

TRANSLATION

REPORT TO THE CANADIAN JUDICIAL COUNCIL OF THE INQUIRY  
COMMITTEE APPOINTED PURSUANT TO SUBSECTION 63(1) OF THE *JUDGES  
ACT* TO CONDUCT AN INQUIRY CONCERNING MR. JUSTICE BERNARD  
FLYNN WITH RESPECT TO STATEMENTS MADE BY HIM TO A JOURNALIST  
WHOSE ARTICLE APPEARED IN THE NEWSPAPER *LE DEVOIR* ON FEBRUARY  
23, 2002.

DECEMBER 12, 2002

*COMPOSITION OF COMMITTEE**Inquiry Committee:*

- The Chief Justice of New Brunswick, Joseph Z. Daigle, Chairperson.
- Chief Judge Alban Garon of the Tax Court of Canada.
- Paul Bédard, lawyer and member of the Montreal firm Gowling, Lafleur, Henderson.

*Counsel:*

- L. Yves Fortier, C.C., Q.C., Independent Counsel, accompanied by Leigh D. Crestohl of his firm;
- Gérald Tremblay Q.C., Counsel for Bernard Flynn J., accompanied by François Grondin of his firm.
- François Aquin, Counsel to the Inquiry Committee, accompanied by Carla Chamass of his firm.

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*SUMMARY*

In a letter to the Canadian Judicial Council on March 28, 2002, the Honourable Paul Bégin, Minister of Justice and Attorney General of Quebec, requested that an inquiry be held pursuant to subsection 63(1) of the *Judges Act* concerning Mr. Justice Bernard Flynn with respect to statements he allegedly made to a journalist whose article appeared in the newspaper *Le Devoir* on February 23, 2002.

The Honourable Paul Bégin asked the Canadian Judicial Council that the inquiry he requested deal with a possible failure by Mr. Justice Flynn in the due execution of his office, in particular with regard to his duty to act in a reserved manner. On April 24, 2002 the Honourable Paul Bégin confirmed to the Canadian Judicial Council that he was asking for the inquiry to be held on the ground stated in paragraph 65(2)(c) of the *Judges Act*.

The members of the Committee disapprove the communication and statements made by Mr. Justice Bernard Flynn reported in the article in the newspaper *Le Devoir* on February 23, 2002 and conclude that in keeping with his duty to act in a reserved manner he should have refrained from making public comments about the transaction involving his wife. They consider these statements to be inappropriate and unacceptable. However, in the Committee's opinion, the conduct of Mr. Justice Bernard Flynn does not mean he has become incapacitated or disabled from the due execution of the office of judge within the meaning of subsection 65(2) of the *Judges Act*, and for this reason it does not recommend that Mr. Justice Bernard Flynn be removed from office.

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*REPORT BY INQUIRY COMMITTEE MEMBERS DAIGLE, CHIEF JUSTICE,  
GARON, CHIEF JUDGE, BÉDARD, LAWYER*

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*I- MANDATE OF THE COMMITTEE*

[1] On March 28, 2002 the Honourable Paul Bégin, in his capacity as Minister of Justice and Attorney General of Quebec, asked the Canadian Judicial Council to commence an inquiry pursuant to subsection 63(1) of the *Judges Act* into statements which Mr. Justice Bernard Flynn allegedly made, according to the February 23, 2002 edition of the newspaper *Le Devoir*, regarding the sale and transfer of assets of the Town of L'île-Dorval to local residents. In a letter of April 24, 2002 to the Council the Attorney General subsequently confirmed his request that an inquiry be commenced to determine whether, in voicing his opinion in the circumstances, Mr. Justice Flynn had become incapacitated or disabled pursuant to paragraph 65(2)(c) of the *Judges Act* from the due execution of the office of judge, in particular with regard to his duty to act in a reserved manner.

[2] Under subsection 63(1) of the *Judges Act*, a request for an inquiry by the Minister of Justice and Attorney General of Quebec is mandatory. Consequently, the Council must hold an inquiry in this matter. This is the fourth time since the Canadian Judicial Council was created in 1971 that an inquiry requested pursuant to subsection 63(1) of the *Judges Act*, either by the Minister of Justice of Canada or the Attorney General of a

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province, is held in public. The three other cases were *Marshall* in 1990, *Bienvenue* in 1996 and *Flahiff* in 1999.

[3] In accordance with section 63 of the Canadian Judicial Council By-laws, the inquiry is public. In conducting this inquiry the Committee has the same powers as a superior court to summon witnesses and to require them to file and produce documents and other evidence which the Committee deems requisite to a “full investigation”, as required by paragraph 63(4)(a) of the *Judges Act*.

[4] On October 23, 2002 the Canadian Judicial Council announced the creation of this Inquiry Committee, consisting of two of its members, with the addition of a lawyer designated by the Minister of Justice of Canada to sit as the third member.

[5] L. Yves Fortier, Q.C., was appointed to act as independent counsel in the inquiry by the Chairperson of the Judicial Conduct Committee, Chief Justice Richard J. Scott. Under section 61 of the Canadian Judicial Council By-laws, an independent counsel acts at arm’s length from the Council and the Inquiry Committee in the inquiry. He must present the complaint to the Inquiry Committee in accordance with the law and his best judgment of what is required in the public interest.

[6] For its part, the Inquiry Committee appointed François Aquin to act as counsel to the Committee, his function being in particular to advise members of the Committee on various points of law which might arise in the course of the inquiry.

[7] Gérald Tremblay, Q.C., was retained by Mr. Justice Flynn to represent him before the Inquiry Committee.

[8] The Inquiry Committee held a hearing in Montreal on October 28, 2002. It heard submissions from L. Yves Fortier, the independent counsel, and Gérald Tremblay, counsel for Mr. Justice Bernard Flynn.

[9] No witnesses were heard at the hearing. Mr. Justice Flynn was not present, but had assured the Committee he would be available if his testimony were needed.

