CJC
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Canadian
Judicial Council
Conseil canadien
de la magistrature

DANS L'AFFAIRE DE
l'article 65 de la *Loi sur les juges*,
L. R., 1985, ch. J-1, et du
comité d'enquête constitué par le
Conseil canadien de la magistrature
pour examiner la conduite de
l'honorable Michel Déziel de la
Cour supérieure du Québec :

Rapport du
Conseil canadien de la magistrature
à la ministre de la Justice

En vertu du mandat que lui confère la *Loi sur les juges*, et après avoir enquêté sur la conduite du juge Déziel, le Conseil canadien de la magistrature recommande par la présente au ministre de la Justice, aux termes de l'article 65 de la *Loi sur les juges*, que l'honorable Michel Déziel ne soit pas révoqué.

Le Conseil fait cette recommandation pour les motifs majoritaires ci-joints, après avoir dûment pris en considération les motifs énoncés par une minorité de membres.

Présenté à Ottawa,
le 02 décembre 2015

IN THE MATTER OF
Section 65 of the *Judges Act*,
R.S., 1985, c. J-1, and of the
Inquiry Committee convened
by the Canadian Judicial Council
to review the conduct of
the Honourable Michel Déziel
of the Superior Court of Québec:

Report of the
Canadian Judicial Council
to the Minister of Justice

Pursuant to its mandate under the *Judges Act*, and after inquiring into the conduct of Justice Déziel, the Canadian Judicial Council hereby recommends to the Minister of Justice, pursuant to section 65 of the *Judges Act*, that the Honourable Michel Déziel not be removed from office.

Council makes this recommendation on the basis of the attached majority reasons, after due consideration of reasons prepared by a minority of members.

Presented in Ottawa,
2 December 2015

Liste des membres du Conseil qui ont participé à l'examen de ce dossier

List of Council Members who participated in the review of this matter

- L'honorable / The Honourable Neil C. Wittmann (Président / Chairperson)
- L'honorable / The Honourable Heather J. Smith
- L'honorable / The Honourable Joseph P. Kennedy
- L'honorable / The Honourable David D. Smith
- L'honorable / The Honourable J. Derek Green
- L'honorable / The Honourable Jacqueline R. Matheson
- L'honorable / The Honourable Deborah K. Smith
- L'honorable / The Honourable David H. Jenkins
- L'honorable / The Honourable Eugene P. Rossiter
- L'honorable / The Honourable Lawrence I. O'Neil
- L'honorable / The Honourable Paul S. Crampton
- L'honorable / The Honourable Austin F. Cullen
- L'honorable / The Honourable Martel D. Popescul
- L'honorable / The Honourable Shane I. Perlmutter
- L'honorable / The Honourable Alexandra Hoy
- L'honorable / The Honourable Frank N. Marrocco
- L'honorable / The Honourable Robert G. Richards
- L'honorable / The Honourable Christopher E. Hinkson
- L'honorable / The Honourable Lucie Lamarre
- L'honorable / The Honourable B. Richard Bell

MAJORITY REASONS OF THE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HONOURABLE MICHEL DÉZIEL

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INTRODUCTION

[1] Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal and collective duty to maintain this confidence by upholding the highest standards of conduct.

[2] In some cases, conduct that precedes a judge's appointment can undermine public confidence in the judiciary, as was noted by the Supreme Court of Canada in *Re Therrien*.[1]

[3] This matter raises issues about a judge appointed to the Bench in 2003 who is alleged to have engaged in misconduct in 1997, while he was a practising lawyer. The alleged misconduct concerns the transfer of money in contravention of applicable municipal electoral law in force in Quebec at the time.

MANDATE

[4] An Inquiry Committee appointed pursuant to s. 63(3) of the *Judges Act*, to investigate the conduct of the Honourable Michel Déziel of the Superior Court of Quebec issued a report 19 May 2015.

[5] As noted in *Re Matlow*[2], the Canadian Judicial Council (Council), when reviewing the report of an Inquiry Committee, is not acting as an appellate tribunal. The process contemplated is a seamless one in which the Inquiry Committee plays a critical role. The purpose of an Inquiry Committee is to investigate the complaint made, hear the relevant evidence, make the necessary findings of fact and produce a report documenting the findings made and conclusions reached. The report normally considers whether a recommendation should be made for removal from office. The Inquiry Committee Report is meant to assist and guide the Council in its deliberations. The members of an Inquiry Committee are the ones who hear the evidence from the witnesses testifying before it, and therefore have the chance to observe those

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1 [2001] 2 S.C.R. 3

2 *Report of the Canadian Judicial Council to the Minister of Justice about the Honourable Ted Matlow*, 3 December 2008 (http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Final%20Report%20En.pdf).

witnesses, determine what evidence to accept or reject and to evaluate the weight to be given to that evidence. For this reason, considerable weight is accorded to the findings of the Inquiry Committee.

[6] The existing legislative framework, detailed below, contemplates that the Council will consider the recommendations of an Inquiry Committee afresh, applying its independent judgement to the facts. The Council, however, ought not to interfere with fact findings or inferences made by an Inquiry Committee without good reason. The mandate of the Council at this stage of the proceedings is to consider the Inquiry Committee Report and send its conclusions to the Minister of Justice for Canada. The Council may, in exercising the jurisdiction conferred on it under s. 65(2) of the *Judges Act*, recommend that Justice Déziel be removed from office. While the Council should give serious consideration to the recommendations of an Inquiry Committee on the subject of sanction, the Council is not bound by those recommendations.

LEGISLATIVE FRAMEWORK

[7] Sections 63-65 of the *Judges Act*[3] state:

> 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*).
>
> (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.
>
> (3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.
>
> (4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have
>
> (*a*) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and
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> (*b*) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

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[3] R.S.C., 1985, c. J-1

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

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

64. A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

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

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

(*a*) age or infirmity,
(*b*) having been guilty of misconduct,
(*c*) having failed in the due execution of that office, or
(*d*) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[8] Sections 10.1, 11 and 12 of *Canadian Judicial Council Inquiries and Investigation By-laws*[4] (the *By-laws*) state as follows:

10.1 (1) The most senior member of the Judicial Conduct Committee who is eligible and available to participate in deliberations concerning a removal of a judge of a superior court shall chair any meetings of Council related to those deliberations.

(2) If no member of the Judicial Conduct Committee is eligible and available to participate in deliberations, the most senior member of the Council who is eligible and available shall chair the meetings related to those deliberations.

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4 SOR/2002-371. These former By-laws apply to the current matter by virtue of section 14 of the *Canadian Judicial Council Inquiries and Investigations By laws, 2015* (SOR/2015-203), which reads as follows: "14. Despite these By-laws, the *Canadian Judicial Council Inquiries and Investigations By laws*, as they read immediately before the day on which these By-laws come into force, continue to apply in respect of any inquiries or investigations being conducted by a Review Panel or an Inquiry Committee or the Council acting under section 11 or 12, that were commenced under those By-laws."

> (3) A quorum of 17 members of the Council is required when it meets to deliberate the removal from office of a judge of a superior court.
>
> (4) In the event of the death or incapacity of a member during the deliberations, the remaining members constitute a quorum.
>
> (5) During deliberations of the Council concerning the removal from office of a judge of a superior court, the Chairperson may only vote in respect of a report of the Council's conclusions on the matter in the event of a tie.
>
> (6) Meetings of the Council involving deliberations concerning the removal from office of a judge of a superior court may be held in person, by audio-conference or by video conference.
>
> 11. (1) The Council shall consider the report of the Inquiry Committee and any written submission made by the judge or independent counsel.
>
> (2) Persons referred to in paragraph 2(3)(*b*) and members of the Inquiry Committee shall not participate in the Council's consideration of the report or in any subsequent related deliberations of the Council.
>
> 12. If the Council is of the opinion that the report of the Inquiry Committee is unclear or incomplete and that clarification or supplementary inquiry or investigation is necessary, it may refer all or part of the matter in question back to the Inquiry Committee with specific directions.

BACKGROUND

Complaint

[9] In a letter dated 2 May 2013, the Honourable François Rolland, Chief Justice of the Superior Court of Quebec (as he then was), informed the Council of the following: [TRANSLATION] "At the proceedings of the Charbonneau Commission, a witness named Gilles Cloutier made serious allegations against a judge of our Court, the Honourable Michel Déziel, in regard to events that occurred when Justice Déziel was a lawyer."

[10] The "Charbonneau Commission" was established by the Government of Quebec to publicly inquire into potential corruption in the management of public construction contracts (Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry).

[11] For purposes of clarity, we will refer to Justice Déziel as M^{e} Déziel in relation to

events that occurred before Justice Déziel was appointed to the Bench in November 2003.

[12] Former Chief Justice Rolland asked the Council to review these allegations, without otherwise providing details of the alleged misconduct or expressing any opinion about the allegations.

[13] In accordance with section 4.1 of the *Complaints Procedures* in force at the time (the "*Procedures*"), former Chief Justice Rolland's request was referred to the Honourable Edmond Blanchard, then Chief Justice of the Court Martial Appeal Court of Canada and Vice-Chairperson of Council's Judicial Conduct Committee.

[14] At the request of Chief Justice Blanchard, Justice Déziel was asked to submit his comments concerning the matter. Justice Déziel submitted his comments to Chief Justice Blanchard in a letter dated 19 June 2013. In his letter, Justice Déziel states among other things that, in March 2013, two investigators from the Charbonneau Commission met with him to inform him that his name would be mentioned during Mr Cloutier's upcoming testimony and more specifically, about Mr Cloutier's claim that, at M[e] Déziel's request, he had given M[e] Déziel a number of cheques in the amount of $750 in exchange for cash. Justice Déziel told investigators that he had no recollection of such an occurrence and categorically denied any such allegation. Under Chief Justice Blanchard's authority, additional information, publicly available from the *Charbonneau Commission* proceedings, was also gathered.

[15] Mr Gilles Cloutier, a former vice-president of business development for the engineering firm Roche, testified before the Charbonneau Commission on 2 May 2013. His testimony dealt with his activities as a political organizer, the orchestration of so-called "turn-key" elections, various business development strategies, as well as the impact of such strategies on the awarding of certain public contracts. The witness also spoke of actions taken by M[e] Déziel in 1997.

[16] Mr Cloutier testified that in October 1997, he was contacted by M[e] Déziel, who asked to meet Mr Cloutier.

[17] Mr Cloutier testified that, at a meeting, M[e] Déziel had a white envelope containing a sum of $30,000, in $100 bills, from an engineering firm called Dessau and asked Mr Cloutier if he would agree to convert the entire sum into cheques in the amount of $750 made payable to the *Parti de l'Action civique de Blainville*.

[18] Mr Cloutier said that he agreed to do this, that he personally took care of converting a sum of between $20,000 and $22,000 to $750 cheques, and that he got some help to convert the rest.

[19] Mr Cloutier testified that he returned to M[e] Déziel's office and, behind closed doors, handed him all the cheques that had been written.

[20] After reviewing all the available information, Chief Justice Blanchard decided to refer the matter to a Review Panel, pursuant to the authority provided by the *Procedures* and *By-laws*.

[21] The Review Panel considered the circumstances in the matter and the additional information provided by Justice Déziel on 14 January 2014 and unanimously decided that an Inquiry Committee should be constituted, in accordance with subsection 63(3) of the *Judges Act*.

Inquiry Committee

[22] In accordance with the *By-laws*, the Honourable Ernest J. Drapeau, Chief Justice of New Brunswick was appointed as a member and Chairperson of the Inquiry Committee, and the Honourable Glenn D. Joyal, Chief Justice of the Court of Queen's Bench of Manitoba was appointed as a member of the Committee. The Minister of Justice, the Honourable Peter Mackay, appointed M[e] René Basque, Q.C., a lawyer from New Brunswick, as a non-judicial member of the Committee.

[23] Also in accordance with the *By-laws*, an Independent Counsel, M[e] Suzanne Gagné, was appointed to present the case to the Inquiry Committee.

[24] On 14 November 2014, Independent Counsel provided the Inquiry Committee and counsel for Justice Déziel a document entitled *Notice of Allegations* describing the essence of each complaint referred to the Inquiry Committee by the Review Panel.

[25] The *Notice of Allegations* was divided into two allegations:

> (1) That M[e] [Justice] Déziel asked Mr Gilles Cloutier to convert $30,000 into contributions of $750.00; and
>
> (2) That M[e] [Justice] Déziel acted as an intermediary for the purpose of receiving illegal contributions to a political party.

