APPENDIX C

LETTER OF THE HON. MICHAEL BRYANT
22 April 2004

Attorney General
Minister Responsible for Native Affairs
Minister Responsible for Democratic Renewal

The Hon. Michael Bryant

Procureur général
ministre délégué aux Affaires autochtones
ministre responsable du Renouveau démocratique

L'hon. Michael Bryant

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The Right Honourable Beverly McLachlin, P.C., C.J.C.
Chairperson
Canadian Judicial Council
15-150 Metcalfe Street
Ottawa, ON
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Dear Chief Justice McLachlin:

Pursuant to subsection 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as the Attorney General for the Province of Ontario, I am requesting that an inquiry be commenced into the conduct of Justice Paul Cosgrove of the Superior Court of Ontario during the trial held at Brockville and Ottawa in *Regina v. Julia Yvonne Elliott.* More particularly, I am requesting that an inquiry be commenced to determine whether Justice Cosgrove should be removed from office for any of the reasons set out in paragraphs 65(2)(b) to (d) of the *Act.*

As you are aware, the test applied by the Canadian Judicial Council as articulated in the Inquiry Committee of the Canadian Judicial Council in the *Marshall* case is as follows:

> *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?*

It is my respectful opinion that the conduct of Justice Cosgrove throughout the lengthy proceedings in *Regina v. Elliott* has undermined public confidence in the administration of justice in Ontario and has rendered Justice Cosgrove incapable of executing his judicial office. Accordingly, it is my opinion that Justice Cosgrove has become incapacitated or disabled from the due execution of the office of judge, within the meaning of subsection 65(2) of the *Act.*

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The history of the proceedings giving rise to this request is summarized in the attached Appendix to this letter.

In brief, this trial of a murder charge, the most serious criminal matter society must contend with, was submerged into procedural, pre-trial mendacity that culminated in an unwarranted stay. The proceedings tarnished the administration of justice, and turned into an exercise of vilifying the state built on irrelevant, inappropriate and harmful findings. The proceedings trivialized the *Charter*, and deprived society and the victim's family of any semblance of justice.

Regrettably, the *Elliott* matter is not the first time the Court of Appeal for Ontario has been critical of the manner in which Justice Cosgrove has handled judicial proceedings. In *Perry v. Ontario* (1997), 33 O.R. (3d) 705, the Court of Appeal concluded that Justice Cosgrove had reduced the proceedings to a "procedural nightmare" for the Crown. In *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735, the Court of Appeal concluded that Justice Cosgrove's comments, findings, and rulings had given rise to the appearance that he had not approached the proceedings with an "open mind" and that he had manifested a "suspicious attitude toward the government that caused him to misapprehend some of the evidence before him".

His Honour, in what the Ontario Court of Appeal described as " typical of the trial judge's approach in general," found in excess of 150 *Charter* breaches. Such a finding, an indictment in itself, was based on the following "common elements," according to the Court of Appeal:

1. *There was no factual basis for the findings.*
2. *The trial judge misapprehended the evidence.*
3. *The trial judge made a bare finding of a Charter breach without explaining the legal basis for the finding.*
4. *In any event, there was no legal basis for the finding.*
5. *The trial judge misunderstood the reach of the Charter.*
6. *The trial judge proceeded in a manner that was unfair to the person whose conduct was impugned.*

(*Regina v. Elliott*, Unreported decision of the Court of Appeal for Ontario, September 7, 1999, at paragraph 123 and 124)

In reviewing the trial judge's conduct, which was not supported on appeal, the Court of Appeal concluded, in part:

> *"At times the proceedings completely lost their focus as the trial judge permitted defence counsel to delve into areas that had no possible impact on the Respondent's right to a fair trial. On occasion, the proceedings seemed to resemble nothing so much a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial."*

(*Supra*, at paragraph 164)

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The Court of Appeal concluded that the findings of the Charter breaches were not supported by the evidence; that the judge committed numerous errors; and that findings of misconduct against state actors were unwarranted and unsubstantiated. The formidable contempt power was misused in a coercive manner. Accordingly, integrity of countless persons was unfairly and distressingly sullied. The proceedings were not conducted in a fashion that promoted respect for, or conformity with, the rule of law.