[10] The independent counsel set out the sequence of relevant events by filing a series of exhibits, including the article by Kathleen Lévesque published at page A1-14 of the newspaper *Le Devoir* on February 23, 2002 which led to the request of the Minister of Justice of Quebec for an inquiry. That article reads as follows:

[TRANSLATION]

*LE DEVOIR*, February 23, 2002

L'Île-Dorval

**BOISCLAIR COULD INVALIDATE SALE**

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**Bourque calls for temporary withdrawal of Peter Yeomans****Judge among residents****Kathleen Lévesque***Le Devoir*

The former mayor of Dorval, currently a member of the executive committee of the City of Montréal, Peter Yeomans, is not alone at the centre of a stormy controversy surrounding the sale of property on Île-Dorval to cottage owners. Among the residents is Superior Court judge Bernard Flynn, who sees the conversion of this public property to private co-ownership as a means of preserving [TRANSLATION] “vested rights in this little kingdom”.

Yesterday *Le Devoir* disclosed that all the owners of cottages on Île-Dorval, including Mr. Yeomans, purchased the land, buildings and equipment from the old municipality, now amalgamated with Montréal, for \$25,000 without first obtaining authorization from the Minister of Municipal Affairs. Reacting to this headline, the Minister of Municipal Affairs André Boisclair said that he is looking into the possibility of invalidating the deed of sale registered three days before the merger of the 28 towns in the Montréal area. The leader of the opposition, Pierre Bourque, for his part, called for the temporary withdrawal of Mr. Yeomans from the executive committee, but the mayor of Montréal, Gérald Tremblay, regarded this as premature.

Regarding this sensitive situation, Bernard Flynn J., contacted at the court house yesterday (his cottage officially belongs to his wife), felt that there was nothing immoral about this sale, which was [TRANSLATION] “administrative in nature”. “We must have vested rights in this little kingdom which harms no one and which is not a kingdom of millionaires”, Mr. Justice Flynn maintained. [ . . . ] “and the merger is going to change all that? I am surprised that you do not see the reasonableness of what we are trying to do. We are trying to keep what belongs to us. Nothing more.”

According to the judge, the purchase of properties from the municipality was to ensure that the cottagers would control the administration of the island and access to it. It would also avoid an increase in municipal taxes as a result of the forced merger. [TRANSLATION] “We were aware that it might not be valid, but we also knew that there was a good argument to be made”, Bernard Flynn explained. “Personally, I said to myself: this is a perfectly reasonable solution which costs no one anything, which does not give undue advantage to anyone, which makes it possible to more or less preserve the status quo and at the same time resolve an administrative problem for the

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City of Montréal. In other words, it is an elegant solution to everyone's problem".

What is clear is that the 75 purchasers signed the deed of sale with full knowledge of the statute adopted by Quebec last June, which requires municipalities to receive government approval before disposing of property worth more than \$10,000. [TRANSLATION] "Our legal counsel have always said to us, perhaps they will say among other things that a municipality cannot dispose of its assets . . . but there is a good chance that the government will not raise any objection to what was done in complete good faith. We were fully aware of that", Bernard Flynn stated. "Doing something like that which requires authorization involves absolutely nothing illegal. What may happen is that those in authority will say, we do not recognize the validity of what you have done in disposing of the town's assets".

In fact, the Minister André Boisclair asked counsel for the Department to look into this difficult case. Let us go back to the government's objective. [TRANSLATION] "First of all, it was to ensure greater social justice through greater fiscal equality. And I am not sure that the persons who proceeded with this sale did so with the public interest in mind", Mr. Boisclair said yesterday.

The Department of Municipal Affairs has indicated that no penalties are provided for by the statute. [TRANSLATION] "For the sale to be invalidated, there must be a legal action filed by the Attorney General or by any interested party. It might be a citizen, for example, who feels he was adversely affected, or even the City of Montréal", Sophie DeCorwin at the Department explained.

Mr. Justice Flynn feels that if the government intervenes in the case, the municipal merger will [TRANSLATION] "significantly [affect] the standard of living of those who have acquired [Île-Dorval] honestly".

Quite apart from the legality of the action of the cottagers of this little island surrounded by Lac Saint-Louis, opposite the former municipality of Dorval, the issue of morality arises. Mr. Boisclair said this was a concern for him. [TRANSLATION] "It is clear that I am also looking into whether the people in question acted contrary to the provisions of the Act respecting elections and referendums, which deals with conflicts of interest; but it is too early to say", he said.

Peter Yeomans, who fought the "one island, one city" proposal and who now sits on the executive committee of the new Montréal with responsibility for the delicate portfolio of public security, refused yesterday to make any comment

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whatever. Mayor Gérald Tremblay, visibly embarrassed, simply said the situation was currently being examined by Montréal's legal department. Mr. Tremblay also noted that he spoke early yesterday morning to Mr. Yeomans, who allegedly has another version of the facts.

The opposition leader, Pierre Bourque, quickly called for an investigation by the Department of Municipal Affairs. He also called on Mr. Tremblay to exercise caution by asking Mr. Yeomans [TRANSLATION] "to give up his position on the executive temporarily", though he always refused to take such an approach when scandals affected his administration.

Concurrently with the sale of the Île-Dorval assets, combined with the simultaneous creation of a co-owners' association, the former municipality is challenging its own real estate evaluation before the Administrative Tribunal of Québec. Residents are alleging that difficulty of access to the island, which is accessible from May to October by a small ferry, reduces its value.

[11] Through his counsel, Mr. Justice Bernard Flynn stated that he did not deny having made the statements reported by the journalist and accepted that they were accurate. Gérald Tremblay subsequently read in full a letter which his client had asked him to enter into the record.

[TRANSLATION]

October 25, 2002

Inquiry Committee  
Canadian Judicial Council  
Hon. Joseph Z. Daigle  
Hon. Alban Garon  
Mr. Paul Bédard  
Place de Ville B  
112 Kent Street, Bureau 450  
Ottawa, Ontario K1A 0W8

**Re: Your file: 02-005**

Dear Sirs:

I wish to take this opportunity to explain the circumstances surrounding my conversation with a journalist from the newspaper *Le Devoir* on February 22, 2002. The article published by the said journalist the following day is what led to this request for an inquiry.

On Friday February 22 I read an article in *Le Devoir* titled [TRANSLATION] "A mayor and his neighbors bought Île-Dorval before amalgamation". The article described certain actions taken by Île-Dorval residents to acquire the property of the island.

