime and the right to make full answer and defence. It is in this context that the following comments in *Cosgrove* must be understood[104]:

> I would emphasize five aspects of the inquiry procedure that, taken together, establish that the inquiry, once commenced, is fair to the judge who is the subject of the inquiry:
>
> 1) The judge is given notice of the allegations of the complainant, and an opportunity to respond and to be heard.
>
> 2) The inquiry is entrusted in the first instance to a group of senior judges and lawyers, and their recommendation is reviewed independently by a larger group consisting of Chief Justices, Associate Chief Justices and other senior judges of the superior courts. That ensures that the issues are considered by a number of different individuals whose collective

[103] *Avis de questions constitutionnelles*, at paras. 6, 7, and 8 (in French only).
[104] *Cosgrove*, at para. 65.

knowledge and experience is not only appropriate to the task, but the best available in terms of their knowledge of the relevant constitutional principles and the work of the judiciary.

3) The substantive and procedural aspects of the inquiry are guided by the participation of Independent Counsel, who is required to act impartially and in the public interest, which necessarily includes the public's interest in maintaining the independence of the judiciary. I note parenthetically that it was Independent Counsel who argued for the summary dismissal of the Attorney General's request for an inquiry in the *Boilard* case (referred to above).

4) The Attorney General who requests an inquiry does not present or prosecute the case against the judge, and has no formal role in the conduct of the inquiry.

5) The outcome of the proceedings is a report and recommendation to the Minister, who must determine whether the matter will be referred to Parliament. The Minister, as the Attorney General of Canada, is obliged and presumed to consider that question in good faith, objectively, independently and in the public interest.

[157] What of the matter at hand?

- Justice Girouard benefits from the services of counsel of his choice who are engaged at the expense of Canadian taxpayers;

- The Inquiry Committee must conduct its inquiry in accordance with the principle of procedural fairness (see section 64 of the *Judges Act* and section 7 of the *By-laws*);

- Justice Girouard was provided with a detailed Notice of Allegations informing him of the subject of the inquiry;

- In accordance with section 64 of the *Judges Act*, Justice Girouard is afforded the opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf;

- The Inquiry Committee is comprised of two Chief Justices and one Associate Chief Justice, who have sworn an oath to administer justice in accordance with the law, as well as two reputable members of the *Barreau du Québec*. It goes without saying that members of the Inquiry Committee understand the importance of judicial independence and the need to establish serious misconduct to support a recommendation for removal. Furthermore, members of the bar remain subject to their ethical obligations, including the obligation to maintain their professional independence[105].

- The Inquiry Committee gave directions to counsel in preparation for the hearing on the merits of the matter. The purpose of these directions is to promote the appearance of impartiality in the view of a reasonable and informed observer with respect to the Inquiry Committee's work;

- The Inquiry Committee's report will be reviewed by the Canadian Judicial Council, which, as previously stated, is comprised of Chief Justices and Senior Judges who have sworn an oath to administer justice in accordance with the law;

- Justice Girouard is the only person who may make submissions to the Canadian Judicial Council regarding the Inquiry Committee's report; and

- The Inquiry Committee, like the Council, performs its duties on the assumption that Parliament will exercise its decision-making power in good faith and with complete seriousness.

[158] In our opinion, the cumulative effect of these elements fully satisfies the constitutional requirements.

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[105] *Code of Professional Conduct of Lawyers*, chapter B-1, r. 3.1, s. 13.

[159] It should be recalled that subsection 99(1) of the *Constitution Act, 1867* provides a fundamental guarantee of judicial independence, which protects federally appointed judges from arbitrary or discretionary removal[106]. In addition, judges responsible for conducting the inquiry, by the very nature of their function, have the expertise and the ability to weigh all the principles that apply to this unique process:

> [...] To have disciplinary proceedings conducted by a judge's peers offers the guarantees of expertise and fairness that judicial officers are sensitive to, while avoiding the potential perception of bias or conflict that could arise if judges were to sit in court regularly in judgment of each other. As Gonthier J. made clear in *Therrien*, other judges may be the only people in a position to consider and weigh effectively all the applicable principles, and evaluation by any other group would threaten the perception of an independent judiciary. [...][107]

[160] Ultimately, and for the reasons set out in Sections 1, 2 and 3 above, we are of the opinion that it cannot be concluded that subsection 63(1) of the *Judges Act* and subsections 3(1), 3(2) and 3(3) of the *By-laws* are invalid.

