IN THE MATTER OF:

Section 65 of the *Judges Act*, R.S., 1985, c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice

# SUBMISSIONS OF THE HONOURABLE PAUL COSGROVE

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TABLE OF CONTENTS

## **Part I.** Overview

1. Justice Cosgrove submits that the Canadian Judicial Council ("CJC") should not recommend to the Minister of Justice that he be removed from the Bench by virtue of having become incapacitated or disabled from the due execution of his office.

2. Justice Cosgrove acknowledges that some of his conduct during the trial of Julia Elliott in 1998 and 1999 constituted judicial misconduct and is properly the subject of sanction by this Council. However, in view of the constitutional guarantee of judicial independence, the CJC has repeatedly recognized that the test for removal is an onerous one. Justice Cosgrove submits that when all of the relevant facts and circumstances are considered, his conduct does not warrant the recommendation that he be removed from the Bench.

3. The *Report of the Canadian Judicial Council to the Minister of Justice regarding Justice Matlow* clarifies important aspects of the analytical process that must be undertaken in determining whether a recommendation for removal should be made (the "*Matlow Report*"). When that analysis is applied to the circumstances of this case, no recommendation for removal is warranted.

4. The *Matlow Report* clarifies that the CJC must undertake a two stage analysis:

   (a) first, determine whether the judge has engaged in judicial misconduct within the meaning of s. 65(2) of the Judges Act; and if so,

(b) second, determine whether, in light of the finding at stage one considered together with all other relevant circumstances, a recommendation for removal is the appropriate sanction (i.e. the "*Marshall* test").

5. In the *Matlow Report*, the CJC emphasized that an important, albeit implicit, aspect of the test for removal is its prospective nature. The test for removal must focus on whether or not public confidence would be sufficiently undermined to render the judge incapable of executing judicial office in the future in light of the conduct to date.

6. Justice Cosgrove submits that focusing on the prospective nature of the test for removal leads to the conclusion that removal is not appropriate. There is substantial evidence in support of this conclusion including:

(a) Justice Cosgrove provided a heartfelt, sincere apology statement to the Inquiry Committee concerning the Hon. Paul Cosgrove (the "Inquiry Committee") that recognized that he had committed acts of judicial misconduct and made many legal errors that visited unfortunate consequences on people who deserved better. This statement demonstrates that Justice Cosgrove is aware of the nature and impact of his past conduct, and is determined to avoid any repetition. The statement thereby reinforces public confidence in him and in the administration of justice.

(b) Independent Counsel, who is charged with representing the public interest and had an intimate knowledge of all of the relevant facts as a result of his thorough investigation, concluded that, taking Justice Cosgrove's statement into account and consistent with previous decisions of the CJC, the case no longer supported a recommendation for removal.

(c) Justice Cosgrove filed 32 character letters, which spoke, in great detail, to support for, and confidence in, Justice Cosgrove. They also speak to an assessment by their authors as to Justice Cosgrove's character and how unlikely they believe a repetition of the misconduct to be when it is placed in the context of his entire 24-year judicial career.

(d) Justice Cosgrove sat as a judge for more than four and a half years after his decision in *Regina v. Elliott*[1] ("*Elliott*") without any complaints by the public or the Crown, including the five months after the decision of the Court of Appeal for Ontario in the *Elliott* case had been rendered. This fact is strong evidence that notwithstanding the publicity that accompanied the *Elliott* decision, his ability to maintain public confidence while discharging his full duties was not impaired.

7. Justice Cosgrove wishes to assure the Council that his apology was, and was intended to be, a full, complete and sincere apology. If any of the words or phrasing created any other impression, that was not intended, and Justice Cosgrove regrets any confusion.

8. Ultimately, Justice Cosgrove submits that when the Council performs its required task in accordance with the analysis outlined in the *Matlow Report* and his admitted misconduct is considered in light of all of the relevant circumstances, the Council should conclude that the appropriate resolution of this matter for there to be a strong admonition, but no recommendation for his removal from the bench.

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[1] [1999] O.J. No. 3265, 105 O.T.C. 241 (Ont. Sup. Ct. J.), Appendix "A" to the *Report of the Inquiry Committee concerning the Hon. Paul Cosgrove*, November 27, 2008 [*Inquiry Committee Report*], Book of Documents, Tab 1a.

## **Part II.** Factual Background

### *A. Background of Justice Cosgrove*

9. From 1969 to 1978, Paul Cosgrove served as Mayor of the City of Scarborough, Ontario. In 1980, he was elected the Member of Parliament for the riding of York-Scarborough. He served as Minister of Public Works, and then as Minister of State for Public Finance.

10. He was sworn in as the County Court judge for the County of Leeds and Grenville on September 8, 1984. By virtue of a restructuring of the courts of Ontario, he became a judge of the Ontario Court (General Division) in 1989. This court was subsequently renamed the Superior Court of Ontario. Since 1984, he has sat in the Eastern Region of Ontario, centred out of the City of Brockville. He was the local administrative Judge for the County of Leeds and Grenville until February 2002.

11. Justice Cosgrove is currently a judge of the Superior Court of Justice in Ontario, which is a superior court pursuant to s. 96 of the *Constitution Act, 1867*. The majority of his time in recent years has been spent in the court in Ottawa.

12. Justice Cosgrove is 74 years old. He will turn 75 in December 2009, when he will reach the age of mandatory retirement from the Bench.

***B. Regina v. Elliott***

13. On August 19, 1995, body parts of 64-year-old Larry Foster were found floating in the Rideau River near Kemptville, Ontario. On August 25, 1995, police arrested Julia Yvonne Elliott in connection with Mr. Foster's death. She was denied bail at a bail hearing conducted by Justice Cosgrove on September 15, 1995.[2]

14. On September 18, 1996, Ms. Elliott was ordered to stand trial after a 16 day preliminary inquiry.[3]

15. Pre-trial motions were scheduled to commence on September 29, 1997, and were expected to take about two weeks. The trial itself was expected to conclude by the end of December 1997. However, defence counsel, Mr. Kevin Murphy brought additional pre-trial motions, which were not completed until December 17, 1997.[4]

16. The trial commenced in Brockville on January 27, 1998. On February 13, 1998, after less than nine full days of evidence in front of the jury, defence counsel embarked on a *voir dire* relating to an unproduced original will-say statement from Constable Laderoute.[5]

17. Between February 13, 1998 and September 7, 1999, defence counsel brought three mid-trial applications for a stay of proceedings. Justice Cosgrove dismissed the

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[2] *R. v. Elliott*, Reasons for Decision of the Court of Appeal for Ontario, December 4, 2003, Appendix "B" to the *Inquiry Committee Report*, at paras. 7, 8, 33 [*Court of Appeal Reasons*], Book of Documents, Tab 1b.
[3] *Court of Appeal Reasons* at paras. 39-40, Book of Documents, Tab 1b.
[4] *Court of Appeal Reasons* at paras. 34-35, Book of Documents, Tab 1b.
[5] *Court of Appeal Reasons* at para. 36, Book of Documents, Tab 1b.

first two stay applications. Defence counsel brought numerous sub-applications in pursuit of an evolving theory that, at the behest of O.P.P. case-manager Detective Inspector Lyle MacCharles and with the tacit approval of Crown counsel, police investigators engaged in a conspiracy to concoct evidence and develop a case that could result only in Ms. Elliott being convicted.[6]

18. On September 7, 1999, in response to the third motion for a stay brought by the defence, Justice Cosgrove entered a stay of proceedings in the case.[7]

19. On December 4, 2003, the Court of Appeal for Ontario allowed an appeal from Justice Cosgrove's order and ordered a new trial.[8]

20. In the more than four years between September 1999 and December 2003, Justice Cosgrove presided over dozens, if not hundreds, of different matters, including dozens of civil and criminal matters involving the Crown. On some occasions, the Crown counsel appearing before Justice Cosgrove had also appeared before him in *Elliott*. During that period of time, no party, including the Crown, ever asked Justice Cosgrove to recuse himself.

21. Similarly, in the months following the release of the decision of the Court of Appeal, Justice Cosgrove continued to sit on a variety of matters in the ordinary course,

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[6] *Court of Appeal Reasons* at para. 37, Book of Documents, Tab 1b.
[7] *Court of Appeal Reasons* at para. 37, Book of Documents, Tab 1b.
[8] *Court of Appeal Reasons*, Book of Documents, Tab 1b.

including civil and criminal matters involving the Crown. In no case did any party, including the Crown, ask Justice Cosgrove to recuse himself.

### *C. Statutory Scheme*

22. The legislative framework covering inquiries into whether a judge of a superior court should be removed from office is set out in sections 63 to 65 of the *Judges Act*, R.S., 1985, c. J-1. Sections 63-65 of the *Judges Act* provide as follows:

> **63. (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).**
>
> **(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.**
>
> **(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.**
>
> **(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have**
>
> > **(a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and**
> >
> > **(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.**
>
> **(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.**
>
> **(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.**

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

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

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

**(a) age or infirmity,**

**(b) having been guilty of misconduct,**

**(c) having failed in the due execution of that office, or**

**(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,**

**the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.**

### *D. The complaint of the Attorney General for the Province of Ontario*

23. On April 23, 2004, the Honourable Michael Bryant, Attorney General for the province of Ontario wrote to the Right Honourable Justice Beverly McLachlin, Chairperson of the CJC, requesting that, pursuant to s. 63(1) of the Judges Act, an inquiry be undertaken into Justice Cosgrove's conduct in *Elliott*.[9]

[9] *Letter of the Hon. Michael Bryant*, April 22, 2004, Appendix "C" to the Inquiry Committee Report at p. 1 [*Letter of the Hon. Michael Bryant*], Book of Documents, Tab 1c.

24. Specifically, the Attorney General requested the CJC to commence an inquiry as to whether Justice Cosgrove should be removed from office for one of the reasons specified in paragraphs 65(2)(b) to (d) of the *Judges Act*.[10]

25. On or about April 29, 2004, Chief Justice Heather J. Smith of the Ontario Superior Court of Justice indicated to Justice Cosgrove that he should not sit on any cases until the inquiry was completed.

26. In February 2006, after the Federal Court had held that s. 63(1) of the *Judges Act* was unconstitutional, Justice Cosgrove resumed performing limited judicial duties. This continued until the Inquiry Committee released its report in December 2008 (the "Inquiry Committee Report").

### *E. Inquiry Committee Process*

27. In accordance with s. 63(1) of the *Judges Act*, the Council was required to constitute an Inquiry Committee under s. 63(3) to conduct an inquiry into whether Justice Cosgrove has become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in s. 65(2) of the *Judges Act*.[11]

28. The members of the Inquiry Committee were The Honourable Lance Finch, Chief Justice of British Columbia, The Honourable Allan Wachowich, Chief Justice of the Alberta Court of Queen's Bench, The Honourable Michael MacDonald, Chief Justice of

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[10] *Letter of the Hon. Michael Bryant* at p. 1, Book of Documents, Tab 1c.
[11] *Inquiry Committee Report* at paras. 7-8, Book of Documents, Tab 1.

the Supreme Court of Nova Scotia, John Nelligan, Q.C., and Kirby Chown of the Ontario bar.[12]

29. The CJC *Inquiries and Investigations By-Laws*, SOR/2002-371 (the "*Inquiry By-Laws*"), are made by the Council under the authority of paragraph 61(3)(c) of the *Judges Act*.[13] The *Inquiry By-Laws* outline the process and parameters to be followed when an inquiry committee is constituted.

30. In accordance with s. 3(1) of the *Inquiry By-Laws*, the Council appointed Earl A. Cherniak, Q.C., as Independent Counsel. The Independent Counsel is charged with the duty to present the case to the Inquiry Committee, and is required to act impartially and in the public interest.

### *F. Interlocutory Proceedings*

#### 1) Challenge to the constitutionality of s. 63(1) of the *Judges Act*

31. In 2004, Justice Cosgrove brought an application before the Inquiry Committee, which challenged the constitutionality of s. 63(1) of the *Judges Act* on the basis, *inter alia*, that it infringed the constitutional independence of the judiciary.[14]

32. Most complaints about judicial conduct are submitted under subsection 63(2) of the *Judges Act*, and are subject to a screening procedure that, in the vast majority of cases, results in a decision that no investigation or inquiry is warranted. This screening

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[12] *Inquiry Committee Report* at paras. 7-8, Book of Documents, Tab 1.
[13] *Judges Act*, R.S., 1985, c. J-1, s. 61(3)(c) [*Judges Act*], Book of Documents, Tab 2.
[14] *Inquiry Committee Report* at para. 9, Book of Documents, Tab 1.

procedure does not apply to complaints filed by the Attorney General of a province, pursuant to s. 63(1) of the Judges Act. Instead, the CJC is required to commence an inquiry after receiving a s. 63(1) complaint.[15]

33. Justice Cosgrove submitted that s. 63(1) of the *Judges A*ct was unconstitutional in so far as it gives a legal power to provincial Attorneys General to compel the CJC to commence a public inquiry into the conduct of a judge of a superior court without a screening procedure akin to that applied to complaints submitted under s. 63(2).[16]

34. The Canadian Superior Courts Judges Association (the "Association") intervened in support of Justice Cosgrove's application for a constitutional challenge to s. 63(1).[17] The Association is a voluntary organization of 1055 Superior Court Judges across Canada. Over 90% of the judges eligible to be members of the Association have joined it. As part of its objects, the Association is concerned with the provisions of the *Judges Act* and procedures pertaining to complaints, investigation and inquiries involving the conduct of judges. The Association noted that Justice Cosgrove's application was the first time the constitutionality of s. 63(1) had been raised. The Association further noted that the matter was one of first instance and first principle. The Association thought the

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[15] *Judges Act*, s. 63(1), Book of Documents, Tab 2.