The article attributed a negative connotation to the actions taken by owners on the island.

Later in the day, I was told that the journalist wished to speak to me.

Without taking much time to reflect I called her back, hoping to be able to persuade her that the action taken by these individuals had been in good faith.

For the sake of brevity I will limit myself to certain specific points, which may be expanded further if the committee wishes it.

My intention was not to comment on the question of the mergers in any way whatsoever. Rather, I was trying to explain the true background to the transaction so as to protect the reputation of several individuals whom I know well and regard very highly. Of course, my wife and I were also involved. She owns the cottage and was a member of the council at the time.

Yvon Denault, an acknowledged specialist in the area, had given island residents a definitive opinion that such a transaction was legal. Moreover, after Ms. Harel, then Minister of Municipal Affairs, publicly stated the contrary, Mr. Denault reiterated this opinion.

Mr. Denault explained that the "meeting of the minds", that is the purchase offer and its acceptance, was prior to the coming into force of the statutory provision requiring that any sale of property by the town worth more than \$10,000 is subject to approval.

Verifications made by my counsel in the case at bar with Mr. Denault confirmed that my memory of the facts set out above is consistent with his own. Further, I attached little significance to the price set in the transaction, as its effect was not to enrich anyone and because the property purchased continued to be available to and for the benefit of all.

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However, I refrain from making any further comment regarding the legality of the transaction, since the matter is now before the courts, nearly a month after my discussion with the journalist took place; but I wanted to explain to the Committee the factual information available to me at the time of the discussion.

Like other residents, I was satisfied with the opinion of the well-known lawyer on this matter. Naturally, it was still possible that the transaction would eventually be challenged.

That is undoubtedly what the article referred to when it dealt with statements I allegedly made about the validity of the transaction in question. I was trying to explain that it often happens that two parties have opposing positions on a given question. I wanted to ensure that the journalist knew the transaction had been carried out in good faith, based on an opinion that it was legal.

I had no intention, whatsoever, of promoting any particular cause, involving myself in a political debate or formulating a legal opinion.

I likewise had no intention of influencing anyone, in the event that a legal proceeding were in fact initiated. I did not initiate the matter, but simply agreed to call back the journalist.

In conclusion, I must now acknowledge in retrospect that it would have been preferable for me not to speak to the journalist. It would also have been more prudent for me not to comment on such a matter, in view of its nature and the circumstances. My intention was not to have my statements reported and the possibility that they could be given such weight and consequences did not cross my mind.

Yours truly,

**BERNARD FLYNN, J.S.C.**

[12] The Committee did not feel it necessary to hear Mr. Justice Flynn, as he had set out his point of view in the letter reproduced above and acknowledged that the statements attributed to him by the journalist Kathleen Lévesque were accurate.

[13] The hearing lasted a morning. The matter was then taken under advisement.

## *II- FACTUAL BACKGROUND*

[14] The exhibits filed and commented on by the parties at the inquiry enabled the Committee to assess the circumstances in which the judge in question spoke to the journalist, as well as his state of mind when he made the statements which are the subject of the complaint. Having said that – it is important to mention this at this stage – it is not in any way the Committee’s function to rule on the legality, or even reasonableness, of the transactions concluded between the Town of L’île-Dorval and the cottagers or their Association. On the contrary, we have taken care not to prejudice anyone’s rights in this matter, which is now before the Superior Court of Québec.

[15] During the year 2000 a consultation process was undertaken regarding the amalgamation of the various municipalities in the Montreal area. Among the municipalities in question was the Town of L’île-Dorval, which was constituted a municipality on March 5, 1915. Île-Dorval is a place of summer homes, with some 57 cottages owned by 75 owners or co-owners. The island, linked to the island of Montreal from April to October by a ferry, is approximately one kilometer long and half a kilometer wide.

[16] On November 9, 2000 the municipal council of the Town of L'île-Dorval accepted the offer submitted by the owners on the island to purchase all the movable and immovable property owned by the town for the sum of \$250,000. That acceptance was subsequently referred to by the parties as a preliminary contract in the deeds of sale of December 18 and December 21, 2001 to which the agreement gave rise.

[17] On December 7, 2000 an article appeared in the newspaper *The Gazette* bringing to the public's attention the planned acquisition of the Île-Dorval property by its residents. The journalist Anne Sutherland wrote in this regard:

Dorval Island residents plan to sidestep the quagmire of forced merger with Dorval by buying their island and dissolving its municipal government.

The island residents contend that they would then effectively be masters of their own domain.

...

Peter Yeomans, who is both a summer cottager on the island and the mayor of Dorval, said that the plan to purchase and dissolve the municipality is a step toward maintaining the autonomy of Dorval Island.

...

When the first reports of municipal realignment were made public 18 months ago, residents started brainstorming ideas to protect their interest, Yeomans said.

They met and decided to form an association that would oversee the needs of the island, and at the same time, dissolve the municipality.

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The newly formed association will assess its members, in a manner similar to condo fees, and the money collected will pay for maintenance and repairs.

[18] In the meantime, on November 15, 2000 Bill 170 dealing with the amalgamation of various municipalities in Montreal, Quebec, Longueuil and Outaouais areas was tabled in the National Assembly.

[19] Following a Radio Canada report on the planned purchase of all the Île-Dorval property, the newspaper *Le Devoir* on April 5, 2001 published an article titled [TRANSLATION] “Île-Dorval purchase offer”, in which the position of the Minister of Municipal Affairs, Louise Harel – who had already rejected the proposal – was reported as follows:

[TRANSLATION]

When questioned by Radio Canada the Minister of Municipal Affairs, Louise Harel, indicated that she had already rejected this proposal because public property could not be sold to individuals in this way.

[20] On April 26, 2001 the Town of L'île-Dorval asked for a reduction in the amounts of municipal valuations of the property which it owned both on Île-Dorval and on the territory of the City of Dorval, from \$1,135,000 to \$150,913. This request had been considered inadmissible by the Montréal Urban Community, and the Town of L'île-

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Dorval appealed the decision later in 2001 to the Administrative Tribunal of Quebec, where the matter is pending.