[26] Independent Counsel then informed the Inquiry Committee that (1) the alleged offences would have fallen within the provisions of the *Municipal Elections Act* in force at the time,[5] and (2) prosecution of the offences would have been time-barred before Justice Déziel's appointment to the judiciary.[6]

[27] Independent Counsel filed an *Amended Notice of Allegations* to the effect that the alleged misconduct could show that Justice Déziel had become incapacitated or disabled from the due execution of the office of judge by reason of "having been guilty of misconduct" (as set out in paragraph 65(2)*(b*) of the *Judges Act*).

[28] Public hearings were held by the Inquiry Committee on 10, 11, and 12 March 2015. The Inquiry Committee concluded that the version of the facts put forward in allegation 1 was improbable, particularly in view of the information contained in an auditor's report. The Inquiry Committee concluded that the version of the facts set forth in allegation 2 should be taken as true.

[29] The Inquiry Committee made findings of fact. It concluded that:

> M^{e} Déziel agreed to act as an intermediary by transferring a sum of between $30,000 and $40,000, received from Mr Sauriol [of the engineering firm Dessau], to Mr Monette, the *Parti de l'Action civique de Blainville*'s field organizer.

[30] The Inquiry Committee then focused its analysis on the issue of whether these facts constituted misconduct within the meaning of paragraph 65(2)(*b*) of the *Judges Act*.

[31] The Inquiry Committee concluded that although they were convinced that M^{e} Déziel's actions described in allegation 2 constituted misconduct within the meaning of paragraph 65(2)(*b*) of the *Judges Act*, such reprehensible conduct did not render Justice Déziel incapacitated or disabled from the due execution of the office of judge. The Inquiry Committee was of the opinion that the misconduct stated in allegation 2 did not warrant a recommendation for Justice Déziel's removal from office.

[32] The Inquiry Committee reviewed various factors related to allegation 1 and found

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5 *An Act Respecting Elections and Referendums in Municipalities, RSQ,* C. E-2.2.

6 Section 648 of that *Act* stated: "Penal proceedings for an offence referred to in section 647 of this Act shall be prescribed by one year from the date on which the prosecutor became aware of the commission of the offence. However, no proceedings may be instituted where more than five years have elapsed from the commission of the offence."

that it was not in the interest of justice nor the public interest to continue hearing allegation 1. Therefore, the Inquiry Committee summarily dismissed allegation 1 set out in the *Amended Notice of Allegations*.

[33] Pursuant to section 9 of the *By-Laws*, Justice Déziel advised Council that he did not wish to make representations for Council's consideration in regard to Council's deliberations concerning the Inquiry Committee Report.

THE TEST FOR REMOVAL AND PROCESS

[34] The Report of the Inquiry Committee Respecting Certain Judges of the Nova Scotia Court of Appeal (1990), (the "Marshall Report") proposed a standard to be applied for a judge's removal from office. That standard, now known as the *Marshall Test*, has been consistently applied by Council since then by posing the question:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[35] In discharging our duties pursuant to subsection 65(2) of the *Judges Act*, we have decided to adopt the two-stage process described in previous cases.[7] First, we determine whether the judge's conduct fall within any one of paragraphs (*b*) through (*d*) of subsection 65(2) of the *Judges Act*. If this question is answered in the affirmative, we then proceed to apply the test for removal set forth above.

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[7] See *Matlow*, para. 166; and Cosgrove, para. 15, *Report to the Canadian Judicial Council to the Minister of Justice about the Honourable Paul Cosgrove*, 30 March 2009. (http://www.cjc-ccm.gc.ca/cmslib/general/Report_to_Minister_Justice_Cosgrove.pdf)

ANALYSIS

[36] Council's publication *Ethical Principles for Judges*[8] provides helpful guidance in respect of the high standards of conduct expected of judges. Commentary 1 of Chapter 3 on Integrity is apposite to our review:

> Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. ... Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment.

[37] As noted by Justice Gonthier in *Re Therrien*, a judge is a symbol of justice in the eyes of the public:

> 109 ...[J]udges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them.
>
> 110 Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:
>
> > ... Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. ...
>
> 111 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...
>
> (Underlining added)

[38] There is a direct connection between public confidence in the judicial system and the

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[8] *Ethical Principles for Judges*, Canadian Judicial Council (http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf)

integrity of the judge, both real and perceived.

[39] As noted in *Re Matlow*, the impact of the impugned conduct on public confidence must be assessed from an objective standpoint of what an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude.

[40] A lack of integrity may constitute misconduct. As was observed in *Re Matlow*, the focus in the judicial conduct process is on the future: what does the misconduct reveal about the judge's character or the risk of future misconduct, and what is the public's confidence in the judicial system in future cases heard by the Judge?[9]

[41] Generally, in a given case, certain facts about an individual's actions may well demonstrate a lack of integrity. However, demonstrating that a person possesses integrity can be more difficult. The mere absence of conduct that would show a lack of integrity does not, in of itself, establish that a judge demonstrates integrity.

[42] At the same time, judges, upon appointment, take an oath of office which binds them to uphold the highest standards and to discharge their duties in accordance with the law, without fear or favour.

[43] In *Re Matlow*, this Council discussed the role of the ethical principles for judges, codes of conduct and guidelines.[10] The general framework of values and considerations contained in *Ethical Principles for Judges*[11] are necessarily relevant in evaluating alleged misconduct by a judge. We do not depart from that principle, mindful nonetheless that *Ethical Principles for Judges* is not a code of conduct.

[44] Integrity is a core value and attribute of a lawyer or judge. It is entrenched in the administration of justice in Canada. The present day *Code of Ethics of Advocates* [12] states that an advocate shall act with integrity. Another section details conduct constituting a breach of the obligation to act with integrity. The additional attributes of impartiality and independence are also mentioned. These core attributes also apply

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9 *Matlow*, at para. 166

10 *Matlow*, at paragraphs 90 to 104

11 *Ethical Principles for Judges*, c.1 at Purpose, Principle 2

12 R.S.Q., Chapter B-1, r. 3.

to the Canadian judiciary.

[45] As noted earlier in *Ethical Principles for Judges*, Chapter 3 is entitled Integrity. In the Commentary 2, it is stated that "judges … should strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity…" As a matter of principle, conduct that is above reproach is required. Observing this high standard personally is necessary. "Integrity" is not defined, perhaps because it is not easy to state in general terms and it is perhaps unwise to be more specific. But it is noted "there can be few absolutes since the effective conduct on the perception of the community depends on community standards that may vary according to place and time."[13]

[46] What, then, is integrity? One definition involves adherence to moral and ethical principles and includes soundness of moral character. It is a synonym for honesty and honour.

[47] In our view, it is significant to note that a lawyer is bound by the same ethical principles as a judge, when it comes to the core attribute of integrity. There may be those that disagree and would suggest that judges are bound by an even higher standard than lawyers. The point is, that at the time of the impugned conduct M^{e} Déziel was bound by a code of conduct and a statute which he violated. His violation was dishonest and contrary to law. However, perfection is aspirational and ideal, not a condition precedent to maintaining one's license as a lawyer or to maintaining the office of a judge.

[48] In the current context, a number of factors can be considered to establish whether a judge evinces the requisite attitude to discharge the duties of office by consistently upholding the high standard of conduct expected from members of the judiciary.

[49] After considering the Report and given the thorough and cogent analysis of the evidence before the Inquiry Committee, we agree with the report and adopt as our own the conclusion reached by the Inquiry Committee as expressed in paragraph 118 of its Report:

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[13] *Ethical Principles for Judges*, c. 3, Integrity, Commentary 2

> The Inquiry Committee unanimously concluded that Justice Déziel, when he was a lawyer, violated the *Elections Act* and that he knowingly committed these unlawful acts. These facts, the seriousness of which must be assessed in light of the important role of judges in our democracy, led the Inquiry Committee to conclude that Justice Déziel had engaged in "misconduct" within the meaning of paragraph 65(2)(*b*).

[50] We agree that Justice Déziel, prior to being a judge, engaged in misconduct. However, it does not follow that the judge has become "incapacitated or disabled from the due execution of the office of judge." In this regard, we agree with the Inquiry Committee's conclusion "that public confidence in Justice Déziel has not been irreparably undermined."

[51] Justice Déziel's conduct, at a time when he was a lawyer, raises concerns.

[52] As an officer of the Court, M[e] Déziel committed unlawful acts and violated the *Elections Act*.

[53] M[e] Déziel, on more than one occasion during the 1997 Blainville municipal election campaign, took money from one person at Dessau and transferred it to the field organizer of the campaign. In total, a sum between $30,000.00 and $40,000.00.

[54] M[e] Déziel was a very experienced lawyer at the time of the misconduct. Not only should he have known better than to do the things he did, society expected and continues to expect more from lawyers than it does from others in society.

[55] M[e] Déziel's behaviour when he committed those unlawful acts fell short of manifesting the integrity the public has a right to expect in a lawyer.

[56] The (Québec) *Elections Act* was enacted for an important social and democratic purpose. As noted by the Supreme Court of Canada in *Libman v. Quebec (Attorney General)*[14], the spending limits imposed by the *Elections Act* "are essential to ensure the primacy of the principle of fairness in democratic elections... and to ensure a right of equal participation in democratic government..."

[57] The *Marshall Test* was formulated to assess a number of factors and that is why it is not enough that there be a finding of misconduct. The misconduct must be egregious and incapacitate the judge from holding office. Here, there has been a demonstrable lack of integrity in 1997 by M[e] Déziel. The question is not whether he can demonstrate integrity since that time and since becoming a judge. That, in our view,

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[14] [1997] 3 S.C.R. 569

is an unattainable and unfair onus because integrity is a quality that is difficult or impossible to conclusively prove in positive terms. True, Justice Déziel could have been called upon by the Inquiry Committee to state that he is a man of integrity. However, any such bare declaration, although not irrelevant, would obviously not have advanced the Committee's decision making in any material way. There is no suggestion of any sort that Justice Déziel has failed to act with integrity since he was appointed to the bench or, indeed, that (other than in relation to the campaign contributions in issue here) he failed to act with integrity prior to becoming a judge. The question, therefore, is whether his actions some 20 years ago in relation to campaign financing matters is so destructive of his integrity that public confidence has been sufficiently undermined to render him incapable of executing judicial office.

[58] We note that Justice Déziel filed letters of support from his former Chief Justice and his former Associate Chief Justice (now Chief Justice). Those letters do not speak expressly of integrity as such but, given the familiarity of those two senior judges with these proceedings, their support must be taken as meaning they have no concerns about Justice Déziel's integrity, notwithstanding his conduct as a lawyer.

[59] That said, the gravity of M^{e} Déziel's misconduct should not be minimized. By today's standards, it constitutes inappropriate interference in the democratic process. As Justice Déziel has now acknowledged in a Solemn Declaration dated 26 February 2015 and filed with the Inquiry Committee:

> [Translation] With the passage of time and in hindsight, I appreciate that my actions had the effect of distorting the democratic process, and also to devalue its pursuit.

[60] We agree with Justice Déziel that his actions had the effect of distorting and devaluating the democratic process. For this reason, we wish to express our concerns to him for his conduct prior to his appointment to the Bench.

[61] Now, as noted, to establish whether a judge evinces the requisite qualities to discharge the duties of office by consistently upholding the high standard of conducts expected from members of the judiciary, a number of factors can be considered. A judge's statement that they understand the gravity of the misconduct but is now a changed person, is not enough.

Nature of the conduct

[62] While the actions of M[e] Déziel were wrong, they cannot objectively be characterized as being on the high end of the spectrum of misconduct.

[63] The objective seriousness of the offences is important to consider. The actions were not criminal in nature. The penalties imposed under the *Elections Act* for this type of infraction were, at the time, minimal (usually a $100 fine).

[64] Also, prescription for the offences under the *Municipal Elections Act* was five years; any offence was therefore time-barred by the time M[e] Déziel was appointed to the bench in November 2003.

[65] This is important. As noted by the Supreme Court of Canada in *R. v. Dudley*[15], the purpose for limitation periods is to allow those who commit minor offences to rest easy after a period. After a time, a person should not have to fear prosecution.

[66] Although M[e] Déziel used the fact that he was the chief organizer of the campaign for *Action civique de Blainville* for the commission of the unlawful acts, he did not act in the capacity of a lawyer, nor did he use his lawyer's office to facilitate the transfer of funds.

[67] M[e] Déziel was not the one who negotiated the agreement to fund the election campaign; nor was he the one who took steps to disguise the contributions. His actions were not those of a principal actor in a scheme that fell afoul of the legislative proscription regarding corporate donations.

[68] There is no evidence that M[e] Déziel financially gained from the transactions or received any other material benefit.