[16] *Reasons Addressing the Constitutionality of Section 63(1) of the Judges Act*, Inquiry Committee concerning the Hon. Paul Cosgrove, December 16, 2004, at para. 4 [*Inquiry Committee Reasons re: Constitutionality of s. 63(1)*], Book of Documents, Tab 3.

[17] In addition, the Criminal Lawyers' Association of Ontario and the Canadian Council of Criminal Defence Lawyers intervened in support of Justice Cosgrove's application. The Attorney General of Canada and the Attorney General of Canada both intervened to support the constitutionality of s. 63(1).

matter significant enough to the interests of superior court judges across Canada to intervene in support of Justice Cosgrove's application.[18]

35. On December 16, 2004, the Inquiry Committee dismissed the application and issued reasons for decision.[19]

36. On October 26, 2005, the Federal Court allowed Justice Cosgrove's application for judicial review, set aside the December 16, 2004, decision of the Inquiry Committee, and declared that s. 63(1) of the Judges Act was invalid. The Association again intervened to challenge the constitutionality of s. 63(1).[20]

37. The Federal Court held that s. 63(1) of the Judges Act was unconstitutional in so far as it gave a legal power to provincial Attorneys General to compel the CJC to commence an inquiry into the conduct of a judge of a superior court without some form of screening procedure. The provision did not meet the minimal standards required to ensure respect for the principle of judicial independence.[21]

38. On March 12, 2007, the Federal Court of Appeal allowed an appeal from the order of the Federal Court, set aside the decision of the Federal Court, dismissed the

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[18] *Factum of the Intervener Canadian Superior Courts Judges Association (Regarding the constitutionality of s. 63(1) of the Judges Act)* at paras. 1, 4.

[19] *Inquiry Committee Reasons re: Constitutionality of s. 63(1)*, Book of Documents, Tab 3.

[20] *Cosgrove v. Canadian Judicial Council*, 2005 FC 1454 [*Cosgrove v. CJC*], Book of Documents, Tab 4; All of the interveners before the Inquiry Committee participated in the application for judicial review. In addition, Independent Counsel intervened to support the constitutionality of the decision.

[21] *Cosgrove v. CJC* at para. 6, Book of Documents, Tab 4.

application for judicial review and referred the matter back to the Inquiry Committee.[22] The Association participated, and supported Justice Cosgrove, in the appeal to the Federal Court of Appeal.[23]

39. On November 29, 2007, the Supreme Court of Canada dismissed Justice Cosgrove's application for leave to appeal the Judgment of the Federal Court of Appeal.[24] With the constitutional challenges concluded, the matter was returned to the Inquiry Committee to proceed with the inquiry.

40. On February 29, 2008, pursuant to s. 5(2) of the By-laws, Independent Counsel provided notice to Justice Cosgrove of all complaints or allegations that were to be considered by the Inquiry Committee to enable the judge to respond fully to them (the "Notice").[25] Shortly thereafter, a notice of hearing for September 2, 2008, was issued.

***2) Boilard Motion***

41. On April 10, 2008, counsel for Justice Cosgrove wrote to Independent Counsel to advise him that Justice Cosgrove intended to bring a *Boilard* motion in advance of the scheduled September hearing dates. Justice Cosgrove would, as a preliminary matter, seek the summary dismissal of the complaint by an Attorney General on the basis that it did not disclose judicial misconduct warranting removal from office. The proposed

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[22] *Cosgrove v. Canadian Judicial Council (F.C.A.)*, 2007 FCA 103 [*Cosgrove v. CJC (F.C.A.)*], Book of Documents, Tab 5.

[23] *Cosgrove v. CJC (F.C.A.)* at para. 24, Book of Documents, Tab 5; All interveners before the Federal Court participated in the appeal to the Federal Court of Appeal. In addition, the Attorney General of New Brunswick intervened in support

[24] *Honourable Justice Paul Cosgrove v. Attorney General of Canada*, Decision on the application for leave to appeal, Docket 32032 (S.C.C.).

[25] *Notice to Justice Paul Cosgrove*, February 29, 2008, Appendix "D" to the Inquiry Committee Report, Book of Documents, Tab 1d.

motion did not assert that the Inquiry Committee was without jurisdiction to consider the complaint, but rather that the Inquiry Committee should exercise its discretion to dismiss it on a summary basis.[26]

42. Independent Counsel indicated that he was of the view that the *Boilard* motion should be heard at the outset of the Inquiry, and be decided by the Inquiry Committee after the evidence had been led.[27]

43. Justice Cosgrove and Independent Counsel put this procedural question before the Inquiry Committee on May 9, 2008, via telephone conference call. The Inquiry Committee determined that it would hear Justice Cosgrove's motion "at the time of the hearing" in September. The Inquiry Committee declined Justice Cosgrove's request to provide reasons for the decision.[28]

44. Justice Cosgrove sought judicial review of the order of the Inquiry Committee. He did so because, particularly absent reasons from the Inquiry Committee explaining their decision, it was unclear how the *Boilard* motion would serve its constitutional purpose if its determination was deferred. Justice Cosgrove sought to expedite his application so that its determination did not further delay the commencement of the inquiry. The

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[26] *Cosgrove v. Canada (Attorney General)*, 2008 FC 941 at para. 20 [*Cosgrove v. Canada (AG)*].
[27] *Cosgrove v. Canada (AG)* at para. 23.
[28] *Cosgrove v. Canada (AG)* at para. 25; *Inquiry Committee Report* at paras. 15-17, Book of Documents, Tab 1.

application for judicial review was dismissed by order of the Federal Court on August 11, 2008.[29]

### *G. Proceedings before the Inquiry Committee*

45. The inquiry commenced in Toronto on September 2, 2008. Independent Counsel and counsel for Justice Cosgrove both made opening statements. In his opening statement, Independent Counsel indicated that he was of the view that his case was capable of supporting a recommendation that Justice Cosgrove be removed from office:

> **The case that independent counsel is presenting is that the conduct of the *Elliott* trial is capable of supporting a finding that has brought the administration of justice into disrepute and is capable of satisfying the *Marshall* test for a recommendation for removal.[30]**

46. Independent Counsel then presented the case to the Inquiry Committee. Justice Cosgrove agrees with the Inquiry Committee's description of the procedure adopted by Independent Counsel and its helpfulness to the process:

> **[20] Mr. Cherniak, assisted by Ms. Cynthia Kuehl, distilled his presentation in a manner which we found to be most helpful. The trial transcript from Regina v. Elliott occupied over 20,000 pages. Mr. Cherniak presented us with four volumes of transcript supplemented by testimony from four witnesses. The four volumes marshalled the transcript in accordance with the particulars Mr. Cherniak had provided previously. Thus, for example, volume one contained particulars 1, 2(a) and 2(b), and the transcript pages were selected for each particular and presented, respectively, with that particular.**
>
> **[21] The inquiry, in its first 6 days, was occupied primarily with Mr. Cherniak leading us through the particulars and the underlying pages of transcript in support. There was, and there could be, no dispute about the relevant events. The**

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[29] *Cosgrove v. Canada (AG)* at paras. 28-29.

[30] *Transcript of the Proceedings of the Inquiry Committee concerning the Hon. Paul Cosgrove*, September 2, 2008, at p. 34, lines 18-23, Book of Documents, Tab 6.

> **transcript captured them. (The next part of this report, beginning at paragraph 28 below, will examine the particulars and set out our related findings.)[31]**

**1) Apology of Justice Cosgrove**

47. On September 10, 2008, the seventh day of the hearing, Justice Cosgrove addressed the Inquiry Committee.[32] Despite the fact that Independent Counsel had not completed presenting his case, Justice Cosgrove felt it was important to address the panel at that time.

48. Given the significance of the apology to the question of whether or not the CJC will recommend that he be removed from the Bench, the apology is reproduced below in its entirety.

> **[1] This is an extremely humbling and chastening experience. It is one I certainly never hoped for, but it is one from which I have learned a great deal.**
>
> **[2] The trial in *Her Majesty the Queen v. Elliott* was extraordinarily difficult for me and, I am sure, for everyone involved. I have thought about that trial virtually every day for ten years. It was like nothing I had seen before or since. By September 1997, I had presided over thousands of cases during my 15 years on the Bench. Not one of them, nor all of them together, prepared me adequately for the challenges of this case. I offer that not as an excuse, but in partial explanation for the mistakes I made.**
>
> **[3] To be clear, I made many mistakes in that trial. In my desire to discharge my obligations as a judge and to provide a fair trial to a person accused of a horrific crime, I at times lost my way. I approached each decision I made with an open mind and I never acted in bad faith, but I now realize that I made a series of significant errors that affected that proceeding.**
>
> **[4] On December 4, 2003, the Court of Appeal released its decision allowing the Crown's appeal from my order staying the proceeding. Almost every trial judge knows the sting of a court of appeal allowing an appeal from one of your judgments. This was not the first time for me. However, these reasons were very different. I read the decision carefully. I was humbled. I thought I had done my best in very difficult circumstances. Nevertheless, the Court of Appeal found that I had**

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[31] *Inquiry Committee Report* at paras. 20-21, Book of Documents, Tab 1.

[32] *Inquiry Committee Report* at para. 22, Book of Documents, Tab 1.

**made many errors in my findings of fact and I had misapplied the law on numerous occasions. I accept their reasons without reservation.**

**[5] I have reflected on the Court of Appeal's decision for the past five years. I have thought about what it said about that case and what it said to me as a judge. The Court of Appeal's reasons for decision have affected me greatly. I have no doubt they have made, and will make me, a better trial judge. I fully appreciate my duties and responsibilities as a judge. I have changed, and will continue to change, my approach to judicial decisions based upon the insights I have obtained from the reasons of the Court of Appeal.**

**[6] In addition, I have learned a great deal from this inquiry process. Let me assure you that Justice Sopinka was absolutely correct when he wrote in *Ruffo* that "a disciplinary inquiry is a traumatic ordeal for a judge." I can think of no process more difficult for a judge than to have the question of whether she or he ought to be removed from office considered in public by a panel of fellow judges and eminent counsel.**

**[7] I have spent many hours reflecting carefully on the Notice provided to me by Independent Counsel. It has not been easy to see my actions characterized that way. I had tried to do my best.**

**[8] Nevertheless, I want to acknowledge freely that I made many findings against the Ministry of the Attorney General and its senior representatives, Crown counsel, police officers and public officials that were set aside by the Court of Appeal. I erred in so doing and I regret those errors. I regret the effect of my findings on them. Moreover, my reasons contained several references to individuals that were not before the court. That was an error, which I regret. I recognize now that my efforts to ensure a fair trial for the accused and to get at the truth made it very difficult for the Crown counsel to prosecute the case effectively. I regret very much the effect my erroneous judicial decisions had on the Ministry of the Attorney General, its counsel and the trial process.**

**[9] As I have mentioned, the trial was extremely difficult. Counsel for both parties aggressively represented their client's interests. From my position, it was a very difficult trial to manage. I tried a variety of techniques to maintain civility in the courtroom and to keep the proceedings focused on the relevant issues at hand. With hindsight, my attempts met with only modest success. I regret that at times I did not try harder and that I did not have more success. In particular, I regret any intemperate, denigrating or unfair language that I may have used during what was the most stressful trial experience of my judicial career. It is certainly not typical of my conduct in the courtroom, and I have and will continue to ensure that I always conduct myself in the best traditions of the judiciary.**

**[10] During this inquiry process, I have had the opportunity to review much of the trial transcript. From time to time, defence counsel used extravagant rhetoric to characterize the conduct of Crown counsel and the police. Some of his statements simply had no place in a courtroom. While I interjected from time to time in an attempt to curb his excesses, it is now evident to me that I did not intervene forcefully or often enough. I should have. I will in the future.**