[21] On May 15, 2001 the Minister of Municipal Affairs, Louise Harel, filed Bill 29 (2001, c. 25), the *Act to amend various legislative provisions respecting municipal affairs*, which included a transitional provision requiring that authorization be obtained from the Minister of Municipal Affairs and Greater Montréal for the sale of municipal property worth more than \$10,000. Section 496 of the Act provides:

**496.** Every municipality or urban community referred to, as the case may be, in section 5 of any of Schedules I to V of the Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais (2000, chapter 56), and every body of such municipal or urban community must, to alienate any property having a value greater than \$10,000, obtain the authorization of the Minister of Municipal Affairs and Greater Montréal.

The Minister may, before deciding an application for authorization, request the opinion of the transition committee that was constituted in the territory comprising the territory of the municipality, urban community or body.

The National Assembly adopted this Bill on June 21, and it received assent the same day.

[22] On June 28, 2001 the Superior Court dismissed with costs an action for a permanent injunction alleging the unconstitutionality, nullity and inapplicability of the *Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Québec and the Outaouais* (Bill 170). The Court of Appeal dismissed the appeal on

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October 16, 2001, and on December 7, 2001 the Supreme Court denied the appellant towns' applications for leave to appeal.

[23] On December 18, 2001, in accordance with the preliminary contract of November 9, 2000, the Town of L'île-Dorval sold to the 75 owners on the island all the movable and immovable property held by it on the island in a deed of sale concluded before Francine Pager, notary. The sale was made by the Town for the following purposes and at the following prices, whereof quit:

- (i) \$10,000 for the municipal immovable property: the swimming pool, the streets, the parks, the wharves on the island, green spaces, the water supply system and the community hall. The municipal assessment of this immovable property, challenged by the Town of L'île-Dorval at that time, was \$665,301;
- (ii) \$15,000 for movable municipal equipment, including the ferry, vehicles, firefighting equipment and so on.

[24] The name of Diane Kingsmill-Flynn, wife of Mr. Justice Bernard Flynn, appears on p. 4 of the deed, described as a lot owner. The deed of sale also contained the following, at p. 35:

[TRANSLATION]

The parties have received a copy hereof before signing it and have received from Yvon Denault,

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lawyer, all the explanations necessary for understanding it.

[25] On December 21, 2001 the Town of L'île-Dorval also sold, before Francine Pager, notary, to the Association des résidents de l'île-Dorval Inc., for \$225,000 the land held by it in the City of Dorval and used as an unloading dock and parking area. The municipal valuation of this immovable property, which was contested by the Town of L'île-Dorval at the time, totalled \$469,760. Diane Kingsmill-Flynn is a member of the Association des résidents de l'île-Dorval Inc. and was a member of the council of the Association at all relevant times.

[26] Accordingly, on December 18, 2001 Diane Kingsmill-Flynn and her 74 neighbours became owners of all the movable equipment and all the immovable property on the island which had belonged to the Town of L'île-Dorval. The joint ownership agreement, as Kathleen Lévesque pointed out in an article on February 22, 2002, provided that common areas could only be used by residents of the island and their guests and by employees responsible for maintaining those areas. On December 21, 2001 the same individuals, through the Association des résidents de l'île-Dorval Inc., purchased all the immovable property held by the Town in the territory of the City of Dorval.

[27] On January 1, 2002 the amalgamation of the Montreal island municipalities came into effect.

[28] On February 22, 2002 the newspaper *Le Devoir* published an article by Kathleen Lévesque titled [TRANSLATION] “A mayor and his neighbours bought L'Île-Dorval before amalgamation”. On the afternoon of the same day Mr. Justice Flynn returned the call of a journalist who had tried to reach him at his office at the courthouse and had the discussion with her which was set out in an article the following day. On February 23, 2002 the newspaper published a second article by Ms. Lévesque reporting the statements made to her by Mr. Justice Bernard Flynn. That article, reproduced above, which led to the request for an inquiry by the Quebec Minister of Justice, was titled “Île-Dorval – Boisclair could invalidate sale – Bourque calls for temporary withdrawal of Peter Yeomans – Judge among residents”. Reference was also made to statements by the Minister of Municipal Affairs André Boisclair about the possibility of invalidating the deed of sale registered three days before the 28 municipalities in the Montreal area were amalgamated. By that time, Mr. Boisclair had succeeded Ms. Louise Harel as Minister of Municipal Affairs, the latter having been appointed president of the National Assembly a few months previously.

[29] On March 27, 2002 the Attorney General of Quebec brought an action in nullity of the deeds of sale of December 18 and December 21, 2001 against the City of Montréal, which had succeeded the Town of L'île-Dorval, and the Association des résidents de l'île-Dorval Inc. This proceeding involved 75 owners who on December 18, 2001 had purchased from the Town of L'île-Dorval all the movable and immovable property held

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by the Town on the island. Diane Kingsmill-Flynn, the wife of Mr. Justice Bernard Flynn, was an impleaded party to the action. At the date of this hearing, no defence had been filed in that case.

[30] The independent counsel, L. Yves Fortier, also filed an article by the journalist Kathleen Lévesque which appeared in the newspaper *Le Devoir* on October 25, 2002 indicating that [TRANSLATION] “the controversial case of the purchase of L'Île-Dorval by 75 cottage owners is to be settled by mutual agreement”. Mr. Fortier stated he knew nothing more about such a settlement.

### III- TEST FOR REMOVAL

[31] The security of tenure for judges “is the first of the essential conditions of judicial independence”: *Valente v. The Queen*, [1985] 2 S.C.R. 693, at 694. In this regard, s. 99 of the *Constitution Act, 1867* states that “the Judges of Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons”.

[32] The *Judges Act* defines as follows the jurisdiction of the Canadian Judicial Council following an inquiry conducted as to whether a judge of a superior court or of the Tax Court of Canada should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d):

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Report and recommendations

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 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.

[33] Since its creation in 1971 the Council has only once recommended, on September 20, 1996, that a judge be removed. This was the case of Mr. Justice Jean Bienvenue, who resigned before Parliament considered the matter.

[34] The By-laws of the Canadian Judicial Council set out the responsibility of an inquiry committee, such as this, at the conclusion of the inquiry it has conducted:

**65.** The Inquiry Committee shall report its findings and conclusions to the Council and may express its

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opinion on whether a recommendation should be made for the removal of the judge from office.