The Passage of Time

[69] The commission of these unlawful acts occurred during the 1997 municipal election campaign, almost twenty years ago, when Justice Déziel was a lawyer. The passage of time alone does not negate the gravity of the misconduct. However, it is an important factor in assessing a person's character and integrity.

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15 [2009] 3 S.C.R. 570, paragraphs 76 - 78.

[70] M[e] Déziel and Justice Déziel are the same person. His character and his integrity have been shaped by the sum of all of his actions and attitudes over the whole of his life. Integrity, although difficult to measure, can weaken or strengthen over time.

[71] Depending on circumstances, the passage of time can make a difference in assessing a person's fundamental character and whether it has changed for the better.

[72] In that sense, Justice Déziel's actions in the years since are directly relevant to our analysis. From all the available information filed as evidence, we find that Justice Déziel's attitude and demeanour, since his appointment to the Bench, has been exemplary, as will be described below. There has been no demonstrated lack of integrity.

The judge's acknowledgments of his actions

[73] In our view, judges have a clear obligation to act in a transparent and forthright manner when responding to allegations of misconduct as part of the review process of Council. A shortcoming in this regard would very likely constitute, in and of itself, judicial misconduct.

[74] We note, in this process of review, that Justice Déziel has been honest, transparent and fulsome in responding to all enquiries from the Council, including all queries made by Independent Counsel and the Inquiry Committee.

[75] It is true that it is only when his misconduct was exposed to public accusation and until he was facing an inquiry into his conduct that Justice Déziel was motivated to make a statement. However, as noted before, those offences to the *Elections Act* were time-barred, which limitation period is presumed to have been enacted to allow those who commit minor offences to rest easy after a period and not fear prosecution.

[76] As noted by the Inquiry Committee in its report, the witness who made the allegations regarding Justice Déziel, alleging unlawful acts at a time when he was a lawyer, was arrested for fifteen counts of perjury, as a result of a complaint filed by the *Charbonneau* Commission. The witness' testimony before that Commission was, at the very least, clouded.

[77] In contrast, Justice Déziel was forthright with the Inquiry Committee. He admitted to the misconduct and expressed sincere regret.

[78] We agree with the judge's assessment of his conduct, as noted in his Solemn Declaration dated 26 February 2015. That is why we have expressed concern about his conduct.

[79] As Council noted in *Re Cosgrove*, a judge's insight and appreciation for his actions is fundamental in assessing whether the judge is likely to engage in misconduct in the future and whether he can discharge his duties fully. In the *Cosgrove* matter, the judge did not acknowledge any misconduct before challenging the constitutionality of the process itself and then did so tardily, as Council noted in paragraph 43 of its Report to the Minister of Justice:[16]

> [43] It must also be emphasized that the apology was not made any time soon after the constitutional issue was resolved against Justice Cosgrove. In fact, it was only on the seventh day of the eight days of the hearings before the Inquiry Committee that Justice Cosgrove finally tendered his apology. It's not surprising that the Inquiry Committee, after considering all the relevant circumstances, including the timing of Justice Cosgrove's statement, found the apology insufficient to restore public confidence. ...

[80] In this case, the judge fully acknowledged and offered apologies for his conduct well before the hearings of the Inquiry Committee began. He notes he would have offered his apologies earlier were it not for the difficult personal circumstances he faced at that very time, when his wife of many years passed away.

[81] All the factors we have considered demonstrate, in our view, that the judge has thoughtfully reflected upon, and understands, the nature of his actions. This is clearly relevant to the notion of Justice Déziel's integrity today.

[82] Justice Déziel, by being forthcoming and upright about his past actions during the entire process of review by Council, acted in the very manner which we expect from all judges.

Public Confidence

[83] Justice Déziel has earned the respect of those with whom he works and those who appear before him. We note the strong and unequivocal support from his former Chief Justice, who has noted among other things that Justice Déziel is an ambassador of the Court.

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[16] *Supra,* Note 5, Cosgrove

[84] We note also the clear and strong support of his former Associate Chief Justice (now his Chief Justice), who noted his unblemished judicial career and strong work ethic. We note also the comments relating to the local Bar's confidence in the judge.

[85] While limited weight should be given to letters of support, the full confidence of a judge's Chief Justice and of members of the Bar speaks to the notion of public confidence.

The likelihood of future misconduct

[86] As noted by Cory J in *R.* v. *S. (R.D.)*,[17] a judge's oath of office speaks directly to the notions of integrity and impartiality:

> (v) Judicial Integrity and the Importance of Judicial Impartiality
>
> [116] Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dream. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trail for all who come before them. Their rate of success in this difficult endeavour is high.

[87] We are of the view that Justice Déziel understands the onerous responsibilities of his office and takes his oath of office very seriously. The reoccurrence of similar conduct on his part cannot be reasonably contemplated.

[88] Based on all of the above, we come to the view that Justice Déziel is, and has been for the entire tenure of his judicial career, a man of integrity who has fully respected his oath of office. His shortcomings before his appointment to the Bench cannot be minimized, but nor can all the indicia of his good conduct since then.

Conclusion by the majority

[89] We turn now to the test we have to apply. Are the judge's past actions "so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role, that public confidence would be sufficiently

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[17] [1997] 3 S.C.R. 484

undermined to render the judge incapable of executing the judicial office?"

[90] We answer this question in the negative.

[91] For the reasons noted above, we conclude that Justice Déziel is capable of executing his judicial office. The nature of the conduct; the passage of time; the judge's acknowledgments and understanding of his actions; public confidence and the complete improbability of future misconduct all support our conclusion.

[92] There is positive evidence that M^{e} Déziel, now Justice Déziel, has changed. He has recognized his past shortcomings and has dedicated himself to discharging his duties conscientiously, with the full confidence of his Chief Justice.

[93] We are convinced that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that public confidence would not be undermined such as would render Justice Déziel incapable of executing the judicial office.

[94] We agree with the conclusion of the Inquiry Committee that the judge's misconduct, prior to his appointment to the Bench, does not render Justice Déziel incapacitated or disabled from the due execution of the office of judge.

DECISION

[95] The Council finds that Justice Déziel did engage in misconduct prior to his appointment as a judge but that his past actions do not so undermine public confidence as to render him incapable of executing his judicial office. Therefore, Council recommends to the Minister of Justice, in accordance with section 65 of the *Judges Act*, that Justice Déziel not be removed from office.

These REASONS are agreed by the following Council members:

1. The Honourable Heather J. Smith
2. The Honourable Joseph P. Kennedy
3. The Honourable Jacqueline R. Matheson
4. The Honourable Deborah K. Smith
5. The Honourable David H. Jenkins
6. The Honourable Eugene P. Rossiter
7. The Honourable Lawrence I. O'Neil
8. The Honourable Paul S. Crampton
9. The Honourable Austin F. Cullen
10. The Honourable Martel D. Popescul
11. The Honourable Shane I. Perlmutter
12. The Honourable Alexandra Hoy
13. The Honourable Frank N. Marrocco
14. The Honourable Robert G. Richards
15. The Honourable Christopher E. Hinkson
16. The Honourable Lucie Lamarre

MINORITY REASONS OF TE CANADIAN JUDICIAL COUNCIL IN THE MATTER OF AN INQUIRY INTO THE CONDUCT OF THE HONOURABLE MICHEL DÉZIEL

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Minority Reasons

[1] I respectfully disagree with the reasoning of my colleagues in the majority and dissent from the conclusion they have reached. In my view, the existing record and the reasons of the majority do not support a conclusion that the file be closed without further consideration as to whether or not there should be a recommendation that Justice Déziel be removed from office.

[2] My disagreement with the majority's reasons is not simply one of disagreement as to emphasis on the evidence, if any, relating to Justice Déziel's integrity; rather it is with respect to the approach to be taken to analysis of that evidence. In my respectful opinion, the approach adopted by the majority risks being perceived as allowing serious misconduct to be discounted solely on the basis of outward appearances of other good qualities not directly related to the issue under consideration.

The Process

[3] The duty of the Council facing a request from the Minister of Justice or an attorney general, or a complaint or allegation against a judge of a superior court, is to conduct "an inquiry as to whether a judge … should be removed from office" (*Judges Act*,[1] s. 63(1)) or to "investigate" the complaint or allegation (s. 63(2)) and to "report its conclusions … to the Minister" (*Judges Act*, s. 65(1)).

[4] The fact the Council may conduct its inquiry or investigation through the means of an Inquiry Committee appointed under s. 63(3) of the *Judges Act* does not detract from the requirement that it is the Council as a body which is required to formulate an "opinion" as to whether the judge has "become incapacitated or disabled from the due execution of the office" by reason of certain stated grounds, including "misconduct," and to state in its report to the Minister whether it recommends that the judge be removed from office (s. 65(2)).

[5] Where, as here, an Inquiry Committee is constituted, its report following inquiry and investigation must be submitted to the Council and may state its conclusion as to whether or not the Council should make a recommendation for the removal of the judge from office (*By-Laws*,[2] s. 8(1)). The Inquiry Committee's report is a recommendation to the Council. However, it is the Council which must decide whether to make a recommendation to the Minister on the issue of removal. Council's duty is to "consider" the report before deciding what recommendation, if any, should be made respecting removal (*By-Laws*, s. 11(1)).

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[1] R.S.C. 1985, c. J-1.
[2] *Canadian Judicial Council Inquiries and Investigations By-Laws*, SOR/2002-371.

[6] The role of the Council is broader than that of an appellate body from the Inquiry Committee's recommendation. In *Re Matlow*,[3] the point was put this way:

> [54] The existing statutory framework … contemplates that the CJC will consider the recommendations of an inquiry committee afresh, applying its own independent judgment to the facts. This includes the issue of what sanctions should be imposed where conduct so warrants. Accordingly, in fulfilling this obligation, the CJC does not employ, and is not constrained by, a standard of review equivalent to that of an appellate tribunal reviewing a decision of another body …
>
> [55] This responsibility on the CJC to make its own independent assessment and judgment is as it should be given the serious nature of the interests at stake. Those interests include both the need to preserve public confidence in the integrity of the judiciary and the need to ensure that judicial independence is not improperly compromised through the use of disciplinary proceedings …
>
> [56] With respect to another central point typically the focus of any inquiry committee, namely what constitutes judicial misconduct or a failure in the due execution of the office or judge or placing one's self in a position incompatible with the judicial office, these are issues that do not lend themselves to being definitively resolved by inquiry committees appointed on an *ad hoc* basis to consider individual complaints. Instead, given the need to ensure uniformity and therefore equal and fair treatment, it is the CJC, and not the individual inquiry committees, that should bring its own independent judgment to bear and ultimately confirm the general principles as to the scope of sanctionable conduct. Therefore, in assessing whether challenged conduct should properly be characterized as sanctionable conduct, the conclusions of an inquiry committee constitute an important factor the CJC should consider. But on this point too, the CJC is not bound to defer to an inquiry committee's conclusions.

[7] The obligation to "consider" the report of the Inquiry Committee is for the Council, as a collectivity, to consider it. That involves more than merely expressing, by individual affirmative or negative vote without more, assent to, or dissent from, the report. The issue is not whether to accept or reject the report; rather it is to decide collectively, taking account of the report and its recommendations, whether or not to recommend removal of the judge to the Minister.

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[3] *Majority Report of the Canadian Judicial Council to the Minister of Justice Concerning the Honourable Theodore Matlow* (December 3, 2008).

Background

[8] The factual background surrounding the complaint against Justice Déziel is described in detail in the report of the Inquiry Committee and in the majority reasons of Council. It is sufficient for present purposes to record that the Inquiry Committee found that:

- Justice Déziel, before he was appointed as a judge, engaged in conduct that was in contravention of the provisions of Quebec's municipal electoral legislation[4] by receiving, as chief organizer of a municipal political party, illegal cash contributions from an engineering firm in amounts totaling between $30,000 and $40,000 and acted as the intermediary in transferring the money to the person responsible for organizing the electoral campaign of that municipal political party. The legislation prohibited corporations from making financial contributions to municipal political parties and capped contributions by individuals at $750 (paragraphs 7, 10, 14).

- Justice Déziel "knew full well" that that conduct contravened the applicable legislation (paragraph 7, 118).

- The conduct was "reprehensible" (paragraph 124).

- The conduct constituted misconduct on the part of Justice Déziel within the meaning of s. 65(2)(b) of the *Judges Act* (paragraphs 14, 118, 124).

[9] None of these findings was challenged by Justice Déziel. Notwithstanding this, however, the Inquiry Committee did not recommend removal, holding that engaging in that conduct "does not render Justice Déziel incapacitated or disabled from the due execution of the office of judge" (paragraph 124) and that "public confidence in Justice Déziel has not been irreparably undermined" (paragraph 125). It is that conclusion that the majority of Council affirms (paragraph 94).