**[11] With hindsight, I recognize that I erred in my discretionary exercise of the contempt jurisdiction. I accept that it is to be used with restraint, and that it is a serious matter to threaten anyone with contempt of court. I appreciate the purpose of the contempt power and have carefully reviewed the CJC's Guidelines on the Use of Contempt Powers. I will continue to be guided by them in the future.**

**[12] I also recognize that some of my judicial decisions, while made in good faith and for the purpose of ensuring a fair trial, unnecessarily expanded the scope of the trial and diverted attention from the central issues of the proceeding. These decisions were wrong. They unnecessarily delayed the proceeding and wasted scarce resources on matters that, with the benefit of hindsight, were not material to the proceeding.**

**[13] This proceeding has emphasized for me the importance of the work of the judiciary. I have spent much time reviewing the CJC's Ethical Principles for Judges. It is an aspirational document and it is one I work towards every day. I recognize that judges must exhibit and promote high standards of judicial conduct so as to reinforce public confidence. I recognize that at times in the *Elliott* trial my conduct did not meet the highest standards articulated in the Ethical Principles for Judges. I assure the Inquiry Committee that I have and will continue to dedicate myself to striving to meet those standards at all times.**

**[14] For the significant errors described above, I sincerely and unreservedly apologize to the Ministry of the Attorney General, its counsel and senior representatives, the police officers and civilian witnesses and counsel that came before me during this case, the public and this Inquiry Committee.**

**[15] Finally, I would like to apologize to the family of the victim of this crime who, as a result of my legal errors, experienced a significant delay in achieving the closure arrived at by having a criminal prosecution reach its substantive conclusion.**

**[16] I want to address the timing of this apology. At the time of the events, and for years afterward, I had a steadfast belief in the correctness of my decisions. Although they were criticized, I, like every trial judge I know, believed my decisions were the right ones. When the Court of Appeal issued its reasons, its harsh assessment of my decision came as a shock to me. Obviously, I accepted their authority to review and correct my judgment. Nevertheless, I was sustained by my view that I had approached the case, and its many problems, in good faith, and to the best of my ability. That overriding belief has informed my view of the case, and this proceeding before the CJC.**

**[17] Recently, I began to prepare for the current hearing. My preparation has profoundly affected my appreciation of the circumstances of this case. Both on my own and with my counsel, I have spent literally weeks reviewing the record of the trial proceedings, and even reviewing the Bench books I created at the time. Finally, I have spent days in this room hearing Independent Counsel's reading passages of the evidence from the proceeding. All of these steps have caused me to re-live the trial, but for the first time from an entirely different perspective.**

**[18] As a trial judge, I have spent 24 years assessing the actions of others. This process required me to step back and assess my own actions and how they**

> **affected others. It has been a revealing and chastening process. That experience has driven home the need for me to make this apology to those affected by my actions, and to make this statement at this time.**
>
> **[19] I have been a judge for 24 years. Aside from my family and my faith, it is the most important thing in my life. I wish to continue to serve the public as a member of the Superior Court of Justice. However, under the circumstances, it is my view that it would be inappropriate for me to sit in the future in cases involving the Attorney General of Canada, Her Majesty the Queen in Right of Canada, the Attorney General of Ontario, or Her Majesty the Queen in Right of Ontario, and I will take the steps to ensure that will not occur.**
>
> **[20] I stand before you humbled and chastened. While I always acted in good faith, at times my actions were inappropriate.**
>
> **[21] I assure the Inquiry Committee that I will at all times in the future execute my office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.**[33]

**2) Position of Independent Counsel**

49. Following Justice Cosgrove's statement, Independent Counsel addressed the Inquiry Committee. He reiterated that only the Inquiry Committee could determine whether or not a particular act amounted to judicial misconduct, and that he was not attempting to usurp or interfere with their role.[34]

50. Independent Counsel indicated that, based on the Justice Cosgrove's statement, he was of the view that the record as it stood then was no longer capable of supporting a recommendation that Justice Cosgrove be removed from office. Rather, Independent Counsel stated that it was his view that the record was capable of supporting a recommendation for a strong admonition:

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[33] *Statement by Justice Cosgrove*, September 10, 2009, Appendix "E" to the Inquiry Committee Report [*Cosgrove Statement*], Book of Documents, Tab 1e.

[34] *Transcript of the Proceedings of the Inquiry Committee concerning the Hon. Paul Cosgrove*, September 10, 2008, at p.1668, lines 6-25 [*September 10 Transcript*], Book of Documents, Tab 7.

**…I had the opportunity of learning yesterday what Justice Cosgrove was going to say to this panel about his conduct in the *Elliott* trial.**

**Knowing that the evidence to this inquiry would be supplemented in this way caused me to reevaluate my view of the case that I have been presenting to this panel on the basis of the whole of the evidence, and, in particular, whether the record as a whole was capable of meeting the onerous *Marshall* test that again I referred to in my opening, which is, to restate it: That a judge, in order that a recommendation for removal as opposed to some lesser recommendation be made, has conducted himself or herself in a way that is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.**

**The statement that you just heard contains a number of key elements in it that have influenced my thinking. There is a recognition of the errors that were made by Justice Cosgrove in his conduct of the *Elliott* trial in fact, in law and in process.**

**There is a recognition of the effect that his conduct of the trial had on the Crown's ability to present its case and on the administration of justice, generally.**

**There is a clear statement from Justice Cosgrove that this inquiry process has led to an understanding and recognition such that it is reasonable to assume that the conduct that has led to this complaint and this inquiry is unlikely to be repeated.**

**There is a series in the statement of full and unreserved apologies in appropriate form to those who are entitled to receive apologies from Justice Cosgrove, including the Crown attorneys, the Ministry of the Attorney General, the lawyers in the Ministry, the police, the civilian witnesses, the public and, most importantly, the Foster family.**

**There is the understanding and appreciation that it would be inappropriate, for Justice Cosgrove's remaining 15 months or so on the Bench, to sit on any case involving the federal or provincial governments or Attorney Generals.**

**The result of that is that my view of the record as it now stands and of the jurisprudence that I have reviewed, that I will review briefly with you, that while the case on that record is capable of providing a basis for findings by this Inquiry Committee, and the Judicial Council to which it reports, the findings and conclusions that would warrant a strong and pointed admonition to Justice Cosgrove about, speaking generally, his conduct of the *Elliott* trial.**

**That record as it stands now is no longer, in my view, capable of supporting a recommendation for removal from office, but, rather, it is capable of supporting a recommendation for a strong admonition, or whatever the appropriate word is for what the Canadian Judicial Council does in cases of this kind.**[35]

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[35] *September 10 Transcript* at p. 1669, line 1 to p. 1671, line 18, Book of Documents, Tab 7.

51. Independent Counsel went on to explain the factors that he had taken into account in reaching his decision:

> **While I had no doubt and would have argued before you at the start of this case, had the matter been heard then, that the evidence in support of the notice was capable of supporting a recommendation for removal, it was never my place to enter an opinion as to whether what recommendation should be made.**
>
> **What has changed is that we now have had the public airing of the complaint of the Attorney General and the case presented as a matter of public record, as is Justice Cosgrove's statement now a matter of public record.**
>
> **I took into account those authorities. I took into account the content, the nature and the content, of Justice Cosgrove's statement. I took into account the extreme nature of the recommendation for removal by an address of both Houses of Parliament, the rarity of such a step actually being taken. I don't think it has ever actually happened. There's been recommendation, but I don't think it has ever actually happened -- and the high test, the *Marshall* test, for such a recommendation.**
>
> **Unlike some of the cases where a recommendation has been made, I refer to the position of the judge, but in some of the cases there was evidence of corruption or moral turpitude on the part of the judge, and neither of those is a feature of the evidence before you.**
>
> **I took into account the recognition, as I said earlier, that Justice Cosgrove recognizes that it would be inappropriate for him to sit on any case involving the federal or provincial governments.**
>
> **I noted the nature and the depth of the statement that Justice Cosgrove -- that I expected he would make and that he just made, and its evident sincerity and the unlikelihood that the conduct which characterized the *Elliott* trial will ever be repeated.**
>
> **I took into account Justice Cosgrove's length of service and the fact he has but a limited time left on the Bench before mandatory retirement.**
>
> **I noted -- last night I was given the folder that I understand Mr. Paliare is going to give you -- the many being expressions of support for Justice Cosgrove. As I say, that just came to my attention, though I did not have it when I made the decision for the opinion that I am giving you now. But those expressions of support, people from the bar, the judiciary and the public that know Justice Cosgrove, do reinforce the view that I had formed before I was given it.**
>
> **For all these reasons, I am prepared, and I do, give you my view that the case as it stands now provides a basis for findings and conclusions by this panel and a recommendation that would result in a strong and pointed admonition, as I**

> **indicated, but does not any longer rise to the level that would justify a recommendation for removal, what all of that entails.**[36]

52. Independent Counsel then indicated that if the Inquiry Committee shared his view that the record no longer supported a recommendation for removal, then he did not feel it was necessary to continue to read in the evidence or to call the four scheduled witnesses:

> **If the panel sees fit to accept this view, then my view is that the panel has enough evidence before it now to make its report to the Canadian Judicial Council and there is not a necessity for me to read in the balance of volume 4 of the evidence books that I have been reading to you for the past several days, but the material in volume 4 is there for you to review. It is evidence, part of the case that I have presented.**
>
> **If the panel wishes, I will mark the passages in volume 4 that I would have read if we don't go any further and I will read if we do go further; nor, if you accept the view that I have just expressed, do I feel it necessary to call the witnesses that I otherwise would have called on Thursday, in view of the statements, expressions of regret and apologies that have now been made by Justice Cosgrove.**[37]

53. The Inquiry Committee concluded that it wanted to hear the remainder of the case to be presented by Independent Counsel. In particular, the Inquiry Committee wished to hear from the four witnesses that Independent Counsel intended to call: Curt Flanagan (one of the Crown counsel who appeared on *Elliott*), Glen Bowmaster (a police officer who testified in *Elliott*), David Humphrey (counsel brought in to prosecute part of *Elliot*), and Steven Foster (the brother of the victim in *Elliott*).[38]

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[36] *September 10 Transcript* at p. 1692, line 5 to p. 1694, line 16, Book of Documents, Tab 7.

[37] *September 10 Transcript* at p. 1694, line 20 to p. 1695, line 12, Book of Documents, Tab 7.

[38] *September 10 Transcript* at p. 1703, line 10 to p. 1704, line 2, p. 1774, line 20 to p. 1775, line 14, Book of Documents, Tab 7.

### *H. Majority Reasons of the Inquiry Committee*

54. After reviewing the evidence before it in some detail, including the *viva voce* evidence of the 4 witnesses who testified, the majority identified three categories of allegations in the case presented by Independent Counsel: conduct that demonstrated incompetence, conduct that gave rise to a reasonable apprehension of bias, and conduct that amounted to an abuse of judicial independence or abuse of the office of a judge.[39]

55. The majority also noted that:

> **[127] Once reviewable misconduct has been identified, there is a further question as to whether it is so serious as to require a recommendation for removal, or whether some other recommendation would be more appropriate.[40]**

56. It identified the test it was required to apply as the one articulated in *Marshall*, namely:

> **[131] Is the conduct alleged so manifestly and profoundly destructive of the concept of impartiality, integrity, and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?[41]**

57. The majority did not specify whether it intended this formulation to be the test for identifying judicial misconduct or the test for determining whether judicial misconduct warrants removal from office.

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[39] *Inquiry Committee Report* at para. 130, Book of Documents, Tab 1.
[40] *Inquiry Committee Report* at para. 127, Book of Documents, Tab 1.
[41] *Inquiry Committee Report* at para. 131, Book of Documents, Tab 1.

58. The majority then proceeded to discuss the various allegations put forward by Independent Counsel under the headings of the three categories of misconduct it had identified.