[35] The accepted test for removal is that suggested by the Canadian Judicial Council Inquiry Committee in the *Marshall* report in 1990. The members of the Committee, who were unanimous on this point, stated the reasons underlying the test they were suggesting:

The standard, in our view, must be an objective one based in part, at least, on conduct which could reasonably be expected to shock the conscience and shake the confidence of the public as opposed to conduct which is, and often must be, unpopular with part of that public.

The test we would propose to apply, as applicable to this case, is an alloy of these many considerations and takes the following form:

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?

[36] The majority of the Committee which recommended removal in the *Bienvenue* case combined the *Marshall* test with that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394. The Committee formulated its conclusion as follows:

Combining the test used by the Committee of the Canadian Judicial Council in the *Marshall* case and that applied by the Supreme Court to assess judicial impartiality and independence, we believe that if Mr. Justice Bienvenue were to

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preside over a case, a reasonable and informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect of a judge.

- [37] In *Re Therrien*, [2001] 2 S.C.R. 3, Gonthier J. essentially adopted the *Marshall* test at para. 147 as follows:

The public's invaluable confidence in its justice system, which every judge must strive to preserve, is at the very heart of this case. The issue of confidence governs every aspect of this case, and ultimately dictates the result. Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. (Friedland, *supra*, at pp. 80-91)

(Our emphasis.)

- [38] In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] S.C.R. 11, Arbour J. adopted an identical approach at para. 51, referring expressly to the passage from Gonthier J. set out above.

- [39] Accordingly, we must now consider whether Mr. Justice Bernard Flynn has failed in the due execution of his office, in particular with regard to his duty to act in a reserved manner, and if so, whether the alleged conduct is so manifestly and profoundly destructive of judicial impartiality, integrity and independence that the confidence of litigants or of the public in its justice system would be undermined, rendering the judge incapable of performing the duties of his office.

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*II- SUMMARY OF THE SUBMISSIONS OF THE PARTIES*

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[40] The submissions of the independent counsel focussed on the following proposition: when the judge in question returned the journalist's call on February 22, 2002, it was not only possible but probable that legal proceedings would be brought in the Superior Court by the government to invalidate the transaction which had been concluded. Mr. Fortier described Mr. Justice Flynn's state of mind at the time of the discussion:

[TRANSLATION]

His state of mind at that time was such that, as he acknowledged in the letter he filed, he knew that – as a man of law and a judge of the Superior Court – he was aware that there could be proceedings brought with a view to invalidating the transaction. He wished to clarify the facts, as he said in his letter, as Mr. Tremblay acknowledged, he wished to clarify the facts, but he was well aware that it was probable there would be a proceeding. Accordingly, in my opinion, he should have held back, rather than commenting on actions and transactions which could be the subject of a proceeding that could thus come before one of his colleagues in the Superior Court.

Were such statements likely to undermine the impartiality of the Superior Court? The independent counsel gave an affirmative answer to this question, which he raised himself:

Could these statements, Mr. Chairperson, members of the Committee, possibly create an apprehension that the Superior Court's impartiality had been

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undermined? It is my duty to tell you that I think they could.

- [41] The independent counsel did not consider that the matter justified a recommendation for removal. However, he considered that the conduct of Mr. Justice Flynn was inappropriate («déplacé») and justified an expression of disapproval by the members of the Committee.
- [42] Counsel for Mr. Justice Flynn, *Gérald Tremblay*, submitted that his client, now 72 years old, had been appointed a Superior Court judge on September 6, 1979 and had no previous record of any disciplinary penalty. He had been admitted to the Quebec Bar in 1959 and just prior to his appointment, from 1977 to 1979, had been counsel in the Montreal office of the Quebec Department of Justice, civil and penal affairs.
- [43] Commenting on the letter which the judge in question sent the Inquiry Committee on October 25, 2002, *Gérald Tremblay* noted that Mr. Justice Flynn acknowledged that he had made a mistake in calling back the journalist and making the comments that are the subject of the complaint. In Mr. Tremblay's submission, the public announcement that an inquiry committee had been created by the Canadian Judicial Council, at the request of the Attorney General of Quebec, to inquire into the conduct of Mr. Justice Flynn and determine whether he had become incapacitated or disabled from the due execution of his office was already a sufficient penalty for what he did. Accordingly, on May 10, 2002 Mr. Justice Flynn was of the view that he was obliged to resign the position, which he had just been given, of Chairperson of the Quebec Federal Electoral Boundaries

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Commission. Having consulted the Chief Justice and Associate Chief Justice, Mr. Justice Flynn felt that the request for an inquiry concerning him made him particularly vulnerable in performing duties where decisions were likely to give rise to a wide-ranging debate and to media coverage.

[44] Although he acknowledged that prior to the conversation with the journalist he had not discussed whether his remarks would be attributed to him, Mr. Tremblay noted that the discussion was nevertheless private in nature and, in his view, concerned the Flynn's private life, namely the participation by Ms. Kingsmill-Flynn in the transactions made to purchase the movable and immovable property of the Town of L'île-Dorval. The judge's only purpose was, he said, to explain the circumstances so as to make it clear that the owners acted in good faith, just as – according to Mr. Gérald Tremblay's comments - Gisèle Chapleau, former mayor of the Town of L'île-Dorval had done in a response by her to the writer of an editorial published in the newspaper *La Presse* on March 4, 2002 and filed at the hearing by counsel for Mr. Justice Flynn.

## V- ANALYSIS AND CONCLUSIONS

[45] We must now determine whether the judge in question, in making the alleged statements to a journalist, failed in the due execution of his office, in particular with regard to his duty to act in a reserved manner.

A. *Duty to act in a reserved manner*

[46] In *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, the Supreme Court, independently of a factual situation which was not before it, defined the duty to act in a reserved manner in para. 107 as follows, *per* Gonthier J.:

The duty of judges to act in a reserved manner is a fundamental principle. It is in itself an additional guarantee of judicial independence and impartiality, and is aimed at ensuring that the public's perception in this respect is not affected. The value of such an objective can be fully appreciated when it is recalled that judges are the sole impartial arbiters available where the other forms of dispute resolution have failed. The respect and confidence inspired by this impartiality therefore naturally require that judges be shielded from tumult and controversy that may taint the perception of impartiality to which their conduct must give rise.