The Rationale for Not Recommending Removal

[10] As *Re Matlow* emphasizes, the report of an Inquiry Committee is "an important factor the CJC should consider."[5] The majority accepted the factual conclusions, approach and ultimate recommendations of the Inquiry Committee. It is necessary to examine the reasons given by the Inquiry Committee for the conclusions it reached, as the reasons of the majority are essentially an extension – albeit a more analytical and fulsome extension - of the reasons in the Inquiry Committee Report.

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[4] *An Act respecting Elections and Referendums in Municipalities*, RSQ, c. E-2.2, ss. 610, 611 and 637.
[5] Paragraph 56

[11] It is my opinion that the reasoning in the Inquiry Committee Report does not support the conclusions it reached and should be rejected. That has the result of requiring the Council to embark on its own analysis of the matter according to proper principle before deciding to recommend either removal or non-removal of the judge under investigation.

[12] The Inquiry Committee essentially accepted the submissions of Independent Counsel (which in themselves were not opposed by Justice Déziel's counsel) in formulating its recommendation that he not be removed from office notwithstanding the misconduct found by the Inquiry Committee and acknowledged by the judge (paragraphs 120, 124). At no point in the process was the contrary position forcefully put forward. The strength of the conclusions and reasoning of the Inquiry Committee, therefore relies on the inverted pyramid of the adequacy of Independent Counsel's submissions.

[13] The Independent Counsel, purported, in her submissions, to follow and apply the *Marshall*[6] test for determining whether Justice Déziel had become incapacitated or disabled from the execution of his judicial office by reason of his misconduct. This test was essentially approved in *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paragraph 147 and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at paragraph 51, for determining whether a judge should be removed from office. In the words of *Marshall* at p. 27:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[14] Independent Counsel noted, referring to *Re Matlow* and *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, that the impact of the impugned conduct on public confidence must be assessed from an objective standpoint of what an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude.

[15] These are well-accepted principles. The question at issue, however, is whether they were applied properly in the circumstances of this case.

[16] Independent Counsel relied on, amongst other cases, *Re Cosgrove*[7] (a case involving allegations that the judge, by his actions and rulings on the bench, failed in the due exercise of his office by abusing his powers and creating

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[6] *Report of the Inquiry Committee Respecting Certain Judges of the Nova Scotia Court of Appeal* (1990)
[7] *Report of the Canadian Judicial Council t the Minister of Justice Concerning the Conduct of the Honourable Paul Cosgrove* (March 30, 2009)

an irremediable apprehension of bias) as establishing that: (i) an apology is an important factor is assessing the future conduct of a judge and whether he will strive to avoid similar conduct in the future; (ii) views of Independent Counsel regarding removal are important; and (iii) the judge's whole career, character and abilities, as disclosed in letters of support are relevant considerations.

[17] Independent Counsel also submitted that the "objective seriousness" of the offences at the time they were committed, "the social and legislative context" that prevailed at the time of the impugned conduct and the passage of time were also relevant factors.

[18] Adopting an approach reminiscent of an approach to sentencing in the criminal context, Independent Counsel then listed a number of aggravating and mitigating factors to be considered by the Inquiry Committee. As to aggravating factors, she noted:

- The offences under the electoral legislation
- The considerable sum at issue
- The "intentional, well thought out and repetitive nature" of the conduct
- The absence of regret and apology in Justice Déziel's letters to the Council in the course of the investigation, wherein he did not admit having committed any offence and sought to minimize the seriousness of what he had done

[19] As to mitigating factors, Independent Counsel highlighted:

- Justice Déziel's acknowledgement of the facts
- His belated admission that he violated the elections law
- His "sincere apologies"
- The "absence of risk of reoffending"
- The "objective seriousness" of the offences
- The elapsed time
- Justice Déziel's "irreproachable career"
- The support expressed by his Chief Justice and Associate Chief Justice, the President of the Bar and three other members of the Bar

[20] For Independent Counsel, the mitigating factors outweighed the aggravating factors. In coming to the position that public confidence in Justice Déziel had not been sufficiently undermined to render him incapable of executing judicial office, she focused on (i) Justice Déziel's apologies and recognition that he had engaged in misconduct; (ii) the lack of any risk of reoffending in light of his sincere apologies; (iii) the fact that the offences, objectively considered, generally attracted the minimum fine of $100; (iv) the endemic nature, at that time, of schemes to avoid the

strictures of the elections laws; (v) the fact that the offences were time-barred by the time Justice Déziel was appointed to the Bench; (vi) Justice Déziel's irreproachable career; and (vii) the relevance of letters of support received.

[21] The Inquiry Committee stated that it "agreed with Independent Counsel's conclusion" (paragraph 124) that public confidence in Justice Déziel had not been irreparably undermined. In so doing, however, the Inquiry Committee stated that it placed emphasis on the letters of support that had been submitted on his behalf. Notwithstanding that the Council had previously stated in *Re Cosgrove* that opinions of individuals "will generally be of little assistance in determining whether public confidence has been undermined" (paragraph 57) and that Independent Counsel had acknowledged this in her submissions (Submissions, paragraph 52), the Inquiry Committee nevertheless concluded that this type of evidence in this case was "relevant and instructive with regard to the issue of public confidence" and gave "considerable weight" particularly to the letters from the Chief Justice and Associate Chief Justice (paragraphs 127 and 128).

[22] The Inquiry Committee concluded:

> [124] … although we are convinced that Me Déziel's actions … constitute misconduct within the meaning of paragraph 65(2(b) of the *Act*, such reprehensible conduct does not render Justice Déziel incapacitated or disabled from the due execution of the office of judge.
>
> …
>
> [129] All things considered, the Inquiry Committee is of the opinion that the misconduct… does not warrant a recommendation for Justice Déziel's removal from office.

[23] In accepting the Inquiry Committee's conclusions and coming to the position that removal from office should not be recommended, the majority of Council have relied on essentially the same factors as were emphasized by the Inquiry Committee. Those factors are summarized at paragraph 91 of their reasons as "[t]he nature of the conduct; the passage of time; the judge's acknowledgements and understanding of his actions; public confidence and the complete improbability of future misconduct."

[24] The majority has, however, also emphasized something that the Inquiry Committee did not: integrity as the important value that is at stake in this proceeding. I agree with this. In fact, I would go further and say that the fundamental issue here is whether the lack of integrity demonstrated by Justice Déziel in violating the Quebec election laws has been demonstrated to no longer define Justice Déziel's character as a judge on the bench. Where I differ with the majority is with respect to (i) the characterization of the nature and seriousness of the lack of integrity demonstrated by Justice Déziel while acting as lawyer; (ii) whether Justice Déziel has the burden of demonstrating that since joining the bench his attitudes and values have changed such that his earlier actions can now be disregarded; and (iii) whether the factors relied on by the majority and the Inquiry Committee are sufficient to enable such an inference to be drawn.

The Nature and Seriousness of the Issues at Stake

[25] The *Marshall* test recognizes that destruction of impartiality, integrity and judicial independence is what may render the judge incapable of executing judicial office if public confidence is sufficiently undermined. In the current case, the issue relates to integrity.

[26] As noted by Gonthier J. in *Re Therrien*, a judge is a symbol of justice in the eyes of the public:

> [109] … [J]udges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and

> freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them.
>
> [110] Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. … In a paper written for its members, the Canadian Judicial Council explains:
>
> > … Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. …
>
> [111] 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.
>
> (Underlining added.)

[27] There is thus a direct connection between public confidence in the judicial system and the image of the integrity of the judge.

[28] Misconduct clearly may reflect on integrity by casting doubt on it. As was observed in *Re Matlow*, the focus in the judicial conduct process is on the future: what does the misconduct reveal about the judge's character or the risk of future misconduct, and what is the public's confidence in the judicial system in future cases heard by Justice Déziel?

[29] Misconduct that strikes at a judge's integrity is more destructive of the judicial role than any other kind of misconduct. Integrity is the central judicial quality, more important than wisdom, learning, experience, diligence or intelligence. Without integrity, no other judicial qualities are even significant. A judge who is apt to decide a case based on fear or favour, whatever his or her other virtues, is no judge at all.

[30] In this context, it is wrong for a judicial conduct review to adopt an analysis of the misconduct that resembles that of a sentencing. The focus is not on punishment for past behavior but on the future impact of the misconduct on the ability of the judge to continue to perform his or her judicial functions. An analysis that proceeds by way of analogy to sentencing for a criminal offence, by focusing, for example, on balancing aggravating and mitigating factors, will tend to distract from a proper consideration of the true issue.

[31] Integrity, impartiality and independence are difficult to measure. People often behave well while the lights are on and the cameras are rolling.

> Integrity describes what you do when no one is looking. Members of the legal community, in particular, have strong incentives, because of their professional obligations and standards, to appear to have integrity whether or not they have or want it. A professional reputation, built up over a career, is more reliable but still an imperfect measure. Few of the people whose opinions factor into the reputation will ever see the individual put to the test. Take this case. Me Déziel by all accounts had a very good reputation as a lawyer; yet he engaged in reprehensible misconduct that could do no credit to the legal profession.

[32] Misconduct that shows a lack of integrity can be highly significant in assessing continuing public confidence in the judicial system. In this context, *the important consideration is not how serious the misconduct is, objectively considered, but what it reveals about the person.* For example, obstruction of justice may not be as serious, objectively considered, as dangerous driving causing death, but it casts much more doubt on the offender's integrity.

[33] The misconduct should be viewed from the perspective of a reasonable person, generally informed about the facts and about our institutions but not part of the legal community's inside conversation. That is the context in which one must ask the question whether the public would doubt the judge's integrity. One must be careful not to allow the legal community's internal consensus on these issues to influence the broader (and possibly different) conclusion that a reasonable informed member of the public might have.

[34] I observe at the outset that Independent Counsel and the Inquiry Committee were careful in their writings to draw the distinction between Me Déziel the lawyer and Justice Déziel the judge when describing the misconduct at issue. This, of course, makes the obvious point that he is not being accused of having done anything improper during the judicial portion of his career. In that sense, his judicial career appears to be, as referenced, irreproachable. But this distinction has little significance in the current context. Me/Justice Déziel has one character. There is one person to be considered. His integrity is the sum of all of his actions and attitudes over the whole of his life. While integrity can weaken or strengthen over time, it is important that the evidence of character/integrity change be examined with care.

[35] Pre-appointment misconduct of a type that reflects on a person's integrity is paradigmatically relevant to a consideration of whether a judge can later execute the office of judge. It is the sort of information that a Judicial Advisory Committee would be very concerned about in determining whether to recommend a person for judicial appointment. Presumably, the Minister of Justice would equally be concerned about it in deciding whether

the person was suitable for appointment. A demonstrated lack of integrity would likely trump all other considerations. It is not likely that the recommender or appointer would reason that it would nevertheless be appropriate to make the appointment of a person lacking integrity because the passage of time and a subsequent clean record would make things right. These considerations are equally important when considering the misconduct with hindsight in the context of a judicial conduct review. Why would passage of time make a difference in a subsequent judicial conduct review if there was no evidence that the judge's fundamental character and integrity had actually changed for the better?

[36] Justice Déziel's misconduct when a lawyer is very troubling. As Independent Counsel observed, it was "intentional, well-thought out and repetitive." Yet he had a high reputation for integrity among his peers and with the public. As a result of that reputation, he held a number of public positions of trust[8]. The facts admitted by Justice Déziel suggest he used his position illegally in a manner that undermined a legislative regime designed to support the democratic process, and he did so in a secretive manner so as not to affect his reputation.

[37] While the admittedly illegal actions in this case are not regarded as criminal, in the constitutional division-of-powers sense, they are offences under a provincial statute and are quasi-criminal in nature. They are part of a legislative scheme designed to support the electoral process, a fundamental part of our democratic system of government. They cannot be equated to breaches of, say, highway traffic laws such as speeding. Campaign finance laws, such as the ones Justice Déziel broke when a lawyer, are fundamental to the Canadian conception of electoral fairness. As the Supreme Court explained in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569:

> [47] …[S]pending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. … To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others.

(See also. *Harper v. Canada (Attorney General)*, [2004] SCC 33, [2004] 1 S.C.R. 827).

[38] In my view, this misconduct strikes not just at Justice Déziel's general character, insofar as it displays a willingness to knowingly flout the law, but at his integrity in a position of influence in the application of the law relating to one of our fundamental values, the preservation of the

[8] Letter, June 19, 2013

democratic process. It cannot be brushed aside as a minor transgression. It is closely associated with the gravest classes of misconduct affecting integrity and of suitability for the bench. It was not a mistake of youth that one could expect the passage of time to correct naturally. Nor was it a simple error of judgment. It was deliberate, advertent and repetitive conduct by a member of the Bar with twenty-five years' experience. It reflects Justice Déziel's mature disposition and it reflects it unfavourably.