**1) Incompetence**

59. On the subject of incompetence, the majority acknowledged that it was aware of no authority, Canadian or other, where incompetence resulted in a recommendation for a judge's removal.[42]

60. It held that there was an important public interest embodied in the principle of judicial independence which prevented it from sanctioning the incompetence of any judge, and that any such conduct, without more, would be accordingly insufficient to warrant a recommendation for removal.[43]

61. The particulars which the majority identified as demonstrating conduct which it described as incompetent were accordingly not a factor in its recommendation.[44]

**2) Appearance of Bias**

62. On the subject of the conduct giving rise to a reasonable apprehension of bias, the majority noted that "[s]ome such conduct may warrant a recommendation for

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[42] *Inquiry Committee Report* at para. 137, Book of Documents, Tab 1.
[43] *Inquiry Committee Report* at para. 152, Book of Documents, Tab 1.
[44] *Inquiry Committee Report* at paras. 150-152, Book of Documents, Tab 1; these were particulars 1, 2(e)-(f), and 6.

removal … . However, other conduct giving rise to a reasonable apprehension of bias is correctable in the appellate process."[45]

63. The majority further explained that while "[a]ctual bias may of course be a ground for recommending removal from office … the evidence in this case falls short of demonstrating actual bias, or bad faith, on the part of Justice Cosgrove. Independent Counsel did not press a case of actual bias."[46]

64. With regard to the particulars alleged by Independent Counsel, the majority held that:

(a) it did not consider any comments made by the Court of Appeal in previous cases (Particular 2) as grounds for a recommendation for removal;

(b) Particular 2(g) was more properly understood as a failure to exercise restraint, and would be discussed later;

(c) Particular 2(l) gave rise to a reasonable apprehension of bias;

(d) while some of the conduct alleged in Particular 3 was capable of redress on appeal and would not be reviewable in this complaint inquiry, requiring Crown counsel to respond to the allegations made against them by defence counsel gave rise to an appearance of bias, or was an abuse of judicial independence, or both;

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[45] *Inquiry Committee Report* at para. 132, Book of Documents, Tab 1.
[46] *Inquiry Committee Report* at para. 133, Book of Documents, Tab 1.

(e) in summary, particulars 2(l) and 3 gave rise to an appearance of bias, and supported a recommendation for removal.[47]

**3) Lack of Restraint and/or Abuse of Powers**

65. The majority described this kind of conduct as "everything from rude, abusive or intemperate language up to misuse of the contempt power, or threats to do so, and beyond that to defamatory statements of persons who had done no wrong and who, in some cases, had no opportunity to answer the judge's damning allegations."[48]

66. With reference to the particulars alleged by Independent Counsel, the majority found that:

(a) Particulars 2(a)-(d), (k), (q), 4, 5, and 5(c)-(g) constituted an abuse of judicial office or powers; and

(b) Particulars 2(g), (i), and (n)-(p) constituted a lack of judicial restraint.[49]

67. It found that the conduct alleged in these particulars met "the strict test set out above in Marshall."[50] It was this conduct in particular, characterized as exhibiting a lack of restraint or an abuse of judicial office or powers, which the majority held warranted a recommendation for removal, subject only to the effect to be given to Justice Cosgrove's statement.[51]

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[47] *Inquiry Committee Report* at paras. 140-147, Book of Documents, Tab 1.
[48] *Inquiry Committee Report* at para. 153, Book of Documents, Tab 1.
[49] *Inquiry Committee Report* at paras. 153-164, Book of Documents, Tab 1.
[50] *Inquiry Committee Report* at para. 164, Book of Documents, Tab 1.
[51] *Inquiry Committee Report* at para. 167, Book of Documents, Tab 1.

**4) Particulars Not Relied Upon**

68. For a number of particulars, the majority either found that they did not warrant a recommendation for removal, or did not expressly rely on them in recommending removal.

69. As discussed above, Particulars 1, 2(e)-(f), and 6, were found not to warrant a recommendation of removal because of the nature of the allegations they contained (that the conduct they allege could be described as incompetent).[52]

70. With respect to Particular 2, the majority noted that it was confining its analysis to what happened in the Elliott trial, and accordingly giving no weight to the decisions of the Court of Appeal in *Perry v. Ontario* (1997), 33 O.R. (3d) 705 and *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735.[53]

71. It then explained that, for the same reason, it would give no weight to the letters of reference submitted by Justice Cosgrove "in [its] determination of whether his conduct in Elliott should lead to a recommendation for removal."[54]

72. With respect to Particular 7, the majority noted that, although it appeared likely that Justice Cosgrove became aware of the CJC's Ethical Principles for Judges (the "Ethical Principles") at some point prior to their publication in November of 1998 (in the

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[52] *Inquiry Committee Report* at paras. 150-152, Book of Documents, Tab 1. See also paras. 59-61, above.
[53] *Inquiry Committee Report* at para. 38, Book of Documents, Tab 1.
[54] *Inquiry Committee Report* at para. 38, Book of Documents, Tab 1.

midst of the Elliott trial), it assessed Justice Cosgrove's conduct "substantially" in light of s. 65(2) of the *Judges Act*, rather than the Ethical Principles.[55]

73. Particular 2(j) related to Justice Cosgrove's indicating there were areas of interest in the anticipated testimony of Crown Cavanagh which the Court would explore with the witness if counsel did not. The majority did not believe this conduct was warranting of censure, whether viewed in isolation or in the context of the *Elliott* transcript as a whole.[56]

74. Particulars 2(h) and (m) were not expressly found to ground a recommendation for removal on any basis. With regard to Particular 2(h), the majority found there was "no basis" for Justice Cosgrove to deny Crown Ramsay the opportunity to present his recusal motion,[57] but did not otherwise discuss this conduct, or find that it was or was not misconduct. With regard to Particular 2(m), the majority remarked that Justice Cosgrove's orders requiring the Crown's internal memorandum to be produced to defence counsel were "exceptional,"[58] but did not otherwise discuss this conduct.

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[55] *Inquiry Committee Report* at paras. 105-107, Book of Documents, Tab 1.
[56] *Inquiry Committee Report* at para. 68, Book of Documents, Tab 1.
[57] *Inquiry Committee Report* at para. 65, Book of Documents, Tab 1.
[58] *Inquiry Committee Report* at paras. 75-76, Book of Documents, Tab 1.

**5) Justice Cosgrove's Statement**

75. The majority prefaced its consideration of Justice Cosgrove's statement by remarking that the context and timing of the statement were important to give the statement its proper weight and effect.[59]

76. The majority then reviewed the history of the *Elliott* trial, of the Attorney General's complaint, and of the Inquiry, including the various preliminary applications brought by Justice Cosgrove, and the various appeals of those decisions made by both Justice Cosgrove and the Crown.[60]

77. All of this was apparently with a view to expressing why the majority was "concerned" about "why [Justice Cosgrove] waited so long to apologize."[61]

78. The majority then parsed the wording of Justice Cosgrove's apology, finding that:

(a) Justice Cosgrove's remark at paragraph 9 of the apology that "[c]ounsel for both parties aggressively represented their client's interests" suggested that he still held the Crown partly responsible for some of his difficulties;[62]

(b) Justice Cosgrove acknowledged "error" in the exercise of his contempt jurisdiction, that some of his good-faith decisions were "wrong", that he regretted "errors" and "mistakes" set aside by the Court of Appeal, that he regretted "intemperate, denigrating, or unfair language that [he] may have

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[59] *Inquiry Committee Report* at para. 168, Book of Documents, Tab 1.
[60] *Inquiry Committee Report* at paras. 169-181, Book of Documents, Tab 1.
[61] *Inquiry Committee Report* at para. 182, Book of Documents, Tab 1.
[62] *Inquiry Committee Report* at para. 183, Book of Documents, Tab 1.

> used" [Inquiry Committee's emphasis], and that he apologized to all those who had been harmed, including the victim's family.[63]

79. The majority concluded that it continued to have "grave concerns," and that Justice Cosgrove's apology could not serve to restore public confidence in the judge or in the administration of justice.[64]

**6) Conclusion**

80. In the result the majority found that the admonition sought by Independent Counsel would not "adequately respond to the conduct," and that because Justice Cosgrove's conduct both constituted an abuse of his powers of a judge, which was a failure in the due execution of his office, and gave rise to a reasonable apprehension of bias, it recommended removal.[65]

### *I. Minority Reasons of the Inquiry Committee*

81. Justice Wachowich disagreed with the majority of the Inquiry Committee. He recommended that the CJC should provide a strong admonition to Justice Cosgrove, rather than recommending that he be removed from the Bench.[66] Justice Wachowich concluded that Justice Cosgrove's statement was a sincere admission of judicial

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[63] *Inquiry Committee Report* at paras. 184-86, Book of Documents, Tab 1.

[64] *Inquiry Committee Report* at para. 187, Book of Documents, Tab 1.

[65] *Inquiry Committee Report* at paras. 188-90, Book of Documents, Tab 1.

[66] *Inquiry Committee Report* at para. 191, Book of Documents, Tab 1; Justice Wachowich adopted the reasons of the majority of the Inquiry Committee, except for paragraphs 182 to 190.

misconduct, demonstrated utmost regret for his conduct, and exemplified his determination to exhibit and to promote the high standards of judicial conduct.[67]

82. Justice Wachowich placed "significant weight" on the opinion of Independent Counsel that, given Justice Cosgrove's admission of judicial misconduct and his statement, the facts as particularized supported a strong admonition, but no longer supported a recommendation for removal. Justice Wachowich emphasized that Independent Counsel was charged to represent the public interest in the inquiry.[68]

83. Justice Wachowich noted that Justice Cosgrove had reflected upon the Ethical Principles, had concluded that his conduct did not meet those standards, and promised to dedicate himself to meeting those standards in the future.[69]

84. In addition, he disagreed with the majority reasons in two key respects – he concluded that Justice Cosgrove's apology was sincere and unqualified:

> **[195] The sincerity of Justice Cosgrove's statement is demonstrated from the outset. He explains that this experience has been "extremely humbling and chastening" for him (at para. 1). He states, "[t]o be clear, I made many mistakes in that trial ... I at times lost my way. ... I now realize that I made a series of significant errors that affected that proceeding" (at para. 3). Justice Cosgrove outlines that he read the Court of Appeal decision carefully and was humbled (at para. 4). He states that "the Court of Appeal found that I had made many errors in my findings of fact and I had misapplied the law on numerous occasions. I accept their reasons without reservation" (at para. 4). Justice Cosgrove notes that he reflected upon the Court of Appeal's decision for the past five years and he then states the following: "The Court of Appeal's reasons for decision have affected me greatly. I have no doubt they have made, and will make me, a better trial judge. I fully appreciate my duties and responsibilities as a judge. I have changed, and will continue to change, my approach to judicial decisions based upon the insights I have obtained from the reasons of the Court of Appeal" (at para. 5). Justice Cosgrove also explains**

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[67] *Inquiry Committee Report* at para. 200, Book of Documents, Tab 1.
[68] *Inquiry Committee Report* at para. 192, Book of Documents, Tab 1.
[69] *Inquiry Committee Report* at para. 194, Book of Documents, Tab 1.

> **that he has "spent many hours reflecting carefully on the Notice provided to me by independent counsel" (at para. 7).**
>
> **[196] The majority of the Committee notes that Justice Cosgrove's statement may not necessarily be viewed as an unqualified apology (at para. 183) and the Committee then outlines portions of the statement that raise such a concern. I respectfully disagree, however, that the phrase "[c]ounsel for both parties aggressively represented their client's interests" (at para. 9) can be interpreted, as suggested by the Committee (at para. 183), to mean that Justice Cosgrove still holds the Crown partly responsible for his difficulties throughout the trial. Nor do I agree that utilizing the word "may" in the regret expressed for "any intemperate, denigrating or unfair language that I may have used" (at para. 9) is to be construed unfavourably towards Justice Cosgrove's statement in its entirety. Rather, Justice Cosgrove realizes that his conduct during the trial was not above reproach in the view of reasonable, fair minded and informed persons. He admits, "[w]ith hindsight, my attempts met with only modest success. ... It is certainly not typical of my conduct in the courtroom, and I have and will continue to ensure that I always conduct myself in the best traditions of the judiciary" (at para. 9).[70]**

85. Justice Wachowich concluded that, among other things, Justice Cosgrove's statement demonstrated that he now realized he did not perform his adjudicative duties with utmost diligence and that he erred in his discretionary exercise of the contempt jurisdiction.[71]

86. Justice Wachowich concluded that, because of Justice Cosgrove's sincere statement, public confidence in the administration of justice could be attained through a strong public admonition:

> **[200] Although the majority takes the view that the statement, even viewed in its most positive light, cannot serve to restore public confidence in Justice Cosgrove, nor in the administration of justice (at para. 187), I respectfully disagree. It is clear from the statement that Justice Cosgrove has undergone serious reflection about his past conduct, recognizing how his errors have affected the trial process and public confidence in the justice system. He has reviewed the Canadian Judicial Council's Ethical Principles for Judges, as well as the Council's Guidelines on the Use of Contempt Powers. The entirety of Justice Cosgrove's statement demonstrates utmost regret for his conduct, but it also exemplifies his determination to exhibit and promote the high standards of judicial conduct, so as to reinforce public confidence in himself and the administration of justice. It is my**

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[70] *Inquiry Committee Report* at paras. 195, 196, Book of Documents, Tab 1.

[71] *Inquiry Committee Report* at paras. 197-98, Book of Documents, Tab 1.

**view that the public not only understands the gravity of Justice Cosgrove's past conduct and the effect it has had on the administration of justice, but that the public is also capable of understanding Justice Cosgrove's sincere apology and his ability to refrain from such behaviour in the future. Public confidence in the administration of justice is attainable through a strong, public admonition of Justice Cosgrove.**[72]

[72] *Inquiry Committee Report* at para. 200, Book of Documents, Tab 1.