The unsatisfactory way in which these proceedings were conducted and the consequent harm that flowed to the repute of the administration of justice is set out in the attached Appendix and described in detail in the Appellant's Factum filed by the Crown in the Court of Appeal on this matter. In these most unfortunate of circumstances, it is my view that the conduct of Justice Cosgrove during the course of this trial was such that nothing short of an inquiry by the Judicial Council can restore public confidence in the due administration of justice in connection with this matter.

Enclosed please find Justice Cosgrove's Reasons for Judgment in *Regina v. Julia Elliott*, the Notice of Appeal filed by the Crown, and the Court of Appeal's Reasons for Judgment allowing the appeal and ordering a new trial. Under separate cover, I will forward the facta filed with the Court of Appeal in *Regina v. Elliott* by the Crown appellant and by the accused respondent. The Crown's Appellant's Factum describes the lengthy procedural history of this case and provides a comprehensive account of the conduct of the trial judge underlying this request.

Should the Judicial Council need any additional information concerning this matter, please do not hesitate to contact:

Mr. Paul Lindsay
Director
Crown Law Office – Criminal
Ministry of the Attorney General
720 Bay Street
10th Floor
Toronto, Ontario
M5G 2K1

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In particular, Mr. Lindsay would be pleased to provide the following:

a) Any additional submissions regarding Justice Cosgrove's conduct of the proceedings or the history of the case;

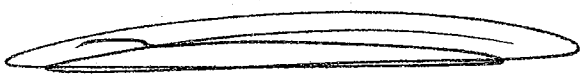
b) A copy of the transcript of proceedings before Justice Cosgrove (approximately 130 volumes, 32,500 pages);

c) A copy of the Appeal Book, which contains all documentary exhibits and other materials filed in the proceedings (32 volumes, approximately 9,500 pages);

d) Contact information for any parties involved in the proceedings, including members of the victim's family and those others whose conduct was unfairly impugned by Justice Cosgrove; and

e) Any additional information that the Council might require.

Yours truly,



Michael Bryant
Attorney General
Minister Responsible for Native Affairs
Minister Responsible for Democratic Renewal

Enclosure

APPENDIX
History of Proceedings

The Trial – 1995-1999

In August, 1995, Julia Yvonne Elliott ("the accused") was charged with second degree murder and interfering with a dead body in connection with the killing and dismemberment of an elderly resident of Kemptville, Ontario. Following a preliminary inquiry and orders to stand trial on both counts, pre-trial applications commenced before Justice Cosgrove in the Superior Court of Ontario in Brockville, Ontario, in September, 1997. Over the next two years, Justice Cosgrove permitted defence counsel, in the context of various applications brought pursuant to the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), to advance all manner of serious allegations of deliberate wrongdoing against the many Crown counsel and police officers who took part in the investigation and prosecution of the case. At the conclusion of one interim application, Justice Cosgrove ordered that the case be traversed to Ottawa.

The Stay of Proceedings

On September 7, 1999, Justice Cosgrove stayed the proceedings as an abuse of process and ordered the Crown to pay the accused's legal costs from the outset of the proceedings. In addition, Justice Cosgrove concluded that the alleged misconduct of the Crown and the police delayed the accused's trial and thereby violated her s. 11(b) *Charter* right to a trial within a reasonable time.

In his Reasons for Judgment, Justice Cosgrove found that eleven Crown Counsel and senior members of the Ministry of the Attorney General and at least fifteen named police officers from three different police forces, in addition to unnamed OPP and RCMP officers, federal Immigration officers, and officials from the Ministry of the Solicitor General of Ontario and the Centre for Forensic Sciences had committed over **150** violations of the accused's *Charter* rights. Many of the violations involved the alleged fabrication of evidence, perjury, deliberate destruction and non-disclosure of evidence, witness tampering, making false or misleading submissions to the court, and various other forms of wilful and grave misconduct. These findings were, in essence, tantamount to a conclusion that there had been a conspiracy of unprecedented magnitude among many of the investigators and prosecutors to intentionally obstruct the course of justice.