[39] How would a reasonable member of the public feel, knowing these facts, if Justice Déziel made a close decision in a politically sensitive case? Or a corruption case? Or a case involving the mafia? How would the losing party feel, no matter how well-acquainted with our legal and political institutions, if Justice Déziel found in favour of a powerful corporation or wealthy individual?

[40] A reasonable person who learned that as of 1997 lawyer Déziel was willing to act illegally in a fundamental matter involving our governmental processes so long as it was in his interests and he was likely to get away with it might be excused for having doubts about whether Justice Déziel in 2015 was much different. In the absence of cogent evidence showing that Justice Déziel had learned or changed, a reasonable person must question his integrity.

[41] Although the majority assert – and I agree -that Justice Déziel's actions had the potential to distort and vitiate the democratic process, they nevertheless minimize this significance on the basis that the actions "cannot objectively be characterized as being on the high end of the spectrum of misconduct" (paragraph 62), citing, as did the Inquiry Committee, the fact that the offences were not criminal in nature and the penalties for the offences were relatively small. They also assert that Justice Déziel was not the "principal actor" and that the acts were not carried out in his capacity as a lawyer nor is there any evidence that he received any material benefit from the transactions.

[42] I disagree with the majority on these points. It is not enough, when assessing the seriousness of the actions, simply to rank the offence on a continuum of worst-to-benign offences. In fact, it is not central to the issue whether the acts actually constituted an offence. What is significant is the symbolic nature of the actions and the fundamental values that they undermine. There can be no doubt that the deliberate, knowing actions on the part of Justice Déziel struck deeply at some of the most fundamental social and political values we have. In that sense, even a "minor" offence judged on a continuum of offences takes on a greater significance. Even more significant, however, is what the action says about the moral character of the actor. At the end of the day, this is the most important aspect of the

nature and significance of what was done. It cannot be said that, viewed in this light, the actions can be brushed aside by stressing only the "objective seriousness" of the offence.

[43] As to the other reasons given for minimizing the seriousness of what occurred, I would simply say that it is hard to say that what was done was not done in his capacity as a lawyer; lawyer Déziel held positions of trust and had a high reputation no doubt at least partly because he was a member of the legal profession. Codes of professional conduct impose high standards on lawyers even outside the narrow confines of their legal practice as such. Nor can it be asserted that he was not a "principal actor"; in fact, he was the conduit by which the transaction was completed. If he had not been prepared, in knowing violation of the law, to so act the transactions would not have been completed. His role was vital to the scheme's success. Finally, while financial benefit might aggravate the offence, its lack cannot be an argument for minimizing it. It is what it is, regardless of the motivation for doing it. In any event, who is to say what indirect benefits did not accrue to Justice Déziel by participating in the event?

[44] I accordingly disagree with the analysis of the majority insofar as it downplays the significance of what was involved. That analysis ignores the most important aspects of the misconduct, namely, its significance in relation to the undermining of the values at stake, and its implications for what it says about the character, and hence the integrity, of the actor.

The Burden of Demonstrating Change

[45] Given Justice Déziel's acknowledgment that the alleged actions occurred and that he knew that they were against the law, and given my conclusion that the offences, properly viewed, are serious, there are logically only three "defences" that he can raise with respect to the manner in which the commission of the offences could reflect on his integrity:

(i) The misconduct did not reflect his character at the time;

(ii) The misconduct did reflect his character at the time but his character has since changed, such that it does not reflect his character now;

(iii) The misconduct does reflect his character now, but that character is still compatible with the judicial role, i.e. it doesn't justify removal.

[46] The third defence is not something that is being asserted on behalf of Justice Déziel. While in his original response to the complaint he asserted that the matter was "not serious enough to justify removal,"[9] in his subsequent submissions, he distances himself from the nature of the events

[9] Letter, January 14, 2014

in issue and does not wish it to be perceived that his character is defined by those events. Nothing more need be said about this.

[47] The first defence involves assertions that the events were isolated and out of character and that there was some unusual or special reason for the uncharacteristic action. Though there are suggestions early on in some of the inconsistent positions he took when responding to the complaint, that his actions were out of character, it cannot be said, on the existing record, that this position can now be seriously maintained. This was not one isolated event or a momentary lapse in judgment. The transactions were repetitive and occurred over several months. In any event, as a minimum, to maintain this position would require a statement from Justice Déziel that he committed no other elections or analogous offences - i.e. his record was otherwise "clean" - and also some indication from him of the special or unusual circumstances that led him to commit these ones. He has offered no such statement or detail that might suggest either of these things.

[48] It is possible, perhaps, that his reference to the unwritten "rules of the game" in his affidavit could be taken as an explanation why he acted as he did, namely that the political culture at the time minimized the seriousness of this type of action and essentially countenanced it. However, Justice Déziel rightly eschews reliance on such an argument.[10] Indeed, such a submission could have no traction. It amounts in essence to an argument that such actions were permissible because "everyone was doing it." To give such a suggestion credence is to do violence to the notion that people who become judges are expected by the public to adhere to higher standards of ethical behavior than ordinary citizens.

[49] That leaves only the second "defence" for consideration. Its essence is that his character is no longer represented or defined by his actions when a lawyer twenty years ago. In other words, he has changed to a man of integrity. Although, as I will suggest later, even this defence is not very robustly advanced, it implicitly underpins the reasoning of both the Inquiry Committee and the majority's reasoning. It flows from the majority's emphasis on the passage of time, the judge's statements about he now views his actions, the statements of his Chief Justice and others in his support and the majority's analysis of the likelihood of future conduct. For reasons given later, I do not believe that the record, properly analyzed, supports the inference that he has changed. What is important at this stage, however, is to determine the proper approach to analysis of this issue.

[10] Affidavit: [Unofficial Translation] "The fact that these unwritten "rules of the game" were known doesn't excuse the deficiency of the jurist that I was and am."

[50] The majority's approach is best demonstrated by two passages from their reasons:

> [57] Here, there has been a demonstrable lack of integrity in 1997 by M[e] Déziel. The question is not whether he can demonstrate integrity since that time and since becoming a judge. That, in our view, is an unattainable and unfair onus because integrity is a quality that is difficult or impossible to conclusively prove in positive terms. … There is no suggestion of any sort that Justice Déziel has failed to act with integrity since he was appointed to the bench … .
>
> [72] … There has been no demonstrated lack of integrity.
>
> (Underlining added.)

[51] Notwithstanding protestations to the contrary (see majority reasons, paragraph 41), these passages make explicit what is necessarily implicit in the majority reasoning throughout its analysis, namely an approach of being prepared, notwithstanding a finding of lack of integrity, to accept that integrity has been rehabilitated unless there is positive evidence that he continues to lack integrity. This approach, in my respectful view, is wrong and could be perceived by the reasonable observer as "giving a pass" to the judge because he demonstrates many other good, but unrelated, qualities.

[52] Given the judge's acknowledgement of the misconduct, the finding of the Inquiry Committee of its "reprehensible nature" and the majority's conclusion that there has been "a demonstrable lack of integrity"[11] by him, the correct way to approach this matter is to look for evidence from which a reasonable inference – not "conclusive" proof, as suggested by the majority -can be drawn that the judge's character and integrity have changed. In the absence of sufficient evidence from which such an inference can be drawn, then the conclusion must be that there has been no demonstration that the demonstrable lack of integrity evidenced in 1997 no longer represents his integrity today. Once the earlier lack of integrity has been established, and the normal presumptions as to impartiality and integrity are called into question, the evidentiary onus must be on Justice Déziel to make that case.

[53] In the current circumstances, this is not to put an "unattainable or unfair" burden on Justice Déziel as suggested by the majority. As stated previously, integrity is the sum of all of one's actions and attitudes over the whole of one's life. It is what one does when no one else is looking. At the end of the day, only Justice Déziel himself knows how he has acted when the cameras are not rolling. It is only he who knows how he really views what constitutes an ethical and principled life. It is only he who knows what

[11] Majority reasons, paragraph 57

torments of conscience he may have faced when dealing with ethical dilemmas. He alone can speak to how his integrity may have developed and changed over time. This is information he has and could have been shared with the Inquiry Committee. It is such information which could be relied on in drawing an inference that, whatever his state of integrity was twenty years ago, it is without reproach now and that he now fully understands the importance of integrity for the judicial role.

[54] The majority downplays this type of information by saying that a "bare declaration" of integrity would "obviously not have advanced the Committee's decision-making in any material way." (paragraph 57). But it is not being suggested that all that is required is a bare assertion of present integrity. The judge can provide so much more than that. He can provide a window into his thinking processes, his ethical dilemmas, his philosophy of life action, from which a judgment relating to sincerity and true understanding can be made. It is these things that should play a very important role in a case such as this, where doubts have already been raised about integrity and where personal attitudes and values are the core consideration in the analysis.

[55] Absent information from Justice Déziel himself, reliance can only be placed on circumstantial external sources which can suffer from the risk that they may wrongly be influenced by misleading outward appearances and not by true internal thoughts and attitudes. Such sources are still valuable, however, because they provide a potentially objective foil against which the judge's assertions about how his attitudes may have changed can be judged.

[56] This is not a situation where Justice Déziel is being asked to prove a negative; in fact he is being expected to provide information from which a positive inference can be drawn. The reality is that the proponent of the opposite point of view – if there were such a proponent – is the one who would have to prove a negative, i.e. that his demonstrated lack of integrity in 1997 has not changed. All Justice Déziel is being asked to do is provide information from which the Inquiry Committee and the Council can evaluate whether the concerns about integrity are no more. There is nothing unfair to Justice Déziel in requiring this. In fact, to approach the matter from the opposite point of view, as the majority have done, presents an almost impossible task for reaching any conclusion other than what the majority have reached, especially since there was no one in the process, including Independent Counsel, who was making the contrary case.

[57] Accordingly, Justice Déziel should be expected to provide sufficient information, both from himself and from external circumstantial sources, that would justify a reasoned conclusion that his integrity has changed for the better and that it is compatible with the role of a judge. Surely, a judge

who has committed such serious misconduct has some onus of explaining why he can nevertheless be trusted to exercise judicial office.

[58] Furthermore, what Justice Déziel does provide – both from himself and from others – must be evaluated in the light of what it was within his power to provide if his theory of the case is true. Lord Mansfield's well-known dictum in *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at page 970 is apposite:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[59] I will delay the analysis of what evidence, if any, exists to support an inference of change until I set out what I believe is the proper framework for conducting that analysis. As a prelude that, however, it is necessary to consider how the passage of time since the acknowledged misconduct factors into the analysis.

The Relevance of Passage of Time

[60] The difficulties presented by the majority's reversal of the burden facing Justice Déziel in this case are highlighted by their use of the passage of time as a factor influencing the conclusion that his integrity has been rehabilitated.

[61] They assert that the passage of time is "an important factor" in assessing character and integrity (paragraph 69). Certainly, that would be the case if, as the majority propose, the burden is on others to demonstrate continuing lack of integrity. In such a situation, it is then easy to reason that since a long time has elapsed without any positive indication of another lapse of integrity, it is likely that integrity has been rehabilitated.

[62] But if the burden is on the judge to explain why he can now be trusted to exercise judicial office, the mere passage of time has little, if any, significance as a justification for concluding his ethical attitudes have changed.

[63] It must be remembered that exactly the same evidence would have been available in 1997 – the time of commission of the misconduct – to attest to lawyer Déziel's integrity. He gave every sign of integrity. Colleagues could have written letters of support. There was no outward sign of corruption. Judging by the external evidence, Justice Déziel looks no different now than lawyer Déziel looked then. Yet lawyer Déziel's actual attitudes and actions did not comport with his public reputation. His conduct in 1997 was done in secret knowing that it would be difficult to detect; it was only a fortuitous and unpredictable series of events (the Charbonneau Inquiry) that

brought it to light. In this context, the absence of evidence of other misconduct does not give much reassurance no matter how long a period of time has elapsed. Stasis is not evidence of change in these circumstances.

[64] This why it is so fundamental that, once events have occurred to throw one's reputation for integrity into doubt, there should be positive evidence to assuage that doubt, not just absence of evidence of other misconduct.

[65] There is another reason why the lapse of time should be regarded as having little significance in the current context. If it is given too much prominence, it risks being treated as an affirmation of the implicit suggestion that "If you can get away with it long enough by keeping it secret, it will be OK." That cannot be a proper basis for decision in this case.