(Our emphasis.)

[47] Mr. Justice Gonthier went on to point out that the duty to act in a reserved manner had been enshrined in principle at the international level in various documents, including the *Basic Principles on the Independence of the Judiciary* (published by the United Nations Department of Public Information in 1998), which provides *inter alia*:

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly ; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

(Emphasis by Gonthier J.)

[48] In common with the other ethical standards which judges must apply to their conduct both in and out of court, the ultimate purpose of the duty to act in a reserved manner is to sustain the litigant's confidence in the judiciary so as to ensure the permanence of the rule of law (*Ruffo, supra*, para. 108).

**B. *The image of a judge: integrity, impartiality and good judgment***

[49] As far as the public is concerned, the judge plays a fundamental role which requires him or her to project an image of integrity, impartiality and good judgment. In *Re Therrien*, [2001] 2 S.C.R. 3, Gonthier J. described the judge's role in our society as follows, at paras. 108 to 111:

**3. The Role of the Judge: "A Place Apart"**

The judicial function is absolutely unique [...] Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges 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 democracy are built,

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but they are asked to embody them (Justice Jean Beetz, introduction of the first speaker at the conference marking the 10th anniversary of the Canadian Institute for the Administration of Justice, observations collected in *Mélanges Jean Beetz* (1995), at pp. 70-71).

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:

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. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. 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.

( Canadian Judicial Council, *Ethical Principles for Judges*, (1998), p. 14.)

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens. This is eloquently

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expressed by Professor Y.-M. Morissette:

[TRANSLATION] [T]he vulnerability of judges is clearly greater than that of the mass of humanity or of “elites” in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain beyond the judgment of others. (“Figure actuelle du juge dans la cité” (1999), 30 *R.D.U.S.* 1, at pp. 11-12)

In *The Canadian Legal System* (1977), Professor G. Gall goes even further, at p. 167 :

The dictates of tradition require the greatest restraint, the greatest propriety and the greatest decorum from the members of our judiciary. We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation and, at the same time, accept numerous constraints. At any rate, there is no question that a certain loss of freedom accompanies the acceptance of an appointment to the judiciary.

(Our emphasis.)

[50] In short, impartiality is “the fundamental qualification of a judge and the core attribute of the judiciary” (*Ethical Principles for Judges* (1998), published by the Canadian Judicial Council, p. 30). In *R. v. Lippé*, [1991] 2 S.C.R. 114, Lamer C.J. said the following at 139 regarding the perception of impartiality that the public should have:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a “means” to this “end”. If judges could be perceived as “impartial” without judicial “independence”, the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

[51] The impartiality required of judges, implying not only an apparent absence but also a real absence of prejudice and preconceived ideas, must however be distinguished from neutrality, as L'Heureux-Dubé and McLachlin, JJ. noted in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 32 to 35. Pointing out that “objectivity [is] an impossibility”, L'Heureux-Dubé and McLachlin JJ. (Gonthier and La Forest JJ. concurring) cited in support of their view this passage from *Commentaries on Judicial Conduct* (1991), published by the Canadian Judicial Council, to determine the true test for impartiality:

As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, “[t]here is no human being who is not the product of every social experience, every process of education, and every human contact”. What is possible and desirable, they note, is impartiality:

. . . the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that a judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

(Our emphasis.)

[52] The “open mind” test was reaffirmed in *Ethical Principles for Judges, supra*, at pp. 31-32, which comments on the duty of impartiality as follows:

The judge’s fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality

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which also extends to minimizing any reasonable apprehension of bias.

A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole, and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality. Everything from his or her associations or business interests to remarks to which the judge may consider to be “harmless banter”, may diminish the judge’s perceived impartiality.

**C. *Statements by judges out of court***

[53] While it is recognized that judges enjoy wide latitude in writing their reasons, as was noted by the Chief Justice of Nova Scotia, Constance R. Glube, who in 1999 chaired the Panel established by the Canadian Judicial Council regarding the complaint about Mr. Justice John W. McClung, it is also well settled that criteria for intervention are much more restrictive when the statements made out of court concern matters of public controversy. The *Ethical Principles for Judges, supra*, at p. 38 identify two “fundamental considerations” which must be considered by anyone seeking to determine the level of participation in public debate that is appropriate for judges. In reiterating these two “fundamental considerations” in his letter of March 15, 2001 regarding the complaint about Mr. Justice Bastarache, the Chairperson of the Judicial Conduct Committee, Chief Justice of Manitoba, Richard J. Scott noted the:

... [T]wo “fundamental considerations” in defining the appropriate degree of involvement of the judiciary in public debate. The first is whether the judge’s involvement could reasonably undermine confidence in his or her impartiality. The second is

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whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

[54] Although the Panel of the Canadian Judicial Council in *Angers* (1995) expressed certain reservations about *Berger* (1981), it nevertheless endorsed the principle that is now unanimously accepted in judicial ethics matters: a judge should refrain from expressing opinions out of court on matters which are [TRANSLATION] “politically controversial”. When he was judge of the New Brunswick Court of Appeal, Mr. Justice Angers sent an open letter, signed in his capacity as an appeal court judge, to the Prime Minister of Canada and members of Parliament, in which he severely criticized the government policy set out in the highly controversial bill imposing stricter control on firearms registration; the Panel established by the Council was of the view that interventions of this nature were partisan and highly inappropriate when made by a judge. The *Ethical Principles for Judges, supra*, reiterated the principles laid down in *Angers*:

**D. *Political activity***

[...]

3. *Judges should refrain from:*

[...]

(d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice ;

(Our emphasis.)

[55] Paragraph 3(d) set out above does contain exceptions which authorize judicial intervention on matters affecting the administration of justice. In *Must a Judge Be a Monk – Revisited* (1996), 45 U.N.B.L.J. 167, Sopinka, J. reiterated that since the *Charter*, it has proved difficult for judges to avoid involvement in democratic activity and the public “is demanding to know more about the workings of the Courts and about judges”. He went on to say: “No longer can we expect the public to respect decisions from a process that is shrouded in mystery and made by people who have withdrawn from society”. Cogent as the points raised by the late Mr. Justice Sopinka may still be, we did not feel it appropriate to go into them as the subject-matter of this inquiry does not call for such analysis.