## **Part III.** Submissions of Justice Cosgrove

87. Justice Cosgrove does not challenge the finding of the Inquiry Committee that his conduct in the *Elliott* trial constituted judicial misconduct (or in the words of the CJC's *Matlow Report*, "sanctionable conduct"). As such, it falls within paragraph 65(2)(b) of the *Judges Act*. Justice Cosgrove submits, however, that in all of the circumstances of this case, his conduct does not warrant a recommendation to the Minister of Justice that he be removed.

### ***A. Role of the Canadian Judicial Council***

88. As the CJC recognized in the *Matlow Report*, having received the Inquiry Committee Report, the CJC's task is to make its own report and recommendations to the Minister of Justice of Canada.[73] The CJC is not an appellate tribunal sitting in review of the decision of the Inquiry Committee. The CJC does not apply a standard of review to the Inquiry Committee Report. The CJC is to make its own independent assessment and judgment of whether or not the challenged conduct amounts to sanctionable conduct and, if so, to determine what sanction is appropriate.[74]

89. There are at least 4 key principles that guide the CJC in making its report :

(a) the CJC should carefully consider the report of the Inquiry Committee, which is meant to assist and guide the CJC in its deliberations;

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[73] *Report of the Canadian Judicial Council to the Minister of Justice*, Inquiry concerning the Hon. Theodore Matlow, December 3, 2008, at para. 48 *[Matlow Report*], Book of Documents, Tab 9.

[74] *Matlow Report* at paras. 52-56, Book of Documents, Tab 9.

(b) the CJC ought not to interfere with factual findings or inferences made by the Inquiry Committee without good reason;

(c) the CJC is not bound to defer to the conclusions of an inquiry committee as to whether challenged conduct should properly be considered sanctionable conduct; and

(d) the CJC is not bound to defer to the recommendation of the Inquiry Committee on the subject of sanction, and should consider the matter afresh and make its own independent judgment regarding what sanctions should be imposed.[75]

90. The CJC's obligation to make its own independent assessment and judgment accords with the statutory framework set out in ss. 65(1) and 65(2) of the *Judges Act*, and the serious nature of the interests at stake. Moreover, such an approach ensures uniformity and the fair and equal treatment of judges across the land and promotes and protects judicial independence.[76]

***B. Analytic Framework to be utilized by the CJC***

91. Justice Cosgrove submits that, consistent with the *Matlow Report*, the CJC should approach its task in two stages.

92. First, the CJC must determine whether Justice Cosgrove's conduct falls within any one of paragraphs (b) through (d) of s. 65(2) of *the Judges Act*. As noted above, Justice Cosgrove does not challenge the findings of the Inquiry Committee that his

[75] *Matlow Report* at paras. 51 to 57, Book of Documents, Tab 9.
[76] *Matlow Report* at para. 56, Book of Documents, Tab 9.

conduct amounted to judicial misconduct. The CJC can then proceed to the second step.

93. Second, the CJC must determine whether the conduct is 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.[77]

94. To answer this question, the CJC must focus on the prospective nature of the question and consider all relevant evidence and circumstances in answering that prospective question. Justice Cosgrove submits that the Inquiry Committee failed to perform that task.[78]

95. In the *Matlow Report*, the CJC emphasized that an important, albeit implicit, aspect of the test for removal is its prospective nature. The test for removal must focus on whether or not public confidence would be sufficiently undermined to render the judge incapable of executing judicial office in the future in light of the conduct to date.

> **[164] We adopt the Inquiry Committee's statement of the test for removal from the Bench, particularly at paras. [111] - [113]. Quoting from para. 35 of the *Report of the Inquiry Committee concerning Mr. Justice Bernard Flynn of the Superior Court of Quebec (2003)* (the "Flynn Inquiry Report"), the test proposed and adopted there, and by the Inquiry Committee here, 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?**

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[77] *Matlow Report* at para. 164, Book of Documents, Tab 9.

[78] *Matlow Report* at para. 166, Book of Documents, Tab 9.

> **[165] The Inquiry Committee Report, at para. 112, goes on to cite para. 147 of *Re Therrien*, *supra*, where in considering the removal of a Provincial Court Judge from office the Supreme Court of Canada stated:**
>
> > **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. 80-81).**
>
> **[166] The Inquiry Committee, at para. [113] of its Report, correctly characterized its task as two-fold: first, determine whether Justice Matlow's conduct falls within any one of paragraphs (b) through (d) of s. 65(2) of the *Judges Act*; and second, if so, apply the test for removal set forth above. An important aspect of the test not specifically articulated is its prospective nature. Implicit in the test for removal is the concept that public confidence in the judge would be sufficiently undermined to render him or her incapable of executing judicial office in the future in light of his or her conduct to date.** [79]

96. To apply properly the test for removal, especially its prospective nature, the CJC should take into account the broad range of factors it took into account when determining the appropriate sanction in the *Matlow Report*:

> **[181] We have carefully considered the articulated test for removal from the Bench, the findings of the Inquiry Committee Report as modified by these Reasons, the evidence tendered by way of letters of support to the Inquiry Committee, Justice Matlow's address to the CJC at the Public Meeting and the extent of his expressions of regret contained therein, previous decisions of the CJC and other judicial councils and the relevant jurisprudence.**
>
> **[182] In doing so, it is important to place Justice Matlow's conduct in the context of his judicial career. Justice Matlow has served on the Bench for 27 years. During that time, apart from this case, there is no evidence before us of any improper or inappropriate behaviour on his part on or off the Bench.** [80]

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[79] *Matlow Report* at paras. 164-166 [emphasis added], Book of Documents, Tab 9.

[80] *Matlow Report* at paras. 181-182, Book of Documents, Tab 9.

97. Justice Cosgrove submits that the majority of the Inquiry Committee focussed on the conduct of Justice Cosgrove, but failed to consider whether or not it would render him incapable of executing judicial office in the future. Moreover, it failed to take into account many important factors or gave them far too little weight. These interrelated errors, Justice Cosgrove submits, contributed to the majority of the Inquiry Committee recommending that he be removed from office. They included that:

(a) The Inquiry Committee refused to consider the 32 character letters filed by Justice Cosgrove. These letters (many very detailed) speak, in part, to public support and confidence in Justice Cosgrove. They also speak to an assessment by their authors as to Justice Cosgrove's character and how unlikely they believe a repetition of the misconduct to be.

(b) The majority of the Inquiry Committee failed to place Justice Cosgrove's conduct in the context of his entire judicial career. Justice Cosgrove has served on the Bench for 24 years. During that time, apart from the *Elliott* case, there is no evidence of any inappropriate or improper conduct on his part on or off the Bench. Quite the contrary, the character letters that the Inquiry Committee disregarded speak to his enviable record of judicial and community commitment. This is strong evidence that the conduct will not be repeated in the future.

(c) The majority of the Inquiry Committee failed to give sufficient weight to the opinion of the Independent Counsel, who is charged with representing the public interest, that taking Justice Cosgrove's statement into account, the case no longer supported a recommendation for removal.

(d) The majority of the Inquiry Committee gave insufficient weight to Justice Cosgrove's sincere recognition of the inappropriateness of his past conduct and his apology for that conduct, or of the ability of that

recognition and apology to reinforce public confidence in himself and in the administration of justice.

(e) The Inquiry Committee gave no weight to the fact that Justice Cosgrove sat as a judge for more than 4.5 years after his decision in *Elliott* without any complaints by the public or the Crown, including the five months between the decision of the Court of Appeal for Ontario and the complaint of the Attorney General for the Province of Ontario. This fact is strong evidence that notwithstanding the publicity that accompanied the *Elliott* decision, his ability to maintain public confidence while discharging his full duties was not impaired.

98. Justice Cosgrove submits that focusing on the prospective nature of the test for removal leads to the conclusion that removal is not appropriate.

### *C. Justice Cosgrove's statement to the Inquiry Committee is strong evidence that removal from office is not necessary*

99. Justice Cosgrove urges the CJC to consider carefully his statement to the Inquiry Committee as supplemented by his statement to the CJC. Justice Cosgrove submits that it is strong evidence that the CJC need not recommend his removal from office.

100. With respect, the Inquiry Committee's treatment of Justice Cosgrove's statement is unreasonable, uncharitable, and unfair. The Inquiry Committee's parsing of Justice Cosgrove's language has obscured its true import: it was a sincere, complete, and abject apology for acts of judicial misconduct and other acts which may not even amount to judicial misconduct but nevertheless had a significant and troubling effect on the lives of public servants and citizens. It was a promise to do better in the future, which was informed and infused by reference to the canonical works of the CJC.

101. The Inquiry Committee concluded the apology was "not unqualified" and showed that Justice Cosgrove still blamed the Crown for his difficulties; that it demonstrated a lack of "insight into his own role in the trial" and that he "minimizes his own responsibility for controlling the trial." The Inquiry Committee seized on the use of the word "may" and "error" to discount the sincerity and depth of Justice Cosgrove's statement.[81] This strained interpretation of the statement is simply not supportable if the entirety of the apology is considered objectively.

102. Justice Cosgrove submits that Justice Wachowich's interpretation of the apology should be preferred by the CJC:

> **[195] He explains that this experience has been "extremely humbling and chastening" for him (at para. 1). He states, "[t]o be clear, I made many mistakes in that trial ... I at times lost my way. ... I now realize that I made a series of significant errors that affected that proceeding" (at para. 3). Justice Cosgrove outlines that he read the Court of Appeal decision carefully and was humbled (at para. 4). He states that "the Court of Appeal found that I had made many errors in my findings of fact and I had misapplied the law on numerous occasions. I accept their reasons without reservation" (at para. 4). Justice Cosgrove notes that he reflected upon the Court of Appeal's decision for the past five years and he then states the following: "The Court of Appeal's reasons for decision have affected me greatly. I have no doubt they have made, and will make me, a better trial judge. I fully appreciate my duties and responsibilities as a judge. I have changed, and will continue to change, my approach to judicial decisions based upon the insights I have obtained from the reasons of the Court of Appeal" (at para. 5). Justice Cosgrove also explains that he has "spent many hours reflecting carefully on the Notice provided to me by independent counsel" (at para. 7).**
>
> **[196] The majority of the Committee notes that Justice Cosgrove's statement may not necessarily be viewed as an unqualified apology (at para. 183) and the Committee then outlines portions of the statement that raise such a concern. I respectfully disagree, however, that the phrase "[c]ounsel for both parties aggressively represented their client's interests" (at para. 9) can be interpreted, as suggested by the Committee (at para. 183), to mean that Justice Cosgrove still holds the Crown partly responsible for his difficulties throughout the trial. Nor do I agree that utilizing the word "may" in the regret expressed for "any intemperate, denigrating or unfair language that I may have used" (at para. 9) is to be construed unfavourably towards Justice Cosgrove's statement in its entirety. Rather, Justice**

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[81] *Inquiry Committee* Report at paras. 183-185, Book of Documents, Tab 1.

> **Cosgrove realizes that his conduct during the trial was not above reproach in the view of reasonable, fair minded and informed persons. He admits, "[w]ith hindsight, my attempts met with only modest success. ... It is certainly not typical of my conduct in the courtroom, and I have and will continue to ensure that I always conduct myself in the best traditions of the judiciary" (at para. 9).**
>
> **[197] Further, the statement illustrates that Justice Cosgrove now realizes he did not perform his adjudicative duties with the utmost diligence. He regrets not adhering to the highest standard of impartiality and an even-handed application of the law, which includes treating all parties fairly and even-handedly and to ensure that proceedings are conducted in an orderly and efficient manner. Justice Cosgrove explicitly reflects upon and regrets his errors of findings against the "Ministry of the Attorney General and its senior representatives, Crown counsel, police officers and public officials" as well as his "references to individuals that were not before the court" (at para. 8). He adds "I regret very much the effect my erroneous judicial decisions had on the Ministry of the Attorney General, its counsel and the trial process" (at para. 8). Moreover, after reviewing the trial transcript, Justice Cosgrove notes that "defence counsel used extravagant rhetoric to characterize the conduct of the Crown counsel and the police. Some of his statements simply had no place in a courtroom. While I interjected from time to time in an attempt to curb his excesses, it is now evident to me that I did not intervene forcefully or often enough. I should have. I will in the future" (at para. 10).**
>
> **[198] Justice Cosgrove also recognizes that he erred in his discretionary exercise of the contempt jurisdiction and he states, "I appreciate the purpose of the contempt power and have carefully reviewed the CJC's Guidelines on the Use of Contempt Powers. I will continue to be guided by them in the future" (at para. 11). He admits that some of his judicial decisions "unnecessarily expanded the scope of the trial and diverted attention from the central issues of the proceeding. These decisions were wrong. They unnecessarily delayed the proceeding and wasted scarce resources on matters that, with the benefit of hindsight, were not material to the proceeding" (at para. 12).**[82]

103. Justice Cosgrove also agrees with the interpretation offered by Independent Counsel who said of Justice Cosgrove's statement that:

> **There is a recognition of the errors that were made by Justice Cosgrove in his conduct of the Elliott trial in fact, in law and in process.**
>
> **There is a recognition of the effect that his conduct of the trial had on the Crown's ability to present its case and on the administration of justice, generally.**
>
> **There is a clear statement from Justice Cosgrove that this inquiry process has led to an understanding and recognition such that it is reasonable to assume that the conduct that has led to this complaint and this inquiry is unlikely to be repeated.**

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[82] *Inquiry Committee Report* at paras. 195-198, Book of Documents, Tab 1.

