

(TRANSLATION)

**DECISION OF INQUIRY COMMITTEE
ESTABLISHED BY THE
CANADIAN JUDICIAL COUNCIL
TO CONDUCT A PUBLIC INQUIRY
CONCERNING MR. JUSTICE ROBERT FLAHIFF**

RE: PRELIMINARY MOTIONS BY JUDGE CONCERNED

Montréal, April 9, 1999

INQUIRY COMMITTEE

Chief Justice Joseph Z. Daigle of New Brunswick, Chairperson
Associate Chief Justice John D. Richard of the Federal Court of Canada
Patrick Healy, lawyer

COUNSEL

Jacques Bellemare, Q.C. and Louise Viau, Independent Counsel
Christian Desrosiers and Jacques Larochelle, Counsel for Mr. Justice Robert Flahiff
André Lespérance, Counsel for the Attorney General of Canada
François Aquin, Legal Adviser to the Inquiry Committee

**DECISION OF INQUIRY COMMITTEE ON PRELIMINARY MOTIONS BY MR.
JUSTICE ROBERT FLAHIFF**

On January 25, 1999 the Minister of Justice, Hon. A. Anne McLellan, wrote a letter to the Chairperson of the Canadian Judicial Council, the Rt. Hon. Antonio Lamer, pursuant to s. 63(1) of the Judges Act asking that a public hearing be held into the capacity of Mr. Justice Robert Flahiff to properly perform his duties.

The letter reads as follows:

The Right Honourable Antonio Lamer
Chairman
Canadian Judicial Council
Place de Ville B, Suite 450
112 Kent Street
Ottawa, Ontario
K1A 0W8

Dear Chief Justice Lamer:

As you are aware, Mr. Justice Robert Flahiff of the Superior Court of Quebec was convicted on charges under sections 19.1(2)(a) and 19.2(2)(a) of the Narcotics Control Act and section 465(1)(c) of the Criminal Code. Accordingly, pursuant to section 63(1)

of the Judges Act, I hereby request that the Canadian Judicial Council commence an inquiry as to whether Mr. Justice Flahiff should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d) of the Act. In particular, I request that the Council consider whether he has become incapacitated or disabled from the due execution of the office of judge by reason of (b), having been guilty of misconduct; and (d), been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office.

I also request that the inquiry be public. When the Council has nominated its members for the inquiry, I will be pleased to advise of the nomination(s) from the Bar under subsection 63(3) of the Judges Act.

Yours sincerely,

A. Anne McLellan

Under ss. 63(1) of the Act, a request for an inquiry by the federal Minister of Justice compels that an inquiry be held by the Council or its committee. Since the Council was created in 1971, this is the fourth time that the federal Minister of Justice has requested an inquiry pursuant to ss. 63(1).

On February 3, 1999 the Judicial Council announced the creation of this Inquiry Committee, made up of two of its members, together with a lawyer appointed by the Minister of Justice.

The Chairperson of the Judicial Conduct Committee appointed Jacques Bellemare as independent counsel. The Inquiry Committee appointed François Aquin to act as legal adviser to the Committee.

In this decision the Inquiry Committee intends to dispose of the three preliminary motions made by the judge concerned, laid before it and argued on March 29 and 31, 1999.

I - MOTION MAKING VARIOUS PRELIMINARY ARGUMENTS, SUBMITTED BY THE APPLICANT MR. JUSTICE ROBERT FLAHIFF

There are four parts to this motion.

VALIDITY OF SEC. 72 OF BY-LAWS

Relying on para. 61(3)(b) of the Judges Act, counsel for the judge concerned argued that s. 72 of the By-Laws is invalid. In his submission, it is to the Judicial Conduct Committee, not the chairperson of that committee, that the Council is by para. 61(3)(b) of the Act

authorized to delegate by by-laws the powers to appoint members of the Council to sit on the Inquiry Committee and designate one of them as chairperson.

It will be useful to set out s. 61 of the Judges Act and s. 72 of the By-Laws.

Judges Act, R.S.C. 1985, c. J-1:

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

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

(3) The Council may make by-laws

(a) respecting the calling of meetings of the Council;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(c) respecting the conduct of inquiries and investigations described in section 63.