The Crown Appeal

1) The position of the Crown on appeal

By Notice of Appeal dated September 7, 1999, the Crown appealed against the stay of proceedings and the order for costs to the Court of Appeal for Ontario. On the appeal, the Crown advanced the position that Justice Cosgrove's many very serious and troubling findings against the police officers and Crown counsel were totally unsupported by the record and demonstrated a fundamental misunderstanding of the law. Moreover, the Crown submitted the following:

a) that Justice Cosgrove conducted himself in a manner that patently demonstrated an actual bias against the Crown or, at the very least, gave rise to a reasonable apprehension of bias;

b) that Justice Cosgrove repeatedly denied the Crown fundamental procedural fairness and grossly breached the rules of natural justice;

c) that the public interest in having these very serious charges tried on the merits was entirely abandoned as Justice Cosgrove conducted a wholly inappropriate wide-ranging judicial inquiry, probing into the largely irrelevant and immaterial conduct of Crown counsel, the police, the correctional authorities, immigration officials, independent RCMP investigators and others;

d) that the proceedings became a "procedural nightmare" for the Crown as a result of Justice Cosgrove's entirely unwarranted and unprecedented orders that saw Crown counsel variously disqualified, compelled to testify, and prohibited from communicating with their predecessors and their superiors; and

e) that throughout the proceedings, Justice Cosgrove made various rulings, comments, and findings which manifested an adversarial stance towards the Crown entirely antithetical to the role of an independent judicial arbiter.

2) Defence counsel's concession on appeal

In response to the position advanced by the Crown, counsel for the accused on the appeal (who was not trial counsel) **did not seek to support any of Justice Cosgrove's findings of police and Crown misconduct**. Nor did the accused's appellate counsel seek to uphold the stay of proceedings based on an abuse of process. The accused's appellate counsel made the following concession:

> *...[T]he appellate Crowns have alleged in their Appellant's Factum that virtually all of...[defence counsel's] motions were without arguable merit and that no judge could reasonabl[y] have found that any of the alleged Charter breaches actually occurred. At the request of the court at the most recent case conference,* ***the Respondent's appellate counsel has reconsidered each of the 150 alleged Charter breaches and cannot envision arguments to make in support [of] the judge's findings with respect to these alleged Charter breaches.*** [Emphasis added.]

Instead, the defence on appeal advanced the position, *inter alia*, that Justice Cosgrove was incompetent and that he had utterly failed to properly manage the trial by allowing defence counsel at trial to advance patently unmeritorious allegations against the police and the Crown, thereby unjustifiably prolonging the proceedings and violating the accused's section 11(b) *Charter* right to be tried within a reasonable time. The defence thereby sought to uphold the stay of proceedings on an entirely different basis than that upon which it had been imposed.

The Decision of the Court of Appeal for Ontario

1) Overview

The appeal was argued during the week of September 15, 2003, before a panel of the Court of Appeal for Ontario composed of Justice Marc Rosenberg, Justice Michael Moldaver, and Justice Janet Simmons. Following the hearing, the Court of Appeal reserved its decision. On December 4, 2003, the Court of Appeal allowed the appeal, set aside the order of Justice Cosgrove staying the proceedings, set aside the costs order, and ordered a new trial.

The sixty-day period within which the respondent could have filed an application for leave to appeal to the Supreme Court of Canada expired on February 2, 2004. The Crown has not been served with any application for leave to appeal, and, accordingly, it would appear that the Court of Appeal's order in this matter is now final.