[66] The majority place emphasis on the fact that the limitation period for prosecution of the offences in question had expired, asserting that limitation periods are enacted "to allow those who commit minor offences to rest easy after a period and not fear prosecution" (paragraph 75). That rationale has no relevance in the current context. The issue here is not simply about the significance of the commission of a series of offences but about the implication that has for the integrity of the individual involved and his suitability to perform the judicial role. The fact that the actual offences are time-barred does not give a holiday from moral reflection. What is significant is that so long as his actions were shielded from public view, it appears, in the absence of evidence from him to the contrary, Justice Déziel was not prepared to confront the ethical issues that were involved.

[67] In fact, the lapse of time can be said to work against Justice Déziel's position. The facts show that he had opportunities to change. He might have changed as a natural development over the past twenty years, or in a dramatic self-evaluation on taking the judicial oath or more slowly under the influence of a judge's heightened sense of responsibility and broader perspective on society. These are all reasonable possibilities. But an opportunity is only meaningful if it is taken. Justice Déziel is in sole possession of any facts about his internal ethical development. If he has changed, he had many chances to explain how and why. Yet, in his first statements he expressed no regret, and even in his final statement, the degree of insight he showed with respect to the ethical wrongfulness of his actions and how they are incompatible with the judicial role was, as will be explained later, limited.

[68] In the circumstances, the lapse of time does not support any positive inferences or conclusions about Justice Déziel's integrity today.

Why the Recommendations of the Inquiry Committee cannot be Accepted

[69] Much of the foregoing discussion explains my conclusion that the reasoning of the Inquiry Committee cannot be accepted and that any recommendation based on such reasoning must be rejected.

[70] In my view, it was error on the part of the Inquiry Committee:

(a) not to identify and highlight that the fundamental issue at stake in this case is judicial integrity;

(b) to minimize the nature and seriousness of the judge's misconduct and thereby not focus on what those actions revealed about the judge's character;

(c) to adopt an analytical approach which, at least in part, resembled the analysis of a sentencing judge; and

(d) to rely on the lapse of time since the events occurred as justification for the conclusion that the judge's integrity is no longer in question.

[71] I am also of the view, for the reasons given later, that the Inquiry Committee also erred in its reliance on the other reasons it gave for its conclusions (namely, that the judge had been honest, transparent and fulsome in responding to Council inquiries; that he had the strong and unequivocal support of his Chief Justice and others; and that recurrence of a similar event could not reasonably be contemplated). Those reasons also do not support the Committee's conclusions. However, inasmuch as the reasons of the majority also rely on variants of these reasons, I propose to deal with those aspects during my own analysis of the matter later on.

[72] Accordingly, I cannot accept the recommendation in the Inquiry Committee report based on the analysis undertaken and the reasons given. They cannot support a conclusion, in the face of admitted misconduct knowingly undertaken and kept secret, and which raises questions about integrity, that the judge is not disabled or incapacitated from continuing to execute the office of judge.

[73] That said, it does not follow that a recommendation for removal should necessarily follow. Whether that should be the recommendation will depend on a proper analysis of the test for removal. It is that issue to which I now turn.

Analysis

(a) An Approach

[74] Section 65(2) of the *Judges Act* provides that if the Council forms the opinion that a judge "has become incapacitated or disabled from the due

execution of the office of judge" by reason of age or infirmity, having been guilty of misconduct, having failed in the due execution of his office or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, it may[12] recommend removal of the judge from office. In the current case, we are dealing only with allegations of misconduct.

[75] It is not the misconduct in itself which can trigger the removal recommendation. The misconduct must be of such a nature as to render the judge "incapacitated or disabled" from due execution of the office thenceforth. That is the condition that must be met before the Council may recommend removal.

[76] Council has stated on other occasions that this involves a two-stage test. For example in *Re Matlow*, after articulating the *Marshall* test as "the test for removal from the Bench" (paragraph 164), the Council's majority report put it this way:

> [166] The Inquiry Committee … correctly characterized its task as two-fold: first, determine whether [the judge's] conduct falls within any one of paragraphs (b) through (d) of s. 65(2) of the *Judges Act* [in the current case, paragraph (b) – misconduct]; and second, if so, apply the test for removal set forth above [the *Marshall* test]. An important aspect of the test not specifically articulated is its prospective nature. Implicit in the test for removal is the concept that public confidence would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date.

[77] The key, in this process, is the connection between the undermining of public confidence by "manifest" and "profound" destructive effects of the proven or acknowledged misconduct on impartiality, integrity and independence, and the inability of the judge to continue to execute the judicial office. Where public confidence has been undermined in that way, it follows that the judge has been rendered incapable of executing his office. The *Marshall* test, with its emphasis on destruction of public confidence, is designed to determine when the judge, by his or her

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[12] Section 65(2) uses the word "may." I interpret this, not as giving the Council a discretion to refuse to recommend removal in the face of finding of irremediable incapacity or disability, but as an authority to make a recommendation for removal which it would not otherwise be permitted to make (and, indeed should not make, given that Council's role is not to comment on suitability of a judge for the Bench except in the limited circumstances permitted by s. 65). If the Council concludes that the judge "has become" incapacitated or disabled, in the sense of not being reasonably capable in the future of reversing the incapacity or disability (surely the sense in which the phrase is used in s. 65, because that is the whole purpose of the section), removal from the office must follow, because the judge can no longer perform the judicial role. In such circumstances, the Council has a duty to act. As to the distinction between use of "may" as signifying discretion versus signifying an authority which involves a power coupled with a duty to act if stipulated conditions are satisfied, see Ruth Sullivan, *Sullivan on Construction of Statutes*, 5th ed.(Markham, Ontario: LexisNexis, 2008), pp. 68-74.

misconduct, has rendered him or her incapacitated or disabled from the due execution of the office within the meaning of s. 65(2).

[78] In this case, there has been a finding of misconduct which has not been challenged. The only question, therefore, is whether the second stage of the test has been satisfied. That engages the relationship between the degree and nature of the misconduct in question and its impact on public confidence.

[79] To apply the test, one must determine, in the words of *Marshall*, whether the misconduct is "manifestly" and "profoundly" destructive of the impartiality, integrity and independence of the judicial role so as to "sufficiently" undermine public confidence. It is a prospective analysis (*Matlow*, Majority, paragraph 166*)* and it is assessed from the perspective of the reasonable and informed person, viewing the matter realistically and practically – and having thought the matter through (*Ruffo*).

[80] Assessing the impact on public confidence is difficult. It is not the adjudicator's personal opinion on that subject that it important nor is it the adjudicator's opinion as to the internal consensus of the judicial and legal community; rather, it is how the reasonably well-informed member of the public would so regard it. It is important, therefore, to apply an analysis that will deflect itself away from personal opinion or the perceived opinion of the judicial or legal community.

[81] The process has some affinities with the approach to determining reasonable apprehension of bias in recusal cases and also with the notion of bringing the administration of justice into disrepute when applying s. 24(2) of the *Canadian Charter of Rights and Freedoms.* To objectify the process and reduce the tendency to make one's own personal determination, a structured approach to the analysis, employing the application of a number of factors involving the asking and answering of more specific questions, has been used.

[82] So, for example, a s. 24(2) analysis under the *Charter* to determine whether the administration of justice will be brought into disrepute by the reception or rejection of impugned evidence involves inquiring into and balancing against each other (i) the seriousness of the *Charter*-infringing state conduct; (ii) the impact of the breach on an accused's *Charter*-protected interests; and (iii) society's interest in adjudicating the case on its merits (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 248, paragraph 71). As in the case of the required assessment of the impact of judicial misconduct on public confidence, the assessment in a *Grant* analysis is both objective and prospective in nature, is focused on the long term, is not aimed at punishment for past conduct but looks at systemic concerns and focuses on society's "confidence" in the justice system (see *Grant*, paragraphs 67-71).

[83] Of course, the analogy with a *Grant* analysis is not perfect. In the *Marshall* analysis, the standard of proof is arguably higher and some of the values at stake are different, involving a concern for protecting judicial independence while at the same time ensuring accountability. Nevertheless, the general approach adopted in *Grant*, of employing, not an open-ended general inquiry, but a structured analysis facilitated by focusing on specific lines of inquiry that are relevant to the purposes underlying the analysis, can be helpful in the current context.

[84] The starting point must be with the *Marshall* test itself. According to that test, for public confidence to be "sufficiently" undermined to render the judge incapable of executing the judicial office, the conduct in issue must be:

- "destructive";
- of a "fundamental" concept relating to the judicial role (impartiality, integrity and independence); and
- "manifestly" and "profoundly" so.

[85] The first line of inquiry should be to identify the fundamental concepts or values that are at stake in the case under consideration. What fundamental judicial characteristic is threatened by the occurrence of the impugned conduct? The *Marshall* test focuses on three: impartiality, integrity and independence. Whether there are further values or characteristics which, if affected adversely by the misconduct, could be regarded as destroying the fundamental nature of the judicial role is an open question that need not be decided here. That said, it is likely that anything that strikes at the fundamental nature of the judicial role to the extent of undermining public confidence in the continuing ability of the judge to execute his or her office could be subsumed under one of the three characteristics mentioned.

[86] It is fundamental to identify as specifically as possible the essential judicial characteristic that the misconduct potentially undermines because, ultimately, it is the connection between the misconduct and the identified characteristic, not just the nature or seriousness of the misconduct in the abstract, that is crucial to the determination as to whether public confidence is sufficiently undermined so as to create incapacity. The inquiry must focus on what risks the misconduct suggests for the future ability of the judge to perform the judicial role and for ongoing public confidence in the judiciary.

[87] Most of the cases decided to date (*Bienvenue, Moreau-Bérubé, Flynn, Ruffo* and *Matlow*) primarily engaged questions related to compromise of impartiality or independence. *Therrien* and possibly aspects of *Matlow* can be said to have raised questions relating to integrity.

[88] Once the essential judicial characteristic or characteristics potentially engaged in the case are identified, the next line of inquiry should be as to the nature and significance of the misconduct. The negative impact on the judiciary as a whole of associating the courts with misconduct obviously varies with the nature and significance of that misconduct. Some misconduct, by its very nature, may be so destructive of the image of the judicial role that it will call for a virtually automatic conclusion of future incapacity because the judge is unable to play an appropriate symbolic role. The commission of murder or serious sexual offences, for example, might fall into this category. Even though they do not, strictly speaking, throw doubt on a judge's ability to hear cases impartially or independent of influence, it is not likely that the public would have confidence in the integrity of the bench if it were occupied by a murderer or a rapist. *Therrien* could probably be placed in this category.

[89] Often, however, the significance of misconduct is not so much that it is directly incompatible with the judicial role but more that it is evidence that a judge lacks another essential judicial characteristic. To determine the impact on fundamental judicial characteristics it is necessary to consider the conduct's significance as to what it reveals about the person and the image that person will be able to project on the bench. The nature of the misconduct (criminal, quasi-criminal, morally wrong or otherwise inappropriate) is obviously relevant. Discriminatory remarks are different from intemperate courtroom behavior and from a criminal past. How central to the judicial role is the characteristic or attitude that is revealed by the misconduct is important. Courtesy and honesty, for example, are both important to the judicial role but discourtesy is less serious than dishonesty.

[90] Where the conduct amounts to illegal activity, the focus should not be limited to examining the "objective seriousness" of the offence (e.g. if criminal or quasi-criminal, measured against the prescribed penalty level) but should extend to the nature of the activity, when it occurred, how it reflects on the actor and how it reflects societal values. It is only then that one can consider the impact that the misconduct could have on the values or characteristics at stake.

[91] An important consideration is also whether the misconduct involved intentional activity or was done knowingly. Good faith or the lack thereof and whether the action was a momentary lapse of judgment as opposed to something endemic to one's character and carefully planned in a secretive way are also relevant to determining how the misconduct undermines essential judicial characteristics.

[92] The third line of inquiry should then be to consider the extent to which the misconduct and the association of the judge with that misconduct affects

the identified values or characteristics of the judicial role. The more closely the misconduct relates to and is potentially destructive of the fundamental values at stake the greater is the likelihood that removal from the bench, thereby dissociating the judiciary from the destructive effects, will be called for.

[93] This analysis should also consider the judge's reaction and response to the complaint and whether he has given an apology that reflects a true understanding of the impact of the misconduct on the fundamental values at stake. If he has, there may be a possibility of reform of behavior or attitude. Similarly, if the misconduct is simply reflective of bad habits that, with a proper attitude, are capable of correction, the concern about long term destruction of the characteristics under consideration may be minimized. Positive evidence that the judge has changed or is capable of change and has the proper attitude toward doing so may also indicate that the fundamental characteristics of the judicial role may not be sufficiently undermined from a long-term perspective to require removal from the bench.