By-Laws

72. (1) If the Council receives a request from the Minister, or from the Attorney General of a province, under subsection 63(1) of the Act to conduct an inquiry as to whether a judge should be removed from office, the Chairperson of the Committee shall appoint up to five members of the Council to serve on the Inquiry Committee, excluding members of the court of which the judge concerned is a member.

(2) The Chairperson of the Committee shall designate a member of the Inquiry Committee as Chairperson of the Inquiry Committee.

There is no need for the Committee to rule on the question of whether the chairperson of the Judicial Conduct Committee may exercise powers - here, those mentioned in s. 72 - which were allegedly delegated to the Committee. The Inquiry Committee considers that it is not para. 61(3)(b) but on the contrary para. 61(3)(c) of the Judges Act which is the enabling legislation authorizing the Council to adopt Part 2 of the By-Laws on complaints, including s. 72, challenged by the judge concerned.

This argument by the judge concerned is dismissed.

VALIDITY OF SEC. 63(3) OF THE JUDGES ACT

The judge concerned suggested that ss. 63(3) of the Judges Act is constitutionally invalid in that it authorizes the Minister of Justice to appoint to the Inquiry Committee created by the Council lawyers who are members of the Bar of a province and have at least ten years' standing. Subsection 63(3) states:

63. (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.

This arguments rests on the premise that the Inquiry Committee is a superior court pursuant to ss. 63(4) of the Act, which provides:

63. (4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :

a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment - ou de l'affirmation solennelle dans les cas où elle est autorisée en matière civile - et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

According to counsel for the judge concerned, the English version is still more explicit in that it uses the expression "superior court":

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

(a) power to summon before it any person or witness and to require him to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

In short, counsel argued that by the aforesaid enactment Parliament indicated its intention to place the Council or the Inquiry Committee beyond the scope of judicial review by the superior courts.

Counsel for the judge concerned also submitted in support of their argument a passage from the opinion of La Forest J. in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at 812-813, concerning the creation of the Canadian Judicial Council in 1971. In the opinion of

the Inquiry Committee it is in no way possible to infer from that passage that the Canadian Judicial Council is a superior court. The sole purpose of La Forest J.'s comments was to indicate that only a body created by Parliament could exercise the function of inquiring into complaints and allegations against judges appointed by the federal government.

The question raised by the motion was already resolved in February 1994 by a decision of the Inquiry Committee regarding Mr. Justice F. L. Gratton. The members of the Committee, chaired by Mr. Justice E. D. Bayda, Chief Justice of Saskatchewan, said the following at p. 22 of the decision:

We do not agree that section 63(4) of the Judges Act has the effect of making this Inquiry Committee a superior court. While it may be "deemed" to be a superior court for any or for all three of the purposes suggested, an inquiry committee does not have the essential characteristics of a superior court. Parliament did not say that an inquiry committee is a court. The language of "deeming" suggests that Parliament is using a legal "fiction" in order to provide the committee with certain powers or characteristics. But this does not transform an inquiry committee into a court.

If Parliament had intended to make an inquiry committee a superior court, it would not have listed the powers of an inquiry committee: to summon witnesses, to require testimony on oath or on solemn affirmation, to compel production of documents, to enforce the attendance of witnesses. A superior court has all of these powers.

An inquiry committee does not adjudicate disputes between parties. It does not render a legally enforceable decision. It merely carries out an investigation. Nor does it have the jurisdiction of a superior court. An inquiry committee is authorized to deal with only the specific matter which is referred to it. In all of these circumstances, this Inquiry Committee is not a superior court and this second ground of constitutional challenge also must fail.

The Inquiry Committee adopts these reasons of the Committee of the Canadian Judicial Council which was conducting an inquiry respecting Mr. Justice F. L. Gratton. This constitutional argument was abandoned by Mr. Justice Gratton in the proceeding for judicial review of the Inquiry Committee's decision that he initiated in the Federal Court. Strayer J. noted this in his judgment dismissing the application for review by the judge concerned.

It is clear that the purpose of the provision in question is to give the Inquiry Committee or the Canadian Judicial Council, in holding an inquiry, the powers exercised in this regard by the superior courts. It certainly would not have been necessary to list these powers if Parliament had intended to create a superior court.