In light of the accused's concession (which the Court of Appeal accepted) that Justice Cosgrove's various findings against the police and the Crown could not be sustained, the Court of Appeal was not, strictly speaking, required to address those findings in its Judgment. Similarly, the Court of Appeal was not required to address the Crown's position that Justice Cosgrove had demonstrated an actual bias against the Crown, had breached the rules of natural justice, and had allowed the proceedings to devolve into a "procedural nightmare". Nevertheless, the Court of Appeal addressed, in pointed language, some of the rulings and findings made by Justice Cosgrove, in part because the Court of Appeal, "[thought] it necessary to record [its] concern with some of the facts found by the trial judge". [¶¶111-112]

2) The Court of Appeal's conclusions respecting alleged Charter Violations

The Court of Appeal variously described Justice Cosgrove's many rulings against the Crown and his findings of *Charter* breaches as: "unwarranted" [¶113]; "unfounded" [¶113]; "ill advised" [¶122]; "unfair to the person whose conduct was impugned" [¶123]; "completely without foundation" [¶125]; "peculiar" [¶133]; "erroneous" [¶136]; "troubling" [¶138]; "factually incorrect" [¶150]; and, "not borne out by the evidence" [¶160]. In addition, the Court of Appeal reached the following findings relating to Justice Cosgrove's conduct throughout the proceedings:

a) There was no basis for permitting defence counsel to call various Crown counsel as witnesses on the *Charter* applications, as the evidence sought from counsel was immaterial and "totally irrelevant". Referring to one incident, the Court of Appeal concluded, "there was no version of this issue that on any realistic view could ever support an abuse of process or a stay of proceedings". [¶¶113-118]

b) Justice Cosgrove hampered Crown counsel in their conduct of the case by making "ill advised" and "unwarranted" non-communication orders that effectively prevented successor counsel from preparing for the prosecution of the motions and the trial proper. The Court of Appeal noted that these orders seemed to have been made because of Justice Cosgrove's "unfounded" suspicion that "the former

Crown counsel would somehow taint the new counsel or would fabricate evidence". [¶¶113, 122]

c) Justice Cosgrove's many findings of *Charter* breaches typically shared the following common elements:

1. *There was no factual basis for the findings.*
2. *The trial judge misapprehended the evidence.*
3. *The trial judge made a bare finding of a Charter breach without explaining the legal basis for the finding.*
4. *In any event, there was no legal basis for the finding.*
5. *The trial judge misunderstood the reach of the Charter.*
6. *The trial judge proceeded in a manner that was unfair to the person whose conduct was impugned.*

[¶¶123-124]

d) Justice Cosgrove's finding that the Assistant Deputy Attorney General for Ontario had instructed Crown counsel to make various submissions to the court that were inconsistent, deliberately false, untrue, and calculated to mislead the court was "without foundation". In particular, the Court of Appeal concluded:

> *It is a serious matter to find that a counsel has given instructions to mislead the court. The trial judge made this finding against the Assistant Deputy Attorney General in the absence of hearing from him and in the absence of any evidence that he had anything to do with the instructions to Crown counsel. This finding was completely without foundation and gives the appearance of a failure by the trial judge to conduct the proceedings impartiality [sic] and fairly.*
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> *The finding by the trial judge that Crown counsel made false or misleading submissions or representations calculated to mislead the court is not supported by the record.* [¶¶125-126] [Emphasis added.]

e) The administration of justice was brought into disrepute by virtue of the fact that Justice Cosgrove used the *Charter* to remedy "baseless and frivolous claims". [¶129]

f) Justice Cosgrove displayed a "misunderstanding of the role of the Attorney General" by reaching the "peculiar" finding that the Crown's decision to retain counsel from the private bar breached the *Charter* .[¶¶132-136]

g) Justice Cosgrove's "troubling" finding that senior police officers, Crown counsel, and the Assistant Deputy Attorney General had deliberately misled the court

about an "immaterial matter" was not supported by the record. In particular, the Court of Appeal concluded:

> *One of the many troubling findings by the trial judge was that senior police officers, Crown counsel, and the Assistant Deputy Attorney General deliberately misled the court about events surrounding the August 20, 1998 meeting and decision to refer the Detective Inspector MacCharles investigation to the R.C.M.P. He further found that this deliberate deception violated the respondent's Charter rights.* ***Like the other findings made against Crown counsel and the police these were not supported by the record. However, we deal with this issue in particular because it demonstrates a fundamental misapplication of the Charter.***
>
> . . .
>
> ***For the trial judge to build this immaterial matter into Charter violations and find without any reasonable basis that the court had been deliberately misled is troubling.*** *There is no version of the events surrounding the August 20 meeting that could lead to a violation of the respondent's Charter rights sufficient to merit any remedial action.* [¶¶138-141] [Emphasis added.]