[94] Finally, society's interest in promoting judicial independence as well as accountability should be considered. The public has a vital interest in having a judicial system that is above reproach and is one that reflects impartiality, independence and integrity (in the sense of acting fairly, respecting the rule of law, being able to resist improper influences, etc.) Both judicial independence and removal of judges to ensure accountability are intended to foster public confidence. Ensuring public confidence is both the reason for protecting judges and the reason for removing them. Looked at from the reverse perspective, public confidence in the judiciary will be undermined if judges who are able to exercise their office even after committing some misconduct can be prevented from doing so by too easily removing them simply because of uninformed public opinion. But likewise, failure to hold a judge accountable by not removing him or her when the fundamental values of the judicial role are seriously damaged may also undermine confidence in the system.

[95] Recognition of this tension is reflected in the admonition in the *Marshall* test that the misconduct must be "manifestly and profoundly destructive of" the concept of the impartiality, integrity and independence of the judicial role. The *Therrien* and *Moreau-Bérubé* formulations substitute "manifestly and totally contrary to" for the *Marshall* phrase but the point is the same. It is a high standard to meet before taking the step of recommending removal because the consequences are so significant.

[96] Focusing on the high standard to be applied is a reminder, as well, that the issue has to be looked at from the long-term point of view. Immediate

public clamour for removal must give way to a longer-term perspective. By the same token, immediate letters of support for the judge should not be allowed to blind one to the longer-term negative impacts on the system as a whole.

[97] Furthermore, the application of the high standard always reinforces the need to consider, as part of the long-term perspective, whether the concepts of impartiality, integrity and independence, even if affected adversely by the misconduct, could realistically be restored in the future by reform or changes in attitude on the part of the judge. The question to be asked is whether anything short of removal can rectify the situation and maintain public confidence in the judge and the judiciary.

(b) Summary of the Approach to be Applied

[98] In summary, when assessing whether the misconduct[13] in question is so destructive of the fundamental concepts associated with the judicial role that public confidence would be sufficiently undermined to render the judge incapable of executing judicial office, I propose to approach the matter by engaging in four lines of inquiry as follows:

1. What are the fundamental concepts, values or characteristics of the judicial role that are engaged in the case?

2. What is the nature and significance of the misconduct in question?

3. What is the extent to which the misconduct and the association of the judge with that misconduct affects the identified concepts, values or characteristics of the judicial role?

4. How is public confidence promoted, in the circumstances of this case, by balancing society's interest in promoting judicial independence against the need to ensure judicial accountability?

(c) Application to this Case

[99] Much of the previous discussion under the headings relating to the nature of the issues at stake (paragraphs 25-44), the burden of demonstrating change (paragraphs 45-59), the relevance of the passage of time (paragraphs 60-68) and why the recommendations of the Inquiry Committee cannot be

[13] In these Reasons, I have focused on "misconduct" within paragraph 65(2)(b) of the *Judges Act*. My analysis may (but not necessarily) also have relevance to other forms of lack of good behaviour identified in paragraphs 65(2)(c) and (d) that could form the basis of the application of s. 65(2). There is no need, however, to express a firm opinion on these broader issues for the purposes of this case.

accepted (paragraphs 69-73) is relevant to the current analysis and need not be repeated here. I will simply summarize the key points. It is necessary, however, to consider more deeply certain specific reasons offered by the majority to support their conclusion.

[100] As to the concepts, values and characteristics of the judicial role that are at issue, the alleged misconduct involves illegal activity that has the potential to undermine the values which the province of Quebec has deemed important to promote and preserve its democratic electoral process. For members of the legal profession and officers of the court that have respect for the rule of law as one of their core characteristics, engaging in such activity, especially when it is kept secret and is contrary to one's public reputation raises serious issues of integrity. It is an essential characteristic of persons appointed to the bench and it must be maintained throughout one's career. The public must have confidence that each judge not only understands the importance of maintaining integrity but also reflects and is known to reflect that characteristic.

[101] The misconduct that has been found to exist in this case is not now under challenge. It is of a nature that is highly significant for judging one's character and, hence, integrity. Its intentional, well-thought out and repetitive nature carried out knowing that it did not comport with the electoral rules is cause for concern as to the judge's integrity in this case. It strikes at the heart of one of Canada's fundamental values, the preservation of the democratic process. As I indicated earlier in these reasons (paragraph 38), his misconduct in these circumstances reflected his mature disposition, and it reflects it unfavourably.

[102] As to the extent to which the misconduct affects the concepts, values and characteristics of the judicial role, I have to conclude that it does so in a substantial way. If lawyer Déziel was prepared to subvert the process relating to the operation of one of our fundamental social institutions, that fact is clearly relevant to whether his demonstrated lack of integrity in that circumstance would affect his ability to act with integrity with respect to another of society's fundamental institutions, the judiciary. A reasonable person informed of the facts and thinking the matter through must question his integrity in these circumstances. In the absence of evidence of fundamental change, the nagging doubt would always be there: if he was willing to act illegally in a matter involving our governmental processes so long as he was likely to get away with it, why not again? The fact that on the surface he might appear to act always with propriety is no reassurance because his public persona in the past masked his true attitude.

[103] It is thus important in this case to consider whether the judge has changed in his values and attitudes since the events of twenty years ago. As someone

who has committed misconduct of a serious nature that affects the concepts of integrity associated with the judicial role, he should be expected to provide evidence from which a reasonable inference can be drawn that his values and attitudes have changed and he now has integrity or that for some other reason he can be trusted to exercise the judicial office in a manner that will command public confidence.

[104] There are two types of evidence that could support the required inference: (i) evidence from the judge himself; and (ii) other circumstantial evidence.

[105] As in every other case, the evidence so presented should be measured, in accordance with the dictum in *Blatch v. Archer*, against the evidence that would ordinarily and reasonably be available if the judge's assertion of change or fitness for other reasons were true.

[106] In fact, Justice Déziel never suggests that his character, broadly speaking, has changed. Apart from one comment when he says "generally restraint comes easily to me,"[14] he does not describe his character at all. He never points to any circumstance, such as the impact of taking the judicial oath, that might have precipitated a change or any other events in his life that might reflect a change in thinking and attitude.

[107] He does, however, say that he has gained a better appreciation of the importance of election finance laws. But that is too narrow to count as a change in fundamental character. The misconduct in question impugns his integrity in a broader and more fundamental way. Any response must be equally as broad. The following is the only thing he offers:

> With distance and the passage of time, I realized that these acts were not only against the law but had the effect, not only of falsifying the democratic process, but also of discrediting it.

[108] As already noted, the fact that the events happened twenty years ago is of little significance in the absence of positive evidence that Justice Déziel has fundamentally changed his values and recognizes the incompatibility of his acts with the nature of the judicial office. He engaged in that conduct as a senior member of the Bar. It was not until his misconduct was exposed by public accusation and until he was facing an inquiry into his conduct in the context of considering his fitness for the bench that he was motivated to make any statements in this regard and then only reluctantly near the very end of the process. There is nothing on the record to suggest that his revision of attitude was the result of self-reflection and a commitment to act differently that occurred before he was forced to confront the issue by external forces and before his interest in self-preservation was engaged.

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[14] Solemn Declaration, paragraph 10 [Translation]

While even last-moment declarations may be relevant, they do not weigh as heavily in the balance when issues of integrity are engaged.

[109] While recognizing that there are limits to what evidence by or on behalf of the judge can show, it seems self-evident that the judge himself could reasonably have offered, at least:

(a) a statement that he has committed no other similar or other serious offences apart from his one isolated electoral-finance scheme;

(b) a statement that he has not committed any serious ethical infractions as either a lawyer or a judge;

(c) other examples where ethical issues presented themselves while both a lawyer and a judge and he acted in an ethical manner;

(d) a statement that he has consistently behaved ethically or lawfully in his personal life.

[110] Such statements amount to more than simply asserting, as the majority maintain, that "he is a man of integrity" (paragraph 57). Surely, at the very least the reasonable member of the public is entitled to have an assurance from the judge that there are no other serious breaches of integrity lurking in his background, so that one can have confidence that the passage of time is in fact reflective of the judge's putting the events of 1997 behind him. It would also give substance and meaning to the absence of further subsequent complaints against the judge as a basis for concluding that integrity has in act been restored.

[111] Such information is not mere form or without significance. Making a false statement about the lack of other offences or ethical breaches would be to tempt fate. Someone might contradict it. It is an important thing to do to give the assurances that one would naturally expect.

[112] An assurance that there is nothing in a *prospective* judge's life that could reflect badly on the judiciary is something a Judicial Advisory Committee would seek when initially considering suitability for the bench. Where something of concern has already been identified in relation to a *sitting* judge, it surely becomes all the more important to have a similar assurance when considering whether integrity has been restored and whether suitability continues.

[113] In this case, Justice Déziel has not given any of these types of assurances. He also could have offered a self-assessment of his virtues, dispositions and values and how upon reflection on the events of 1997 (with an explanation of the circumstances that led him to engage in those events), his assuming the office of judge, the taking of the judicial oath and his subsequent experience on the bench, he has come to a full appreciation of the

importance of integrity to the judicial role and how he has attempted to embody it. The cupboard is bare in this regard as well, except for, as already noted, a statement that restraint comes naturally to him and that he now has a better appreciation of the importance of electoral finance laws. The recognition that the events have a wider significance, in terms of an appreciation of the importance of the rule of law, public confidence in both the electoral system and the judiciary, the importance of a broad respect for the law and the need to embody judicial integrity at all times does not appear to resonate with him.

[114] The majority assert that the judge "understands the onerous responsibilities of his office and takes his oath of office very seriously," (paragraph 87). With respect, nobody, let alone the judge himself, says this. In fact, the only person who really knows what the taking of the oath of office meant is the judge himself, and he is silent on the matter.

[115] In view of the conclusions the majority draw from it, it is also necessary to consider the judge's solemn declaration to determine if one can tease out of it anything approaching an indication of self-reflection and an acknowledgement and appreciation of the significance of his misconduct so that one can conclude he has changed since 1997.

[116] The majority conclude four things from the judge's response: (i) he was honest, transparent and fulsome in responding to all inquiries from the Council (paragraph 74); (ii) he admitted to the misconduct and expressed "sincere regret" (paragraph 77); (iii) he offered apologies for his conduct well before the hearings of the Inquiry Committee began (paragraph 80); and (iv) he "thoughtfully reflected upon, and understands, the nature of his actions" (paragraph 81).

[117] To suggest that the judge has been honest, transparent and fulsome in responding to all inquiries from Council is to misstate the true position. In any event, it should be noted that the public expects judges to be honest and transparent. There are no bonus points for honesty. If the judge had not been honest or transparent, that would have been greater cause for concern.

[118] If one is nevertheless going to look at and place weight on honesty, transparency and fulsomeness, then the focus should not only be on what Justice Déziel may have submitted to the Council itself for the purpose of the current hearing but one must also look at his response to the investigation and the Inquiry Committee as well his record in that regard over his whole career since the events of 1997.

[119] When he applied to be a judge, he was asked whether there was anything in his past or present that could have a negative effect on him or the judiciary. He answered "no" even though he had knowingly committed elections

offences. It matters not that, at the second application he made in 2002, the limitation period for prosecution had expired. It is not the conviction that is important but the fact that he was prepared knowingly to engage in illegal actions designed to thwart the democratic process. It is that that reflects badly on him. In any event, the limitation period had not expired at the time of his first application to the bench.

[120] While failing to disclose information pertinent to one's suitability to be a judge can in itself amount to misconduct (*Re Therrien*) – something Justice Déziel has not specifically been charged with here – the fact that he was prepared to withhold that information does no credit to his reputation for honesty and transparency. He deserves no special credit for forthrightness once found out.

[121] More importantly, Justice Déziel admits knowing, even at the time the offences were committed, that his acts were illegal. Nevertheless, in his initial responses to the investigation, he refused to acknowledge that his actions constituted offences. Instead of apologizing and expressing regret, he challenged the need for further investigation into the matter.

[122] In his final statement to the Inquiry Committee, Justice Déziel apologized and explained, in a moving account, that the tone of his previous responses was affected by his wife's tragic illness. It is certainly possible that in other circumstances he might have responded differently. However, the evidential onus was on him at the Inquiry Committee to show that he is a different person now, from the point of view of character, than he was when he committed the acts of misconduct in 1997.