In *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, Gonthier J. described at 312 the function of an inquiry committee of the Conseil de la magistrature du Québec in

language which is in all respects applicable to the instant inquiry committee, and clearly indicates that a committee of this kind is not a court of law:

. . . the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

The Inquiry Committee concludes that it is not a superior court. It does not perform the function of a court: it does not adjudicate disputes between parties and does not render legally enforceable decisions; its purpose is to conduct an inquiry and report to the Council.

In view of the conclusion at which it has arrived, the Committee does not have to consider the constitutional argument that it should be made up exclusively of judges appointed by the Governor General.

MOTION FOR PARTICULARS

The motion of the judge concerned asks that the purpose of the inquiry be indicated.

Section 64 of the Judges Act provides:

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

At the request of the Inquiry Committee the independent counsel indicated the purpose of the inquiry as he understood it as follows:

[TRANSLATION]

STATEMENT BY INDEPENDENT COUNSEL REGARDING THE "MOTION FOR PARTICULARS" BY MR. JUSTICE ROBERT FLAHIFF

In compliance with s. 64 of the Judges Act and the directions of the Inquiry Committee on March 29, 1999, the independent counsel states:

subject to any contrary order by the Inquiry Committee, he intends to submit any evidence regarding the conduct of Robert Flahiff between 15.01.89 and 30.06.91 relating to the possession and transfer of money which was the subject of six counts in the trial held before the Hon. Serge Boisvert J.C.Q.;

he also intends to submit any evidence regarding the conduct of Robert Flahiff during the police investigation and the trial in which he was involved following allegations by Paul Larue; in particular, and without limiting the generality of the foregoing:

his non-cooperation with the police investigation;

his attack against Judge S. Boisvert based on an allegation of a lack of judicial independence;

his good faith defence which was not supported by his testimony;

he further intends to refer to the conviction and the sentence imposed by Judge Boisvert in order to show that they are at variance with the requirements for Mr. Justice Flahiff continuing in office;

he reserves the right to add to his evidence other facts which may subsequently be brought to his attention, after compliance with s. 64 of the Judges Act.

MONTREAL, March 31, 1999

Jacques Bellemare, Q.C.
Independent Counsel

The Committee does not feel that at this stage it should intervene to define the purpose of the inquiry, which it leaves to the independent counsel. However, it will be the Committee's duty to rule on the relevance and admissibility of the evidence which shall be placed before it.

APPLICATION FOR STAY OF PROCEEDINGS

The judge concerned asked that this inquiry be stayed on the following grounds:

his right to an impartial hearing in the Court of Appeal is threatened;

it is the common law tradition that Parliament refrains from acting on a case for the removal of the judge pending in the ordinary courts.

This application is in the nature of a stay. This relief, which is subject to the same rules as an interlocutory injunction, requires the Committee to consider three tests laid down by the courts: the existence of a serious question of law, irreparable harm resulting to the applicant and the balance of convenience.

It should be recalled that the granting of a stay is an exceptional measure and the applicant has the burden of establishing that each of the three tests applies to his application.

Serious question of law

In the opinion of the Inquiry Committee the two questions raised by the applicant are not serious questions of law.

(1) Infringement of right to impartial hearing in Quebec Court of Appeal

The judge concerned maintained that his right to an impartial hearing in the Court of Appeal is threatened since the proceedings in the criminal case in which he is involved are pending in the Court of Appeal, the chief justice of which is a member of the Canadian Judicial Council.

Mr. Justice Robert Flahiff was convicted on three counts charging him with the possession of goods worth over \$1,000 resulting from trafficking in narcotics, recycling of such goods and conspiracy to that end. A stay of proceedings was made on three other counts to the same effect. On February 26, 1999, Judge Serge Boisvert of the Court of Quebec imposed sentence on Mr. Justice Robert Flahiff, ordering him to serve three years' imprisonment on each count and ordering that the terms run concurrently. On the same day Mr. Justice Robert Flahiff submitted an application to the Court of Appeal, heard before Joseph R. Nuss J.A., to obtain his interim release. This application was allowed on the usual conditions, namely the surrendering of a passport to the R.C.M.P. Mr. Justice Robert Flahiff appealed his case both as to sentence and verdict.