[56] In short, the duty to act in a reserved manner, as well as the image of impartiality and integrity which the judiciary must project, require that judges refrain from entering the arena of political controversy.

[57] These same principles, moreover, without a doubt prohibit a judge from discussing “cases that could come before the courts” (*Ethical Principles for Judges, supra*, at p. 28), and *a fortiori* litigation in the court in which he or she is a member.

[58] In this regard the Chairperson of the Judicial Conduct Committee said the following in his letter to Mr. Justice Bastarache :

It is a well-established and desirable practice for judges in Canada to avoid specific discussion of cases decided by their courts and, particularly issues which are likely to come before their courts in the future. Even the late Mr. Justice Sopinka, who was an advocate of increased public speech by judges, drew the line at discussing social and political issues. He said in his speech “Must a Judge be a Monk”:

This is the area which is most difficult and sensitive. Obviously, if the issue is likely to come before the court . . . it is taboo to debate the matter in public.

(Our emphasis.)

[59] A judge speaking about a matter likely to come before the court harms both the judiciary as a whole and the sound administration of justice. Such conduct undoubtedly gives rise to a reasonable suspicion by litigants that if it came to a hearing the matter would probably not be handled with complete impartiality.

**D. *Application of the principles to the facts***

[60] When Mr. Justice Flynn returned the journalist Kathleen Lévesque’s call on February 22, 2002, the purchase of the Île-Dorval property by its cottage owners a few days before the merger was unquestionably a subject of current political and legal controversy. The

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polemic surrounding the implementation of this project, described by the journalist as a [TRANSLATION] “stormy controversy”, had in fact been the subject of continuous media coverage for several months. In April 2001 the Minister of Municipal Affairs publicly stated that the proposed purchase of public property by individuals would be rejected. The Minister had subsequently tabled a legislative amendment in the National Assembly, which adopted it, requiring ministerial authorization for the alienation by a municipality of any property having a value greater than \$10,000. At the same time, the coming into effect on January 1, 2002 of the *Act to reform the municipal territorial organization of the metropolitan regions of Montréal, Quebec and the Outaouais* did not end the debate which had so far polarized public opinion on the merger issue.

[61] The judge in question was aware of these facts. His spouse, who owned the Île-Dorval cottage, was also a member of the council of the Association des résidents de l’île-Dorval Inc. Mr. Justice Flynn did not deny his interest in his wife’s cottage. [TRANSLATION] “Of course, my wife and I were involved”, he acknowledged in his letter to the Canadian Judicial Council on October 25, 2002. For residents, the matter went back to 1999, the period when according to the journalist Anne Sutherland they started “brainstorming ideas” to protect their interest in the event of a merger. By transforming the public property into private co-ownership, they had found a way to protect their rights. Accordingly, in commenting to the journalist, Mr. Justice Flynn said:

[TRANSLATION]

We must have vested rights in this little kingdom which harms no one and which is not a kingdom of millionaires.

[62] It was in these circumstances that the judge returned the journalist's call, [TRANSLATION] "hoping to be able to persuade her that the action taken by the[se] individuals had been in good faith" (letter of October 25, 2002). He wanted to explain to her the residents' point of view, by explaining the background to the transaction [TRANSLATION] "so as to protect the reputation of several individuals whom [he] knew well and regarded very highly" (letter of October 25). The judge summarized the owners' position as follows:

[TRANSLATION]

[...] "and the merger is going to change all that? I am surprised that you do not see the reasonableness of what we are trying to do. We are trying to keep what belongs to us. Nothing more."

[63] The judge's statements about the validity of the transaction could easily be interpreted as a sign of indifference to the rule of law which would be inappropriate coming from a judge, had he not attenuated them in his letter to the Council. He nevertheless said to Ms. Lévesque:

[TRANSLATION]

"We were aware that it might not be valid, but we also knew that there was a good argument to be made", Bernard Flynn explained. "Personally, I said to myself: this is a perfectly reasonable solution which costs no one anything, which does not give undue advantage to anyone, which makes it possible to more

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or less preserve the status quo and at the same time resolve an administrative problem for the City of Montréal. In other words, it is an elegant solution to everyone's problem.

He went on to add:

[TRANSLATION]

Doing something like that which requires authorization involves absolutely nothing illegal. What may happen is that those in authority will say, we do not recognize the validity of what you have done in disposing of the Town's assets.

[64] As to the statutory provision adopted by the Quebec National Assembly in June 2001, which requires the municipalities to obtain ministerial authorization for any alienation of property worth more than \$10,000, Mr. Justice Flynn, a judge of the Quebec Superior Court and previously counsel in the office of civil affairs of the Quebec Department of Justice, did not expect the government to intervene. He stated:

Our legal counsel have always said to us, perhaps they will say among other things that a municipality cannot dispose of its assets . . . But there is a good chance that the government will not raise any objection to what was done in complete good faith.

(Our emphasis.)

In this regard Ms. Lévesque added :

Mr. Justice Flynn feels that if the government intervenes in the case, the municipal merger will [TRANSLATION] "significantly [affect] the standard of living of those who have acquired [Île-Dorval] honestly".

[65] Aside from Mr. Justice Flynn's statements which it reported, the article by Kathleen

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Lévesque on February 23, also repeated the comments made by the Minister of Municipal Affairs, André Boisclair, about the Île-Dorval transaction and the reaction of local councillors. It was thus apparent that the Minister of Municipal Affairs was looking into the possibility of invalidating the deed, that the situation was also being examined by the City of Montréal's legal department and that, in particular, the leader of the municipal opposition was demanding an inquiry into the matter by the Department.

[66] A month later, on March 27, 2002, the Attorney General of Quebec filed an action in nullity of the residents' deeds of purchase of Île-Dorval movable and immovable property.

[67] The factual background in the case under consideration does not support the contention that the judge's discussion with the journalist was a private conversation. A judge cannot separate himself from his position as a judge by unreservedly making comments to the media out of court on a matter of current public interest.