[123] As has already been mentioned, he could have responded to the allegations with a sincere and reflective understanding of the gravity of his misconduct and with an account of how in the intervening years he had become a different and better person. The very fact of taking the judicial oath, for example, might prompt a person to reconsider the misdeeds of a previous life. But Justice Déziel's responses did not do that. Instead, his initial response was to minimize his actions. The impression from his earlier responses is that he could still not see anything troubling about his past deeds, thus suggesting there was no clear break between his integrity as a lawyer and as a judge.

[124] Although Justice Déziel's final statement to the Inquiry Committee is not defensive and much more open and contains an acknowledgement that his deeds were against the law, falsified the democratic process and discredited it, even this statement does not demonstrate that he has fully absorbed the significance of his misconduct.

[125] In his final submission, the solemn declaration, he says:

> [UNOFFICIAL TRANSLATION] With distance and the passage of time, I realized that these acts were not only against the law, but had the effect, not only of falsifying the democratic process, but also of discrediting it.
>
> The fact that these unwritten "rules of the game" were known does not excuse the deficiency of the jurist that I was and am.
>
> This moral realization was shared by Quebec society generally, as the *Loi sur les élections et les référendums dans les municipalités* (adopted for the first time in 1987) was amended many times, notably in 2009 and 2010, to raise the penalties (they were raised in 1998), but also to create new offences better adapted to the electoral standards the legislature wished to correct.
>
> I want particularly to apologize to my judicial colleagues, to my chief justice, and above all to the public for the embarrassment that my acts have caused.

[126] It is true that Justice Déziel acknowledges that it is not a justification for his actions that others were engaging in similar improper behavior; yet he nevertheless emphasizes that others were in fact doing so and that not only he but Quebec society itself went through a "moral realization." It appears he wants the poor culture in which he was acting to be recognized when assessing what he did. It should not be forgotten that Me Déziel was a very experienced lawyer at the time of the impugned conduct. Not only should he have known better than to do the things he did, society expected and continues to expect more from lawyers than it does from others in society. Lawyers should be examples of integrity, not followers of the lowest common denominators in political financing circles.

[127] Further, his apology focuses on the bad consequences he now realizes his actions had – discrediting the democratic process and the embarrassment to his colleagues and the public. Notably, these bad consequences follow from getting caught and not from the misconduct itself. His apology does not, however, focus on – or recognize - the intrinsic wrongfulness of his acts and the incompatibility of those types of acts with the office he now holds. This approach resembles more the reasoning process of someone who is still coming to grips with his faults than someone who has changed and moved past them years ago when he ascended the bench. In *Re Cosgrove*, the Council observed that "the tardiness of the judge's apology reveals both his lack of insight and his lack of appreciation of the impact of his egregious misconduct on public confidence in the judiciary" (paragraph 42). The statements of a judge by way of apology and explanation are relevant in assessing the degree to which he or she fully appreciates the

seriousness of the nature of the misconduct and how it may affect his behavior and attitude going forward.

[128] The responses to the Inquiry Committee and the Council were opportunities for Justice Déziel to set himself apart from his former misconduct. He did not take full advantage of those opportunities.

[129] In light of the foregoing, it cannot be said with any strength that the judge "expressed sincere regret" with respect to the impact and potential damage that his actions may have had on his ability to perform the judicial role, the court of which he is a member and the image of the judiciary as a model of integrity in society. His "regret" was with respect only to the embarrassment that may have been caused.

[130] The comments he has made, and the absence of comments that he could have made, are therefore not a basis from which one can draw the inference that "he thoughtfully reflected upon, and understands, the nature of his actions."

[131] As to other circumstantial evidence from which an inference of restored integrity can be drawn, it would have been open to the judge to provide evidence from people who know him well, from the vantage point of being able to comment on integrity issues, who could attest to his reputation for integrity. Such letters can be revealing, both as to what they say and do not say.

[132] In this case, the judge submitted six letters of support. Three do not touch on his integrity at all. Me Synnot did not know him well and therefore nothing can be read into his silence. Me Nichol and (then) Associate Chief Justice Fournier did know him and, presumably they knew why he needed their support. It is apparent from their letters that they like him. Yet, when they searched their memories for things they could praise about him, integrity apparently did not come to mind; instead the focus was on diligence, timeliness, willingness to help out and being "a competent and valued colleague."

[133] The letter from Chief Justice Rolland essentially falls into the same category. His focus is also on things like the judge's "exceptional availability", his willingness to volunteer for extra work, his excellent performance as a coordinating judge, his generosity and his being a "genuine ambassador" of the Court. With generosity of interpretation, there is, however, one sentence that could be said to comment on his integrity: "Members of the law society of Laval hold him in high esteem and have nothing but praise for him." It may be that the praise and high esteem are as a result of the judge's integrity, but, equally, it could be for other reasons, such as his courtesy on the bench or his excellence with respect to his

judicial research and reasoning. The inference is therefore ambiguous. Viewed in the context of all the praise in the letter for other characteristics like generosity or hard work, it does not seem that integrity was the motivating factor for writing the letter.

[134] The two remaining letters, from members of the bar, do contain a reference to integrity. However, both letters discuss with detail and eloquence his personal and judicial manner, his hard work, his intellectual rigour and comprehension, his dignity, his thoughtful decision-making, his kindness and friendliness, among other things, but the reference to integrity appears almost as an afterthought or as a conclusion based on those other qualities. Ms. Maryse Belanger asserts he "inspires respect for and confidence in justice" and uses as examples the types of characteristics mentioned previously. She concludes: "In short, Justice Déziel is known by the members of the bar as a man of integrity." It is clear that all of his other good qualities are what leads her to the conclusion that he possesses integrity. But those other qualities do not directly address the issue of integrity in relation to the type of inquiry with which we are faced.

[135] Finally, lawyer La Badie's letter refers to integrity in a long catalogue of praise in relation to other good qualities. But neither Mr. La Badie's nor Ms. Belanger's letter discusses any experience that would suggest any insight into Justice Déziel's integrity. The context subtracts from the significance of the references to integrity. The words take their context from the other words around them. In this case, the passing unsupported references to integrity appear almost damning by faint praise. In any event, in this context, the references to integrity in these letters relate to the judicial persona that the judge projects. That external persona is undoubtedly excellent. But one must be careful in using an external persona as a proxy for integrity. Integrity is only really tested when no one is looking. Yet reliance on external persona is used in this way because it is an easy shortcut to conclusions about integrity, not because it is reliable or the best evidence.

[136] What is striking about all of the letters filed in support of the judge is the lack of attestation to integrity with the same detail and eloquence used to attest to the judge's other good qualities. The letters are profuse with praise on every point but integrity. Where are the people who have seen him tested? Where are those who can speak of his integrity in a cogent way rather than (in two cases only) making a blanket statement without any stated basis for making it? Where are those who can say they are aware of the judge's statements (if he had chosen to make any) about his understanding of integrity in the judicial role and say that their knowledge of him is consistent with his expressed internal attitudes and values? Justice

Déziel is a liked and respected judge. His vocation and reputation are on the line. Why won't anyone write him a convincing letter attesting to his integrity? The closest anyone comes to dealing with this is Ms. Belanger who says that Justice Déziel was "preoccupied with the rule of law." Certainly, respect for and promotion of the rule of law is necessary for integrity in the judicial role. However, when the letters are viewed in their totality, in the light of what one would have expected them to be directed at, given the issues at stake, and viewed in the context of the absence of any attempt by the judge to address these issues in his responses to the complaint, it cannot be said that they are sufficiently cogent, unambiguous and strong to form a sufficient basis from which a reasonable inference can be drawn that the doubts about Justice Déziel's integrity arising from the misconduct in 1997 have been assuaged. I believe the majority have given far too much weight to other characteristics of the judge that are not related to the integrity issue than is warranted and made assumptions about integrity resulting from the passage of time that the record does not permit.

[137] It is tempting to ask the question, why has Justice Déziel failed completely to give a cogent explanation of why his misconduct does not place his integrity in doubt? One explanation could be that he has not offered evidence of integrity because he cannot. Another could be that, even at this late date, he still does not appreciate the real issues at stake and has come to the inquiry unprepared to deal with them. A still further explanation might be that, because the Independent Counsel was not advancing a case for removal, with the result that no one was making the case contrary to Justice Déziel's interests, he felt it was not necessary to augment the record to address the issue in the detail that might be needed if it had been argued that the public interest required his removal from office. It would be speculation to choose one or the other of these explanations; consequently, one cannot read too much into them. In any event, it is not necessary to do so. It is sufficient simply to say that the record does not support the view of the majority that "there is positive evidence that Me. Déziel, now Justice Déziel, has changed" (paragraph 92).

[138] Accordingly, I conclude that it was inappropriate for the Inquiry Committee and the majority to give the degree of weight to the type of letters of support that they did in a case such as this. The Independent Counsel's reliance, and the acceptance by the Inquiry Committee and the majority of that approach, on statements in *Matlow* and *Cosgrove* relating to the relevance of letters of support is misplaced in this context.

[139] In *Re Matlow*, the Council recognized that character evidence, including letters attesting to that character, was relevant to the issue of, amongst other things, integrity of the judge. The letters in that case were admitted with

some caution (recognizing that they may not necessarily be representative) because the judge's integrity was in issue and the letters dealt with "various aspects of [the judge's] character, that is, his integrity [and] honesty…" (paragraph 150). This is unlike the case here, where the letters in question do not speak to issues of integrity in any substantive way but only to work ethic and other matters not in issue.

[140] In *Re Cosgrove*, the Council emphasized, as noted previously, that letters of support will generally be "of little assistance" in determining whether public confidence has been undermined to such an extent as to render a judge incapable of discharging the duties of his or her office. In that case, the issue revolved around the allegation that the judge, by his actions and rulings on the bench, had failed in the due execution of his office by abusing his position and creating an apprehension of bias.

[141] The context in which the relevance of letters of support arose in *Cosgrove* and *Matlow* was very different from that of the current case. There, the reference to such letters could be said to be relevant to whether the judge could continue in office in the face of the type of misconduct that was in issue. On the other hand, in the current case, the letters attesting to work ethic, collegiality and general reputation are virtually irrelevant to the judge's attitudes and appreciation of the seriousness of his misconduct. They do not speak to whether he has changed since the time when he was a lawyer, so as to make him suitable as a continuing representative of the judiciary and thus capable of executing his office.

[142] I conclude, therefore, that *Matlow* and *Cosgrove* do not provide support for according any significant weight to the letters of the Chief Justice and Associate Chief Justice in this case.

[143] This leads to the conclusion that, *on the record as it stands*, the misconduct in this case is destructive of the fundamental judicial characteristic of integrity, manifestly and profoundly so. Considering society's interest in promoting judicial independence as well as judicial accountability, I conclude that in the absence of evidence from which a reasonable inference can be drawn that Justice Déziel has changed, public confidence would be sufficiently undermined so as to render Justice Déziel incapable of executing judicial office in the future. Accountability trumps judicial independence in these circumstances. The question is not whether, in fact, Justice Déziel would be likely to engage in behavior exhibiting these sorts of inappropriate traits; rather, it is whether, viewed objectively, the public would have confidence, based on his past behavior and what has happened since, that such traits would *not* be exhibited or reflected in his role as a judge in the future. His integrity has been manifestly and profoundly compromised and there is nothing on the record from which one can

conclude that he has met the evidentiary onus of showing that his integrity is no longer represented by his illegal actions in 1997. He has had many opportunities to demonstrate that he is now different but he has not taken them. To allow him to remain on the bench in these circumstances, with a cloud of doubt hanging over his head affecting his image of integrity would undermine confidence in the judicial system.

Recommendation

[144] I conclude, therefore, that, on the record as it stands, the Marshall test has been satisfied. A conclusion that Justice Déziel has become incapacitated or disabled from the due execution of the office of judge within the meaning of s. 65(2) of the Judges Act should be reached, and a recommendation for removal from the Bench should follow.

[145] That said, I am concerned that because a recommendation not to remove Justice Déziel was made by Independent Counsel, supported by his own counsel and whole-heartedly accepted by the Inquiry Committee, it may have been this convergence of view without any contrary position appearing on the horizon that motivated Justice Déziel not to make any further submissions to the Council. Furthermore, if the views being expressed here were to represent the majority of the Council, the conclusions reached would be based on a somewhat different approach to the application of the *Marshall* test on which Justice Déziel and his counsel would not have had an opportunity to comment.

[146] In these circumstances, I would have been prepared, if my views represented the majority, to recommend deferral of removal until such time as Justice Déziel was given a further opportunity to make submissions to the Council in the knowledge that removal remains a live issue, and Council has had an opportunity to reconsider the matter based on those submissions.

Respectfully,

The Honourable J. Derek Green

We concur:

The Honourable David D. Smith

The Honourable B. Richard Bell