The Canadian Judicial Council is a body created by the federal Parliament and consists of the Chief Justice of Canada and the chief justices, senior associate chief justices and associate chief justices of the superior courts of Canada.

In the opinion of the Inquiry Committee the presence of the Chief Justice of the Court of Appeal, who is the Chief Justice of Quebec, on this body consisting of some forty judges of the superior courts of Canada could not in any way prejudice the interests of the judge concerned in his appeal hearing.

As the Supreme Court recently noted in *R. v. S. (R.D.)*, a strong presumption of impartiality applies to judges. Judges are bound by oath to render justice impartially. The courts have thus recognized that there is a presumption that judges will carry out their oath of office. "This is one of the reasons", Cory J. said at p. 533 of the aforementioned judgment, "why the threshold for a successful allegation of perceived judicial bias is high". This presumption of judicial integrity can only be displaced by "cogent evidence".

There is not one iota of evidence to cast any doubt on the integrity of the judges of the Quebec Court of Appeal who will be assigned to hear the case of the judge concerned. A reasonable and informed person could not reasonably fear that such judges would be concerned by the fact that the Chief Justice of the Court sits on the Canadian Judicial Council or be in any way influenced by the proceedings at this inquiry.

(2) Application of common law tradition

Counsel for the judge concerned argued that it is the common law tradition that Parliament should refrain from acting in circumstances such as those at issue here. They argued that the Committee's inquiry is only an initial stage in a wider process for the removal of a judge which will eventually involve the Council and Parliament. In particular it was argued that as the Committee's primary function is to conduct an inquiry into the facts, the Committee's findings of fact will be taken into account by the Council and by Parliament in reviewing the report and recommendation, if any, by the Inquiry Committee. For this reason, it was argued that the Inquiry Committee is also governed by the common law tradition that Parliament should refrain from acting in a case for the removal of a judge until the appellate remedies have been exhausted.

It does not seem necessary to examine the historical basis for the tradition mentioned, as it would appear that the argument put forward clearly does not apply to this application by Mr. Justice Flahiff. The latter is not currently appearing before Parliament. He is in fact the subject of an inquiry conducted by a committee of the Canadian Judicial Council.

Whereas under s. 99 of the Constitution Act, 1867 Parliament has the power to remove a judge, the Inquiry Committee has no powers other than to investigate and submit to the Council a report on its findings and conclusions, and if necessary indicate that removal of the judge should be recommended. It is the Council's function to submit a report of its conclusions to the Minister of Justice and recommend removal, if necessary.

This second argument, which does not apply to these proceedings and is in any case premature, does not raise a serious question of law.

Although the Committee might halt its analysis of the tests applicable in granting the desired stay here, it considers it advisable to deal with the other two tests.

Irreparable harm

The judge concerned will not suffer any irreparable harm if the inquiry proceeds at the same time as the criminal trial, for the following reasons:

as the purpose of the inquiry is broader than a mere criminal conviction, the report and any recommendation by this Committee, whatever they may be, might be based on facts other than those presented at the criminal trial;

in the appeal proceeding the court can only take into account the trial record and certainly could take no account whatever of the facts that might be disclosed by this inquiry;

in the event that a new trial is ordered - which is purely conjectural - the judge concerned would benefit from the guarantees in ss. 7, 11(c) and 13 of the Canadian Charter of Rights and Freedoms, the rules for which governing derivative evidence among other

things were stated by the Supreme Court in *R. v. S. (R.J.), B.C. Securities Commission v. Branch and Phillips v. N.S. (Westray Inquiry)*;

this Committee only makes a report, and if it considers it necessary, a recommendation pursuant to s. 65 of the By-Laws.

65. The Inquiry Committee shall report its findings and conclusions to the Council and may express its opinion on whether a recommendation should be made for the removal of the judge from office.

The Canadian Judicial Council reviews this report pursuant to ss. 67 to 71 of the By-Laws:

67. A judge who is the subject of an investigation pursuant to subsection 63(2) of the Act may make written submissions to the Council regarding the report of the Inquiry Committee or may appear in person before the Council for the purpose of making a statement to the Council.

68. If the judge advises that he or she intends to appear before the Council, with or without counsel, the Council shall invite the independent counsel to appear.