> **There is a series in the statement of full and unreserved apologies in appropriate form to those who are entitled to receive apologies from Justice Cosgrove, including the Crown attorneys, the Ministry of the Attorney General, the lawyers in the Ministry, the police, the civilian witnesses, the public and, most importantly, the Foster family.**
>
> **...**
>
> **I noted the nature and the depth of the statement that Justice Cosgrove -- that I expected he would make and that he just made, and its evident sincerity and the unlikelihood that the conduct which characterized the *Elliott* trial will ever be repeated.**[83]

104. The Inquiry Committee ultimately concluded that the statement, "even viewed in its most positive light: cannot serve to restore public confidence in the judge or in the administration of justice" and that an admonition would not adequately respond to the conduct. [84]

105. In contrast Justice Wachowich concluded that, given the sincere apology of Justice Cosgrove and his ability to refrain from such behaviour in the future, public confidence in the administration of justice could be attained without removing Justice Cosgrove from the Bench:

> **[200] Although the majority takes the view that the statement, even viewed in its most positive light, cannot serve to restore public confidence in Justice Cosgrove, nor in the administration of justice (at para. 187), I respectfully disagree. It is clear from the statement that Justice Cosgrove has undergone serious reflection about his past conduct, recognizing how his errors have affected the trial process and public confidence in the justice system. He has reviewed the Canadian Judicial Council's Ethical Principles for Judges, as well as the Council's Guidelines on the Use of Contempt Powers. The entirety of Justice Cosgrove's statement demonstrates utmost regret for his conduct, but it also exemplifies his determination to exhibit and promote the high standards of judicial conduct, so as**

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[83] *September 10 Transcript* at p. 1669, line 24 to p. 1670, line 20, p. 1693, lines 14-19, Book of Documents, Tab 7.

[84] *Inquiry Committee Report* at para. 187, Book of Documents, Tab 1.

> **to reinforce public confidence in himself and the administration of justice. It is my view that the public not only understands the gravity of Justice Cosgrove's past conduct and the effect it has had on the administration of justice, but that the public is also capable of understanding Justice Cosgrove's sincere apology and his ability to refrain from such behaviour in the future. Public confidence in the administration of justice is attainable through a strong, public admonition of Justice Cosgrove.**[85]

106. Justice Cosgrove submits that the CJC should adopt the conclusion reached by Justice Wachowich.

**1) Justice Cosgrove's statement was an admission of judicial misconduct**

107. Justice Cosgrove wishes to reiterate that his apology was, and was intended to be, a sincere admission of judicial misconduct. The Inquiry Committee found that it was an admission of judicial misconduct,[86] as did Justice Wachowich.[87] Independent Counsel concluded that the statement was an admission of judicial misconduct.[88]

108. There was some regrettable confusion at the inquiry over this point. This arose out of two possible definitions of judicial misconduct:

(a) first, is judicial misconduct conduct that meets the *Marshall* test and thus necessitates a recommendation for removal? or

(b) second, is judicial misconduct conduct that falls within any one of the paragraphs of s. 65(2) of the *Judges Act* and could lead to either a recommendation for removal or a lesser penalty.

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[85] *Inquiry Committee Report* at para. 200, Book of Documents, Tab 1.
[86] *Inquiry Committee Report* at paras. 25, 128, Book of Documents, Tab 1.
[87] *Inquiry Committee Report* at para. 192, Book of Documents, Tab 1.
[88] *Inquiry Committee Report* at para. 129, Book of Documents, Tab 1.

109. When counsel for Justice Cosgrove stated that Justice Cosgrove was not admitting to judicial misconduct, he was attempting to indicate only that Justice Cosgrove was not admitting to conduct that, in his view, necessitated removal from the Bench. This, it is submitted, is not a reason to discount the sincerity or nature of the apology and statement.

**2) The timing of Justice Cosgrove's statement does not diminish its importance**

110. Finally, the Inquiry Committee may have been troubled by the timing of Justice Cosgrove's statement and the interlocutory proceedings described above. Justice Cosgrove explained the timing of his statement as follows:

> **[16] I want to address the timing of this apology. At the time of the events, and for years afterward, I had a steadfast belief in the correctness of my decisions. Although they were criticized, I, like every trial judge I know, believed my decisions were the right ones. When the Court of Appeal issued its reasons, its harsh assessment of my decision came as a shock to me. Obviously, I accepted their authority to review and correct my judgment. Nevertheless, I was sustained by my view that I had approached the case, and its many problems, in good faith, and to the best of my ability. That overriding belief has informed my view of the case, and this proceeding before the CJC.**
>
> **[17] Recently, I began to prepare for the current hearing. My preparation has profoundly affected my appreciation of the circumstances of this case. Both on my own and with my counsel, I have spent literally weeks reviewing the record of the trial proceedings, and even reviewing the Bench books I created at the time. Finally, I have spent days in this room hearing Independent Counsel's reading passages of the evidence from the proceeding. All of these steps have caused me to re-live the trial, but for the first time from an entirely different perspective.**
>
> **[18] As a trial judge, I have spent 24 years assessing the actions of others. This process required me to step back and assess my own actions and how they affected others. It has been a revealing and chastening process. That experience has driven home the need for me to make this apology to those affected by my actions, and to make this statement at this time.**[89]

[89] *Cosgrove Statement* at paras. 16-18, Book of Documents, Tab 1e.

111. In addition, Justice Cosgrove submits that, although ultimately unsuccessful, his challenge to the constitutionality of s. 63(1) of the *Judges Act* was by no means frivolous. The Federal Court agreed with his position.[90] The Association supported his position.[91] There can be no doubt that he had the right to challenge the constitutionality of the provision and his decision to do so, on the advice of counsel, should not undermine the sincerity of his statement.

112. Independent counsel, while noting that it would have been better for everyone if Justice Cosgrove's statement and apology were made earlier, agreed that Justice Cosgrove was exercising his right to challenge the provision and noted that he had some support:

> **Justice Cosgrove did address that in several paragraphs of his statement. The way I read it is that Justice Cosgrove, as was his right as any citizen, albeit ultimately wrongly, chose two things.**
>
> **He chose, first of all, to challenge the constitutionality of section 63(1) of the *Judges Act*. That challenge was ultimately unsuccessful, but maybe it had some significance on this issue that there was one judge of the Federal Court that found it had merit. She was reversed and his challenge was supported by -- you will have to remind me of the name, but the association of judges, and strongly supported at all levels by the association of judges, and indeed by the criminal bar.**
>
> **So while it was ultimately held to have no merit, it did have support. As I say, every citizen, even judges, are entitled to exercise their rights to challenge the constitutional validity of legislation that affects them.**
>
> **While I argued as strongly as I could, and others did, that the legislation was constitutionally valid, and this panel held indeed it was constitutionally valid, that caused a significant delay.[92]**

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[90] *Cosgrove v. CJC*, Book of Documents, Tab 4.

[91] As did the Criminal Lawyers' Association of Ontario and the Canadian Council of Criminal Defence Lawyers.

[92] *September 10 Transcript* at p. 1697, line 15 to p. 1698, line 16, Book of Documents, Tab 7.

113. Moreover, under the legislative framework, it is difficult to see how Justice Cosgrove's statement could have been given prior to the inquiry. There is no process to do so. Moreover, his statement did not halt the work of the Inquiry Committee, which elected to receive all of the evidence marshaled by Independent Counsel in order to complete their mandate.

114. Finally, Justice Cosgrove's statement came earlier in the inquiry proceeding than one would normally expect. In the usual course, Independent Counsel would present the entirety of the case first, and then the judge would be given an opportunity to make a statement as part of their case. Justice Cosgrove made his statement when he did, in part, in an attempt to curtail the length of the inquiry.

### *D. The opinion of Independent Counsel is strong evidence that a recommendation for removal from office is unnecessary*

115. Following Justice Cosgrove's statement, Independent Counsel indicated that based on Justice Cosgrove's statement, he was of the view that the record was no longer capable of supporting a recommendation that Justice Cosgrove be removed from office. Rather, Independent Counsel stated, it was his view that the record was capable of supporting a recommendation for a strong admonition:

> **…I had the opportunity of learning yesterday what Justice Cosgrove was going to say to this panel about his conduct in the *Elliott* trial.**
>
> **Knowing that the evidence to this inquiry would be supplemented in this way caused me to reevaluate my view of the case that I have been presenting to this panel on the basis of the whole of the evidence, and, in particular, whether the record as a whole was capable of meeting the onerous *Marshall* test that again I referred to in my opening, which is, to restate it: That a judge, in order that a recommendation for removal as opposed to some lesser recommendation be made, has conducted himself or herself in a way that is so manifestly and**

> **profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.**
>
> **The statement that you just heard contains a number of key elements in it that have influenced my thinking. There is a recognition of the errors that were made by Justice Cosgrove in his conduct of the *Elliott* trial in fact, in law and in process.**
>
> **There is a recognition of the effect that his conduct of the trial had on the Crown's ability to present its case and on the administration of justice, generally.**
>
> **There is a clear statement from Justice Cosgrove that this inquiry process has led to an understanding and recognition such that it is reasonable to assume that the conduct that has led to this complaint and this inquiry is unlikely to be repeated.**
>
> **There is a series in the statement of full and unreserved apologies in appropriate form to those who are entitled to receive apologies from Justice Cosgrove, including the Crown attorneys, the Ministry of the Attorney General, the lawyers in the Ministry, the police, the civilian witnesses, the public and, most importantly, the Foster family.**
>
> **There is the understanding and appreciation that it would be inappropriate, for Justice Cosgrove's remaining 15 months or so on the Bench, to sit on any case involving the federal or provincial governments or Attorney Generals.**
>
> **The result of that is that my view of the record as it now stands and of the jurisprudence that I have reviewed, that I will review briefly with you, that while the case on that record is capable of providing a basis for findings by this Inquiry Committee, and the Judicial Council to which it reports, the findings and conclusions that would warrant a strong and pointed admonition to Justice Cosgrove about, speaking generally, his conduct of the *Elliott* trial.**
>
> **That record as it stands now is no longer, in my view, capable of supporting a recommendation for removal from office, but, rather, it is capable of supporting a recommendation for a strong admonition, or whatever the appropriate word is for what the Canadian Judicial Council does in cases of this kind.**[93]

116. Justice Wachowich, correctly in the submission of Justice Cosgrove, placed significant weight on the opinion of Independent Counsel:

> **[192] The Committee has recorded Justice Cosgrove's acknowledgment that his statement to the Committee on September 10, 2008, was in fact an admission of judicial misconduct (at para. 128). Mr. Cherniak was of the opinion that "the facts as particularized and proven were capable of supporting a recommendation for removal" but that "the statement was an admission of judicial misconduct and,**

[93] *September 10 Transcript* at p. 1669, line 1 to p. 1671, line 18, Book of Documents, Tab 7.

> **given the admission, [Mr. Cherniak] submitted that the facts as particularized supported a strong admonition, but no longer supported a recommendation for removal" (at para. 129). I place significant weight upon the opinion of Mr. Cherniak, who, in his role as independent counsel, represents the public interest. Justice Cosgrove's statement, although late in its arrival, is a sincere admission of judicial misconduct which mitigates in favour of Justice Cosgrove.**
>
> **...**
>
> **[201] I conclude by emphasizing that Independent Counsel is of the view that the facts of this case support a strong admonition as opposed to removal from office of Justice Cosgrove. The reason Independent Counsel came to such a conclusion is because of Justice Cosgrove's sincere admission of judicial misconduct in his statement to this Committee. I agree with Independent Counsel, as displayed in my analysis above, and therefore accept Justice Cosgrove's statement as an admission of judicial misconduct.**[94]

117. Justice Cosgrove recognizes that neither the Inquiry Committee, nor the CJC is bound by the opinion of Independent Counsel.

118. However, the CJC should give significant weight to the opinion of Independent Counsel because he:

(a) is charged with the duty to present the case to the Committee;

(b) is required to act impartially and in the public interest;

(c) had reviewed every one of the more than 20,000 pages of the transcript from the lengthy *Elliott* trial and examined the exhibits from the trial;

(d) interviewed numerous people involved in or affected by the *Elliott* trial; and

(e) represents the public interest, which features so prominently in the analysis of whether or not a recommendation for removal is appropriate.