h) The evidence supported none of Justice Cosgrove's numerous findings that police officers had committed perjury or given false or misleading evidence. [¶145]

i) The proceedings "completely lost their focus" as Justice Cosgrove permitted defence counsel to delve into areas that had "no possible impact on the respondent's right to a fair trial." In particular, the Court of Appeal concluded:

> *The trial judge made several findings of Charter violations based on conduct by immigration authorities or contact between the Crown and immigration authorities. The evidence did not support the various findings and so the impugned conduct could not have been the basis for a stay of proceedings. However,* ***we mention this matter because it was symptomatic of a more serious problem with this trial. On occasion, the proceeding seemed to resemble nothing so much as a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial.***" [¶164] [Emphasis added]

j) Justice Cosgrove failed in his duty to put a halt to defence counsel's "deplorable" litigation strategy. The Court of Appeal concluded:

"Whether his failure stemmed from a misunderstanding of the basic principles that govern the Charter and its application or from his bias toward the Crown or both, we need not finally decide." [¶180]

3) The Court of Appeal's conclusions regarding Justice Cosgrove's Use of the Contempt Power

Over the course of the proceedings, Justice Cosgrove threatened the use of the contempt power against 13 witnesses, cited at least two witnesses for contempt, and threatened to order the arrest of two civilian witnesses. On appeal, the Crown advanced the position that Justice Cosgrove's misuse of the contempt power had brought the administration of justice into disrepute and was abusive, careless and over-zealous. The Court of Appeal expressed its "concern" about the way Justice Cosgrove misused his contempt jurisdiction and stated, "there are several occasions where it appears that the trial judge may have misunderstood the purpose of the contempt power". Citing one example, in which Mr. Eugene Williams, Q.C., senior counsel with the Department of Justice of Canada, was threatened to be cited for contempt, the Court of Appeal concluded that Justice Cosgrove made a "disparaging and unfair comment" about another Crown counsel involved in the episode. The Court of Appeal then concluded:

> *The power of a superior court to cite a person for contempt of court is a very important power but it is to be used with restraint.* ***It is a serious matter to threaten anyone, let alone an officer of the court, with contempt of court. We can see no basis upon which it would have been open to the trial judge to find Mr. Williams in contempt of court.*** *Contempt of court implies conduct that is calculated to obstruct or interfere with the due course of justice or the lawful process of the courts. It is conduct that seriously interferes with, or obstructs, the administration of justice. See for example R. v. Glasner (1994), 19 O.R. (3d) 739 (Ont. C.A.). At worst, in this case there may have been a misunderstanding as to what was to occur when the R.C.M.P. reports were filed with the court. That does not approach the kind of conduct that can properly be stigmatized as contempt of court.* ***A reasonable observer might be concerned that the trial judge appeared to be biased against the police and their counsel because of this unfortunate incident.*** [¶¶142-144, 166] [Emphasis added.]

Under the heading "Abuse of the Contempt Power", the Court of Appeal expressed its concern about the manner in which Justice Cosgrove used his contempt jurisdiction. In this connection, the Court of Appeal stated:

> *Although abuse of the contempt power was not a matter that gave rise to any erroneous findings of Charter violations, we are concerned about the manner in which the trial judge used his contempt jurisdiction.* [¶142]

Conclusion of the Court of Appeal in *R. v. Yvonne Elliott*

The Court of Appeal made the following observations by way of conclusion:

> *We conclude this part of our reasons as we began. The evidence does not support most of the findings of Charter breaches by the trial judge. The few Charter breaches that were made out, such as non-disclosure of certain items, were remedied before the trial proper would have commenced had the trial judge not entered the stay of proceedings. The trial judge made numerous legal errors as to the application of the Charter. He made findings of misconduct against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.* [¶166]