69. The hearing of the Council shall be held in public unless the investigation under subsection 63(2) of the Act was held in private.

70. The Council may refer the matter or any part of it back to the Inquiry Committee with directions.

71. In reporting its conclusions to the Minister under section 65 of the Act, the Council shall also provide the Minister with a copy of the report of the Inquiry Committee.

At the conclusion of this process only the federal Parliament may exercise the power of removal conferred on it by s. 99 of the Constitution Act, 1867. In this connection s. 71 of the Judges Act provides:

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

The purposes sought by this inquiry and by the criminal proceeding differ and are subject to separate bodies of rules, as a result of which a possible acquittal of the applicant would not make the present inquiry inappropriate or even useless. It is no part of the Committee's function to determine the criminal liability of the applicant judge, but to conduct an inquiry as to whether the judge concerned should be removed from his position for one of the reasons mentioned in paras. 65(2)(a) to (d) of the Judges Act, and in particular the reasons mentioned in para. (b), namely having been guilty of misconduct,

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

The public interest and protection of the public are of paramount importance in this inquiry and the question is whether the facts presented to the Committee will lead it to conclude that the applicant has become incapacitated or disabled from the due execution of the office of judge, regardless of the eventual result of the criminal proceedings.

Balance of convenience

The Committee has no hesitation in concluding that granting the stay would produce greater hardship than what might be occasioned to the judge concerned if the stay is denied. It is a matter of the public interest.

As Gonthier J. stated in *Ruffo v. Conseil de la magistrature*, supra, the mandate of this Committee is to "ensure compliance with judicial ethics in order to preserve the integrity of the judiciary". This function is unquestionably one of public order and its purpose is to maintain public confidence in judicial institutions.

In the opinion of the Inquiry Committee serious harm would be done to the public interest if the inquiry were suspended. The truth should be known about a very serious situation brought to the attention of the public and involving the judge concerned, and it is essential that the appropriate bodies deal with this matter.

The public interest is at the very heart of this inquiry, as indicated by the test applicable in such cases:

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?

The public interest must take precedence over any harm which the judge concerned might suffer as a result of this inquiry.

There is sufficient protection for the fundamental rights of the judge concerned that he will not suffer prejudice in other current or future proceedings as a result of the inquiry, as mentioned in the cases cited above, *R. v. S. (R.J.)*, *Branch* and *Westray*.

Further, in accordance with the provisions of s. 64 of the Judges Act, the judge in question has been informed in advance of the purpose of the inquiry. He will have an opportunity to be heard and to cross-examine witnesses.

The Committee considers that procedural fairness is sufficiently protected by the provisions of the Judges Act and the By-Laws.

As granting a stay of the inquiry is exceptional and the applicable tests have not been met, there is no basis for allowing the request of the judge concerned to stay these proceedings.

II- MOTION TO CHALLENGE AND DECLARE UNCONSTITUTIONAL SS. 63(3) OF THE JUDGES ACT

Mr. Justice Robert Flahiff is challenging ss. 63(3) of the Judges Act, which authorized the Minister of Justice to include a lawyer on the Inquiry Committee. Accordingly the Minister, who entrusts the inquiry to the Council and to whom the Council must make a report, herself appoints the third member of the Inquiry Committee. As we know, the Council must conduct the inquiry entrusted to it by the Minister of Justice and, on the latter's order, the inquiry is a public one.

Additionally, the lawyer so appointed does not enjoy the essential components of independence, such as security of tenure and financial security. According to counsel for the applicant, this produces an organizational and functional situation which creates a reasonable fear of lack of independence and institutional impartiality. They thus requested the Inquiry Committee to declare ss. 63(3) of the Judges Act invalid as contravening s. 7 of the Canadian Charter of Rights and Freedoms, or alternatively to withdraw from this case.

The applicant's argument is based on the premise that as she has entrusted an inquiry to the Council the Minister of Justice is a party to the inquiry, and in respect of the judge concerned, an "adverse party".

The test applicable to reasonable fear of bias remains that stated by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394. In *R. v. S. (R.D.)*, supra, L'Heureux-Dubé and McLachlin J.J. repeated it at 502, and Cory J. for his part wrote at 530:

The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. . ."