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[94] *Inquiry Committee Report* at paras. 192, 201, Book of Documents, Tab 1.

119. The opinion of Independent Counsel is strong evidence that a recommendation that Justice Cosgrove be removed from office is unnecessary in the circumstances of this case.

### *E. The character letters filed by Justice Cosgrove are strong evidence that a recommendation for removal from office is unnecessary*

120. Justice Cosgrove submitted to the Inquiry Committee a volume containing 32 references letters that provided evidence of his character and integrity.[95] The letters did not address whether or not the conduct complained of occurred. Rather, they addressed aspects of Justice Cosgrove's character, integrity, honesty, conscientious work ethic, and commitment. Justice Cosgrove submits that the letters were relevant to the whether or not his conduct warranted a recommendation for removal from the Bench.[96] The letters came from the following sources:

(a) 15 letters from currently sitting judges, some of whom had appeared before Justice Cosgrove before they became judges;[97]

(b) 6 letters from retired judges;[98]

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[95] *Volume of Reference Letters*, Exhibit 10 to the Inquiry Committee Proceedings concerning the Hon. Paul Cosgrove, Book of Documents, Tab 10.

[96] *Transcript of the Proceedings of the Inquiry Committee concerning the Hon. Paul Cosgrove*, September 11, 2008, at p. 1899, line 7 to p. 1900, line 22, Book of Documents, Tab 8.

[97] The Hon. Mr. Justice Douglas M. Belch, The Hon. Mr. Justice Richard G. Byers, The Hon. Mr. Justice James H. Clarke, The Hon. Mr. Justice Robert C. Desmarais, The Hon. Mr. Justice Charles T. Hackland, The Hon. Mr. Justice Roydon J. Kealey, The Hon. Mr. Justice James C. Kent, The Hon. Madam Justice Helen K. MacLeod-Beliveau, The Hon. Mr. Justice Barry M. Matheson, The Hon. Mr. Justice Colin D. McKinnon, The Hon. Madam Justice Monique Métivier, The Hon. Mr. Justice Kenneth E. Pedlar, The Hon. Mr. Justice Michael J. Quigley, The Hon. Mr. Justice Douglas Rutherford, and The Hon. Mr. Justice John deP. Wright.

[98] The Hon. James B. Chadwick, The Hon. Robert J. Cusson, The Hon. Robert Daudlin, The Hon. Thomas J. Lally, The Hon. Pierre Mercier, and The Hon. Gerald R. Morin.

(c) 4 letters from lawyers;[99]

(d) 7 letters from members of the community.[100]

121. A number of themes run through the letters, including that Justice Cosgrove:

(a) is a committed jurist;

(b) has a strong and abiding belief in the need for people who come before the courts to be treated fairly;

(c) is a person of great integrity;

(d) is a judicial workhorse who would take whatever assignments were given to him by his regional senior judges, and regularly gave up non-sitting weeks and vacation weeks to pitch in and help where there was a need;

(e) is courteous and thoughtful and recognized as a very good judge, if not an excellent judge, in the area of family law;

(f) is very respectful and helpful to unrepresented litigants;

(g) has a strong commitment to the community, including the restoration of the Brockville Courthouse.[101]

122. Justice Cosgrove submits that all of the letters are relevant and critically important. He respectfully requests that the members of the CJC review them all, in their entirety, and take them into account when determining what recommendation the CJC will make to the Minister of Justice. In particular, Justice Cosgrove wishes to highlight passages from some of the letters.

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[99] Gregory O. Best, Clinton H. Culic, Peter Hagen, and Fergus J. (Chip) O'Connor.

[100] David Cody, Mildred Craig, Paul Godfrey, Robert J. Huskinson, Alan Martin, Don McKinnon, and Ronald Watson.

[101] *September 10 Transcript* at p. 1714, line 14 to p. 1715, line 18, Book of Documents, Tab 7.

123. For example, Justice Desmarais, who was the Regional Senior Judge for Eastern Ontario when Justice Cosgrove was the local administrative judge for the Counties of Leeds and Grenville wrote:

> **Whenever any emergencies occurred, [Justice Cosgrove] was always already ready to step in and assist in any way he could. Never did I have reason to question his integrity, fairness and competence. I know that Justice Cosgrove always had the best interest of the administration of justice in mind in anything he did, and any findings to the contrary, would certainly not be in keeping with my recollection of my dealings with him.**[102]

124. The Honourable James B. Chadwick served as Regional Senior Justice for Eastern Ontario from 1994 until 2006. During that time, Justice Cosgrove remained as the Administrative Justice in Brockville. The Honourable Mr. Chadwick wrote:

> **Justice Cosgrove was a very dedicated and hard-working judge. Notwithstanding his role as Administrative Judge he sat on full-time basis. If the workload in Brockville was not available[,] [h]e was the first person to volunteer for reassignment in the East region.**
>
> **During my term as Regional Senior Justice[,] Justice Cosgrove never turned down an assignment or a request to perform emergency judicial services. I never had a complaint from the public or the Bar about his conduct or reserve judgments.**
>
> **Justice Cosgrove, very seldom, if at all discussed the cases in which he was involved with his judicial colleagues or me. Although I may not have agreed with all his decisions, or his method at arriving at the decision, I considered Justice Cosgrove competent to handle his case load and reach a reasoned conclusion. To me this was part of judicial independence. I know that my judicial colleagues did not always agree with my decisions, or my method at arriving at that decision.**[103]

125. The Honourable Mr. Chadwick then addressed the *Elliott* trial:

> **The case of *R. vs. Elliott*, which is the subject matter of the complaint by the Attorney General of Ontario, was conducted during my watch. Prior to the merger in 1990 [the merger of the County Court and the Superior Court], murder cases [were] the exclusive jurisdiction of the Supreme Court of Ontario. As Regional**

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[102] *Letter of the Hon. Mr. Justice Robert C. Desmarais* at p. 2, Book of Documents, Tab 10d.

[103] *Letter of the Hon. James B. Chadwick* at pp. 1-2 [*Chadwick Letter*], Book of Documents, Tab 10p.

> **Senior Justice it was my responsibility to assign Judges to various cases. Justice Cosgrove had been a Judge since 1984 and had tried numerous criminal cases. I had no reservations assigning Justice Cosgrove to the Elliott case.**
>
> **…**
>
> **It is my view Justice Cosgrove handled all his assignments in a fair and responsible manner. I have never once questioned Justice Cosgrove's integrity.**[104]

126. Justice Métivier, who served as Regional Senior Justice after the Honourable Mr. Chadwick, wrote:

> **With respect to his current difficulties, I am reminded that I had a trial that went for several weeks in Brockville during the early days of the *Elliott* trial and he and I frequently had lunch together during that time. I remember his explanation that he had attempted to resist the assignment as he was a neighbour of the Crown Attorney and wanted to maintain a pleasant relationship with him. I also remember clearly that some of the details that came out about the police in particular and their actions were quite shocking. As I remember, the defence at that time was looking to have him recuse himself because he was too pro-crown.**
>
> **I also had the opportunity to oversee his work while I was Regional Senior Justice. He demonstrated integrity in all of his dealings with the Court, his colleagues and his work.**
>
> **In March of 2004 we had received the instructions of the Chief Justice that he was to have no further sitting assignments. Justice Cosgrove felt very bad about this as he realized that our region was extremely pressed by the shortage of judicial resources and our Family Court was in crisis. He asked to be allowed to assist in some way. In approximately February 2005 Chief Justice Smith advised that he could assist by doing non-adjudicative work. Since then and until the end of my tenure as Regional Senior Justice in May of 2008, he was assigned family case conferences and settlement conferences as well as civil pre-trials. During that time I found Justice Cosgrove willing to work anywhere, anytime. He knew we needed help and he wanted to assist as much as possible.**
>
> **His keen and sincere interest in the administration of justice was demonstrated by his long-standing involvement in Law Day in Brockville where he has earned the appreciation of teachers and students for the yearly mock trials he has organized. When the Brockville Courthouse was being renovated and expanded, Justice Cosgrove was at the forefront of the planning, working co-operatively with all involved.**
>
> **…**

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[104] *Chadwick Letter* at p. 2, Book of Documents, Tab 10p.

> **I am aware that lawyers may find him short, impatient, opinionated and sometimes arrogant but I am also aware that those complaints are made about certain other judges. To the best of my knowledge, he is competent and I have been personally aware that during my tenure, he has frequently attended educational seminars particularly in family law...**[105]

127. The current Regional Senior Justice for Eastern Ontario is Justice Hackland. His Honour's letter stated:

> **I have known Justice Cosgrove for many years, first as counsel appearing in front of him periodically and over the last 5 years as a judicial colleague and more recently as Regional Senior Justice for the East Region of the Superior Court of Justice.**
>
> **I hold Justice Cosgrove in high regard. I have observed him to be extremely dedicated and hard working, always willing to co-operate in terms of judicial assignments and always courteous and pleasant to his colleagues. Notwithstanding the personal stress and embarrassment that the current proceedings have caused Justice Cosgrove, I have not heard him complain and he has not missed one day of assigned work. Moreover, he has continued his long standing habit of waiving his judgment writing weeks in favour of taking on additional work. While he has not been sitting pending the outcome of the present proceedings, he has assisted us by processing a significant part of our large volume of motions in writing and he has conducted many case conferences or settlement conferences in family law. I think this attests to Justice Cosgrove's characters and dedication in the presence difficult circumstances.**[106]
>
> **...**
>
> **To the best of my knowledge and on the basis of my personal experience and observation, Justice Cosgrove has never acted for personal motives or benefit and has always done what he honestly considered to be in the interests of justice. Such errors of law and procedure as he has made have been addressed by our Court of Appeal, as should be the case. I am aware that some lawyers dislike Justice Cosgrove's judging style. On the other hand, he has very strong skills in dealing with self represented individuals, particularly in family law.**
>
> **In conclusion, Justice Cosgrove is owed a debt of gratitude for his contribution to public life, including his many years of judicial service. He continues to have my respect and I wish him well as he nears retirement after a distinguished career.**[107]

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[105] *Letter of the Hon. Madam Justice Monique Métivier* at pp. 1-2, Book of Documents, Tab 10k.

[106] *Letter of the Hon. Mr. Justice Charles T. Hackland* at p. 1 [*Hackland Letter*], Book of Documents, Tab 10e.

[107] *Hackland Letter* at p. 2, Book of Documents, Tab 10e.

128. The next letter that Justice Cosgrove wishes to highlight was written by Justice Byers, a colleague and fellow Administrative Justice. Justice Byers wrote:

> **In a nutshell I would say one bad case does not make a bad judge. This is particularly true for this judge, who has conducted thousands of cases over the course of his judicial career in a competent and thorough manner.**
>
> **I was the Administrative Justice for Hastings County for the past twenty years. Justice Cosgrove has presided in this jurisdiction on countless occasions. I know his work and I am close to all the local lawyers who have appeared before him. It is somewhat ironic that if anything, in criminal matters he was inclined to be a little pro-crown. He is a man of the highest integrity and the best character. He is a prodigious worker. He regularly worked all his non-sitting weeks and many of his holiday weeks. He was an absolute gentleman with the staff. In short I would have him back in a minute.**[108]

129. Justice Roydon Kealey, a colleague of Justice Cosgrove, wrote:

> **There is no doubt that Paul is one of the most diligent and hard working Judges in our Court. He has often set aside vacation time and heard matters on non-sitting weeks to assist in the orderly administration of justice in our region. His dedication to duty in this regard is generally known by all members of the Court.**
>
> **His personal and professional integrity are beyond question in my opinion, and with most of my fellow Judges. Furthermore, over the years together on the Court and in the cases I tried before him, I have never known him to be or experienced him as other than a fair minded, capable trial judge.**[109]

130. Then, Justice Helen MacLeod-Beliveau wrote:

> **I have known Justice Paul Cosgrove for 24 years. I have appeared before Justice Cosgrove as counsel between his date of appointment of July 9, 1984 and my date of appointment of October 4, 1989, primarily in civil and family matters. Justice Cosgrove expected counsel to be properly prepared and familiar with the matters argued before him. I found Justice Cosgrove to be fair-minded, informed, competent and diligent in the matters that I argued before him. I found his decisions to be prompt and well reasoned, even for the losing party which sometimes I was.**
>
> **...**

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[108] *Letter of the Hon. Mr. Justice Richard G. Byers* at p. 1, Book of Documents, Tab 10b.

[109] *Letter of the Hon. Mr. Justice Roydon J. Kealey* at p. 1, Book of Documents, Tab 10f.