[68] The submission that the transaction was for the Flynns a private matter, having to do with the couple's private life, does not stand up to analysis either. This purchase by a group of cottage owners, including Ms. Kingsmill-Flynn, of all the public property owned by a municipality dissolved by the merger clearly cannot be regarded as a private matter. Quite apart from the public debate it had caused, this transaction had

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successively been the subject of policy statements by various Ministers of Municipal Affairs, of a public statute adopted in June 2001, and finally, of a court proceeding in nullity brought by the Attorney General of Quebec on behalf of the government. It still is the subject of a challenge by the Town of L'île-Dorval to its own real estate assessment, in a case pending before the Administrative Tribunal of Quebec. A real estate transaction which had and still has such public ramifications cannot be regarded as a private matter.

[69] We have carefully analysed the letter which Mr. Justice Flynn sent to our Committee on October 25, 2002 and which his counsel read at the hearing. In it the judge noted that before engaging in the transaction, the residents, including himself, had consulted an expert in municipal law. Francine Pager, the officiating notary, took care to mention this in the deed of purchase she drew up. The judge also observed, quite properly, that he did not initiate the events which led him to return the journalist's call. On the other hand, we would have liked to see in this letter from the judge in question an explicit acknowledgment – which was later given at the hearing by his counsel – that he had made a mistake in making the statements which were the subject of the complaint. The acknowledgment [TRANSLATION] “in retrospect” that it would have been better for him not to have communicated with the journalist does not in our view have this meaning.

[70] We noted on reading the letter that the judge did not intend to promote a cause, to

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become involved in any political or legal discussion, or to influence anyone were an action to be brought. However, we must reiterate that the judge should have examined his own conduct in light of the perception of the public and litigants before calling back the journalist to give her his comments. In *Ruffo v. Conseil de la magistrature, supra*, the Supreme Court imposed this responsibility on every judge, at para. 106:

Furthermore, the responsibility for determining what behaviour best reflects the requirements inherent in this duty, and for adopting that behaviour, lies primarily with each judge, whose appointment is a sign of confidence in him or her personally.

[71] In conclusion, it was highly inappropriate for Mr. Justice Bernard Flynn to make the statements, which he acknowledged were his own, to a journalist and which were reported in an article that appeared in the newspaper *Le Devoir* on February 23, 2002. In making those statements, Mr. Justice Flynn spoke out on matters of a very controversial political nature which, moreover, were likely to come before the Superior Court of which he was a member.

[72] Accordingly, the partisan comments which the judge in question made on the mergers and on the applicable municipal legislation, especially the application to the matter of s. 496 of Bill 29, assented to on June 21, 2001, were liable to undermine public confidence in the judiciary and adversely affect the perception of impartiality which Mr. Justice Flynn himself would have to project should he be called upon to interpret or apply that legislation. If seized of a case of this nature, could the judge in question be seen by an observer outside the legal system to be free to entertain and explore various points of

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view, while keeping an open mind, in accordance with the test in *R. v. S.(R.D.), supra?*

[73] The statement that there was a good chance that the government would not raise any objection to the transactions, whatever the intention of the judge in making it, was liable to create a reasonable suspicion among the public that a member of the judiciary – a judge of the Quebec Superior Court – was attempting to press the executive not to act in a matter of law and order.

[74] On February 22, 2002, it was not only possible but also probable that the question of the validity of the real estate dealings of residents in the former Town of L'île-Dorval would come before the Superior Court, as noted by the independent counsel at the hearing, who was not contradicted on this point. It is unacceptable that Mr. Justice Flynn did not refrain from commenting and did not consider taboo any expression of opinion on a matter of this nature, which might eventually come before one of his colleagues.

[75] The disinterested nature of the statements made by a judge is the common factor in all cases which, whatever their outcome, have so far been considered by the Canadian Judicial Council dealing with statements made by judges out of court. On the other hand, in the case under consideration, the judge in question and his wife had a personal interest of a financial nature, which the journalist Ms. Lévesque described in her article of February 23, 2002 as follows:

According to the judge [Flynn J.], the purchase of properties from the

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municipality was to ensure that the cottagers would control the administration of the island and access to it. It would also avoid an increase in municipal taxes as a result of the forced merger.

.....

Mr. Justice Flynn feels that if the government intervenes in the case, the municipal merger will [TRANSLATION] “significantly [affect] the standard of living of those who have acquired [Île-Dorval] honestly”.

Concerns of this kind are clearly not conducive to lessening the adverse effect on public confidence when it is undermined by inappropriate conduct by a member of the judiciary.

[76] We consider that the statements made by Mr. Justice Bernard Flynn, reported in the newspaper *Le Devoir* on February 23, 2002, were inappropriate and unacceptable. Accordingly, we answer the first question put to us as follows: the judge in question failed in the due execution of his office in regard to the duty to act in a reserved manner, and thus infringed the provisions of paragraph 65(2)(c) of the *Judges Act*.

[77] In answer to the second question, we now apply to the impugned conduct of Mr. Justice Flynn the test for removal set out in *Marshall*, which has been considered earlier in these reasons. The question may be posed as follows: is the breach of the duty to act in a reserved manner demonstrated by Mr. Justice Flynn so manifestly and profoundly destructive of judicial impartiality, integrity and independence that it undermines individual and public confidence in the justice system, thereby rendering the judge incapable of performing the duties of his office? In this connection, we particularly

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noted the following: the irreproachable career of the judge in question, the isolated nature of the incident complained of, the unlikelihood of a similar incident reoccurring, the judge's acknowledgment of his remarks, his letter and the acknowledgment made by his counsel that the judge in question made a mistake in making the statements complained of to the journalist. We remain convinced that the judge in question retains his independence and complete impartiality to continue deciding matters brought before him now and in the future. In view of all the circumstances, we are of the opinion that the conduct of Mr. Justice Bernard Flynn has not incapacitated or disabled him from the due execution of his office within the meaning of subsection 65(2) of the *Judges Act*, and thus we do not recommend the removal of Mr. Justice Flynn.

December 12, 2002

(signed)

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**Joseph Z. Daigle, Chairperson**

(signed)

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**Alban Garon, Committee member**

(signed)

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**Paul Bédard, Committee member**