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.

The Committee feels that there is no reason why the procedure for appointing the lawyer included on the Inquiry Committee would be likely to create a reasonable fear of bias in a reasonable and informed observer. When she assigns an inquiry to the Council, the

Minister of Justice is performing the duty expressly conferred on her by s. 63 of the Act. In requesting the holding of an inquiry the Minister of Justice is not seeking any particular conclusion and is not a party to the inquiry before the Committee or the Council. Her request is only an administrative act which "sets the process in motion". This is how Gonthier J., in *Ruffo v. Conseil de la magistrature*, supra, at 312, characterized the complaint of a complainant who under the terms of the Quebec legislation was nevertheless a party to the inquiry.

Further, the Inquiry Committee is not trying a prosecution and does not have to resolve a dispute between the parties. In *Ruffo*, supra, Gonthier J. described the function of a similar committee as follows, at 310 et seq.:

The appellant's argument thus rests on the premise that Chief Judge Gobeil is a prosecutor before the Comité. This assertion presupposes that proceedings before the Comité are similar to an adversarial trial in which the burden of proof is on the prosecution.

.....

As I noted earlier, the Comité's mandate is to ensure compliance with judicial ethics; its role in this respect is clearly one of public order. For this purpose, it must inquire into the facts to decide whether the Codes of Ethics has been breached and recommend the measures that are best able to remedy the situation. Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.

In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the CTA confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Council decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

Counsel for the judge concerned referred to *MacBain v. Lederman*, [1985] 1 F.C. 856, *Matsqui Indian Band Council v. C.P.*, [1995] 1 S.C.R. 3 and *R. v. Généreux*, [1992] 1 S.C.R. 259. Those cases, which restate the rule that a party to a case clearly cannot appoint the members of the court called on to try it, are inapplicable to the instant case, in which there is no prosecutor or case to be tried, but rather an inquiry to be conducted in the name of public order.

For the reasons set out above, the application is dismissed.

III- MOTION TO DECLARE THAT THE "INDEPENDENT COUNSEL" APPOINTED PURSUANT TO SS. 61(1) OF THE BY-LAWS OF THE CANADIAN JUDICIAL COUNCIL IS INCOMPETENT AND THE SAID SUBSECTION UNCONSTITUTIONAL

The judge concerned argued that the Chairperson of the Judicial Conduct Committee did not have the power to appoint the independent counsel since the Act delegated this power to a Committee, not to its Chairperson. The Inquiry Committee has already disposed of this point earlier, in considering the application making various preliminary arguments about the validity of para. 72 of the By-Laws. The Committee found that it was not para. 61(3)(b), but on the contrary para. 61(3)(c) of the Act, which was the enabling legislation authorizing the Council to adopt Part 2 of the By-Laws dealing with complaints. Section 61(1) of the By-Laws, which provides for the appointment of independent counsel by the Chairperson of the Judicial Conduct Committee, is to be found in Part 2 and is part of the enabling legislation which has been held to be sufficient.

The Committee also does not accept the argument about the fact that it was the Chairperson of the Judicial Conduct Committee who appointed two members of the Inquiry Committee as well as the independent counsel. In doing this, the Chairperson exercised functions conferred on him by the By-Laws and there is no basis for concluding that there has been any interference by him in the conduct of the inquiry.

Counsel for the judge concerned submitted that the adversary of the judge concerned is counsel appointed by the Chairperson of the Judicial Conduct Committee, who appointed two members of the Inquiry Committee, and counsel referred to the remarks of Sopinka J. in *Ruffo*, supra, in which that judge dissented. At 339, Sopinka J. found appointment of the Inquiry Committee's counsel by the Committee to be "unusual". This observation by Sopinka J. contains an inaccuracy: under s. 281 of the Courts of Justice Act, set out at p. 311 of *Ruffo*, it is the Judicial Council - and not its committee - which has the power to retain the services of counsel to assist the Committee in conducting its inquiry.

The application of the judge concerned is dismissed.

Montréal, April 9, 1999

J. Z. Daigle

Chief Justice Joseph Z. Daigle

John D. Richard

Deputy Chief Justice John D. Richard

Patrick Healy

Patrick Healy