[161] With respect to subsection 2(1) of the *By-laws*, which is also the subject of the preliminary motions, it provides for the constitution of the Inquiry Committee. However, as previously stated, this provision has no application to the matter at hand.

[162] Finally, section 4 of the *By-laws* and sections 3.1, 3.2 and 3.3 of the *Handbook* relate to the elimination of the formal requirement for an independent counsel. As previously stated in Section 4(c) above, Justice Girouard has not provided any evidence establishing the invalidity of the *By-laws* or the *Handbook*.

[163] In short, the recriminations put forward by Justice Girouard appear instead to relate to the implementation of the *Judges Act* and the *By-laws*.

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[106] *Review of the Judicial Conduct Process of the Canadian Judicial Council*, March 25, 2014, at p. 8.
[107] *Moreau-Bérubé*, at para. 60.

[164] The following constitutional questions submitted by Justice Girouard can be decided on the basis of the reasons set out above:

Is the inquiry process, as amended by the Canadian Judicial Council in 2015, in compliance with current constitutional principles in Canada?

Yes. The process is in compliance with applicable constitutional principles and judgments of the Supreme Court of Canada, particularly in *Ruffo* and *Therrien*. More specifically, the elimination of the requirement for an "independent" counsel and the preparation of the "Notice of Allegations" by the Inquiry Committee do not render the process unconstitutional.

Is the effect of the implementation of the *Judges Act*, the *By-laws* and the *Handbook of Practice and Procedure* in compliance with Canadian constitutional principles governing judicial independence?

The answer to this question is yes.

More specifically, on the basis of the reasons put forward in "*Mémoire des faits et du droit*", is the new procedure governing an inquiry into the conduct of a judge under the *Judges Act* and the *By-laws* in compliance with Canadian constitutional principles?

The Inquiry Committee does not have at its disposal the "*Mémoire des faits et du droit*" referred to in this question. It is our understanding that it is a brief that was filed as part of the applications for judicial review submitted to the Federal Court by Justice Girouard. However, we understand that this brief restates the same arguments as those put forward by Justice Girouard in the present matter. Therefore, the answer to this question is yes.

[165] Ultimately, and for the reasons set out above, the Inquiry Committee:

DISMISSES the motion entitled "*Moyens préliminaires et demande en arrêt des procédures et en irrecevabilité de l'enquête découlant de la décision des ministres de la Justice du 14 juin 2016 concernant l'honorable Michel Girouard*", dated January 13, 2017;

DISMISSES the motion to have the constitution of the Inquiry Committee declared invalid, dated January 26, 2017;

DISMISSES, in part, the motion to reject the Notice of Allegations, disclose evidence and provide clarifications, dated January 26, 2017;

DISMISSES the motion to have the following provisions declared invalid:

a. Subection 63(1) of the *Judges Act*;

b. Subsections 2(1), 3(1), 3(2) and 3(3) and section 4 of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015* SOR/2015-203;

c. Sections 3.1, 3.2 and 3.3 of the *Handbook of Practice and Procedure of Canadian Judicial Council Inquiry Committees*.

Signed by:

March 30, 2017

The Honourable J. Ernest Drapeau

April 5, 2017

The Honourable Glenn D. Joyal

March 30, 2017

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The Honourable Marianne Rivoalen

April 3, 2017

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M^{e} Bernard Synnott, Ad. E.

April 4, 2017

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M^{e} Paule Veilleux

Hearing on the preliminary motions: February 20, 21 and 22, 2017