> **He is respected by his colleagues for his work ethic and his willingness to tackle the most difficult of matters.**
>
> **...**
>
> **Over the years, I have come to know other aspects of Justice Cosgrove's character. He is dedicated to his community and gives tirelessly of his time in that regard. He was the primary leader in the restoration of the Brockville Court House and has helped to ensure its preservation as a seat of justice in Brockville for years to come.**[110]

131. Prior to his call to the Bench, Justice McKinnon appeared in front of Justice Cosgrove as counsel. Justice McKinnon wrote that:

> **I have been acquainted with Justice Cosgrove for over 20 years. I have had occasions to appear before him in court as an advocate on a number of occasions and have spent many hours with him as a colleague, interacting socially and professionally.**
>
> **In court appearances before him, Justice Cosgrove was always well prepared. He cut to the marrow of the argument. He was often challenging in his comments which, personally, I found helpful in developing my arguments. At no time did I feel that I was treated unfairly.**
>
> **For many years I did criminal defence work. Justice Cosgrove's general reputation was that he was 'pro Crown' which, to say the least, renders these proceedings ironic.**[111]

132. Justice McKinnon addressed the *Elliott* case and that it went terribly wrong, but added:

> **As unfortunate as the handling of the case was by Justice Cosgrove, it is nonetheless atypical of Justice Cosgrove's twenty-four year judicial career.**
>
> **...**
>
> **Justice Cosgrove has proven to be a dedicated judge ever ready to serve the public. I would regard it as a great shame were he to be removed from office by**

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[110] *Letter of the Hon. Madam Justice Helen K. MacLeod-Beliveau* at pp. 1-2, Book of Documents, Tab 10h.

[111] *Letter of the Hon. Mr. Justice Colin D. McKinnon* at p. 1 [*McKinnon Letter*], Book of Documents, Tab 10j.

**virtue of his involvement in one unfortunate trial which, as previously stated, was set right by the Court of Appeal for Ontario.**[112]

133. Justice Pedlar, addressed Justice Cosgrove's community involvement:

**His Law Day program with local high school students has been a resounding success for over twenty years and involves presiding over a mock jury trial with students, Crown attorneys, defence counsel and police all participating.**

**He was a key person in arranging for the restoration of the historic courthouse in Brockville and spent countless volunteer hours on that project. He recently also played an important part in the development of the beautiful Brock Gardens in front of the courthouse.**

**Justice Cosgrove has opened this beautiful historic courthouse to the community through hosting tours through the Doors Open Ontario project and arranging to have the medal presentations for the Ontario Senior Winter Games presented on the front steps.**[113]

134. Justice Douglas Rutherford also wrote a letter, which included that:

**Justice Cosgrove approaches his judicial work industriously, with honest and pure intentions. In my discussions with him about our work, I have never heard or seen one iota of indication that would support a suggestion that he intends anything but the due and proper administration of justice. He is proud of our judicial system and feels honored to be a part of it. That he would import bad faith into his judicial decision-making, or knowingly abuse his judicial office is totally foreign to the Paul Cosgrove I have come to know over the past 17 years.**[114]

135. Justice Rutherford touched on the *Elliott* case, and concluded:

**The important point I wish to make, however, is that at no time did I ever hear one word from Justice Cosgrove that could possibly suggest that he was allowing any element of bad faith or intentional abuse of his office to intrude into his efforts to try that case fairly and properly. Unfortunately, he appears to have been overly influenced by the strategic submissions and arguments of defence counsel at trial which led him into the errors in his disposition of the *Elliott* case that the Ontario Court of Appeal dealt with fully and without 'pulling any punches' that fell on Justice Cosgrove.**

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[112] *McKinnon Letter* at pp. 1-2, Book of Documents, Tab 10j.

[113] *Letter of the Hon. Mr. Justice Kenneth E. Pedlar* at p. 1, Book of Documents, Tab 10l.

[114] *Letter of the Hon. Mr. Justice Douglas Rutherford* at p. 1 [*Rutherford Letter*], Book of Documents, Tab 10n.

> **Paul Cosgrove has been a dedicated hard-working judge, conscientious in his efforts, considerate, collegial and supportive of his colleagues and of the Court, and I was witness to some of his intense struggle with the issues and problems raised in the *Elliott* trial. His disposition of them may been marred by error, but it was not without protracted effort and consideration of the consequences. Bad faith and intentional abuse of office are simply not part of the man or of the judge.**[115]

136. The Honourable Gerald R. Morin wrote a letter that Justice Cosgrove wishes to bring to your attention. Prior to his elevation to the Bench, the Honourable Mr. Morin appeared before Justice Cosgrove as counsel. The Honourable Mr. Morin wrote:

> **I first met Justice Cosgrove in 1988 or 1989 while acting as a defence counsel in a lengthy and somewhat complicated personal injury case. It was a jury trial presided over by Justice Cosgrove. Throughout the trial Justice Cosgrove acted in a most gentlemanly fashion. He was fair and even handed in his decisions during the course of the trial. His charge to the jury was fair and reasonable to both sides setting out their respective positions and giving the jury appropriate ranges of damages depending on what view they took of the evidence. There was nothing in Justice Cosgrove's conduct at that time to call into question his competency as a trial judge and nothing has come to my attention since that time to change my views in that respect.**
>
> **…**
>
> **Based on my knowledge and dealings with him, I have never known Justice Cosgrove to lack integrity as a person and as a judge. To my knowledge, he has always dealt fairly with those that came before him. I have never known him to judge a case other than on his honest view of the evidence and his understanding of the law.**
>
> **…**
>
> **Has he made mistakes as a trial judge? Yes, as we all have from time to time. The Court of Appeal found that he made many mistakes in the *Elliott* case, but to suggest that he was motivated by bias against the Crown or in favour of the accused, in my view, does not in any way describe the person and judge that I have come to know and respect over the last 20 years.**[116]

137. Justice Cosgrove also wishes to highlight a letter written by Greg Best, a family law lawyer from Brockville who has appeared frequently before Justice Cosgrove:

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[115] *Rutherford Letter* at p. 2, Book of Documents, Tab 10n.

[116] *Letter of the Hon. Gerald R. Morin* at pp. 1-2, Book of Documents, Tab 10u.

**I have practiced family law before Justice Cosgrove since his appointment as a Superior Court judge of Ontario in 1984. I have appeared before him on numerous occasions in case conferences, settlement conferences, contested motions and full trials.**

**I do not practice criminal law or civil litigation. Therefore, I have no direct knowledge of Mr. Justice Cosgrove's conduct in the case *Regina v. Julie Elliott* or his conduct in any other criminal trial.**

**However, I feel that I have extensive knowledge of Mr. Justice Cosgrove's deportment, judicial conduct and knowledge of family law. I have a busy family law practice and I generally appear before the Superior Court of Ontario several times a week.**

**I have found Mr. Justice Cosgrove to be an insightful, knowledgeable and fair minded judge. When I am informed that Justice Cosgrove is sitting on a particular case I feel confident that the case will be dealt with in a thorough and fair manner. I am confident that the material will be read by Mr. Justice Cosgrove, and he will be well prepared for the hearing. If an issue of law is to be argued he will have read the relevant cases and legislation.**

**There is no doubt that Mr. Justice Cosgrove is a highly demanding judge. He expects counsel to be well prepared, knowledgeable on the facts of a particular case and ready to refer to the relevant law, if required. Mr. Justice Cosgrove can be impatient if he feels counsel are not properly prepared or their filed material is deficient or if he feels counsel have been relegated to the position of mere mouthpieces for their client. He can be very direct with counsel if he feels they have resorted to unfair tactics, undue delays or unnecessary complications in the process. Mr. Justice Cosgrove is acutely aware of the high financial costs to litigants and he is always anxious to ensure that an appearance before him is productive and meaningful to the parties.**

**Although Mr. Justice Cosgrove's conduct does sometimes appear to be abrupt with counsel, I ascribe that to his insistence on high standards and his awareness that the administration of justice is always on trial.**

**In my opinion Mr. Justice Cosgrove's treatment of parties in difficult family law matters is exemplary. He is acutely aware of the common feelings of failure, humiliation and fear. Mr. Justice Cosgrove invariably makes a concerted effort to reassure parties. The vast majority of clients are highly appreciative of this approach. There is a clarity and directness which Mr. Justice Cosgrove conveys to the great relief of most clients. Generally Mr. Justice Cosgrove does not like to spend time on historical grievances, ascribing blame to various parties or rehashing mistakes that parties have made in their marriage or relationship. He wants to identify and focus on the key issues of the case.**

**During the year, I have found Mr. Justice Cosgrove to be very patient with litigants and sensitive to their concerns. He is well aware of human foibles so often displayed in family law matters.**

**I recall one very dramatic custody trial before Mr. Justice Cosgrove. The case was quite complex and the parties were not sophisticated or particularly well educated. After several days of trial a settlement was reached. On their own accord both parties in open court publicly thanked Mr. Justice Cosgrove. They stated that it was obvious to them that the judge was generally interested in the welfare of their little boy and they felt the case had been conducted in a fair manner.**

**Mr. Justice Cosgrove is diligent in ensuring that witnesses in family law cases are not bullied, harassed or abused in the witness stand. He has no hesitation in cautioning or warning counsel if he feels the cross-examination is inappropriate, prolix or repetitive. It is not infrequent that he intervenes if he feels that cross-examination is clumsy or abusive. There are certain counsel who take great umbrage at this approach. In family law where issues are frequently highly sensitive and central to the party's identity, the parties often become extremely upset. I have found Mr. Justice Cosgrove's approach appropriate for the fair and orderly conduct of the cases. Clear guidelines are set for counsel, the court explicitly takes control and the conduct of the judge engenders respect for the process.**

**Mr. Justice Cosgrove is fully engaged as a respected citizen in the City of Brockville. He has been instrumental in the restoration and renovation of a magnificent, historical courthouse overlooking the St. Lawrence River in downtown Brockville. While many of our courthouses resemble bus stations Mr. Justice Cosgrove championed the preservation and improvement of a historical building which clearly embodied the grandeur and authority of the justice system in Canada.**

**The courthouse green in Brockville is a deliberate New England feature created by Loyalists. The beautification and improvement of this landscape has been enthusiastically supported by Justice Cosgrove.**

**Mr. Justice Cosgrove has been a leader in initiating and conducting mock trials each Law Day. In these trials, high school students act as counsel with local members of the bar, sit as jurors and appear as witnesses. Although some lawyers tend to be very patronizing and cynical about this process the high school students themselves and their teachers are enthusiastic supporters and participants. Mr. Justice Cosgrove presides over these proceedings with dignity.**

**In family law, the area of law with which I am familiar, I have found Mr. Justice Cosgrove, in the exercise of his judicial duties, to be thorough, efficient, dedicated and impartial. There has been no conduct that I have witnessed which would undermine public confidence in the administration of justice in Ontario.**[117]

138. Clinton Culic, a family and personal injury lawyer, wrote as follows:

**In my own practice of law I specialize in civil cases, mostly family and personal injury cases. In the cases I have had that were heard by Justice Cosgrove I cannot**

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[117] *Letter of Gregory O. Best* at pp. 1-3, Book of Documents, Tab 10v.

> **recall one single incidence of improper behaviour from the bench. I cannot even recall a seriously annoying incident of behaviour from the bench. In that regard I should disclose that, unlike some of my local brethren, I am not annoyed by being asked pointed, thoughtful questions from the bench. Such questions only to serve to guide and focus my approach as the case evolves, which is undoubtedly their purpose. In my respectful opinion such a judicial demeanour should not be viewed as the judge 'high-jacking' an advocate's case or dominating the courtroom, although I perfectly understand how unprepared counsel may well feel that way.**
>
> **I have only had one criminal trial in front of Justice Cosgrove and that was many years ago early in my career. It involved a defendant whose behaviour had radically changed after suffering a traumatic frontal lobe brain injury. He went from a straight 'A' student to a hooligan; he was entirely two different people. Justice Cosgrove, on his own initiative, contacted a brain-injury organization and obtained their assistance for the defendant as part of his rulings in the matter. It was my first encounter with such a thoughtful, involved judge. Now, if I understand correctly, the proposal before you is to remove Justice Cosgrove from the bench because he became too personally involved in the legal defence of *Julia Elliott*. How ironic. How unfortunate.**[118]

139. The final letter from counsel that Justice Cosgrove wishes to highlight was written by Peter Hagen:

> **I have had the opportunity of appearing before Justice Cosgrove as counsel on a number of matters over the years. Most recently I was involved in an application for Injunctive Relief which eventually evolved into a lengthy hearing that included 18 days of oral testimony. My assessment of Justice Cosgrove is from this perspective.**
>
> **In dealing with the Motion for Injunctive Relief, Justice Cosgrove was extremely accommodating to the parties and allowed argument to extend late into the evening in order to ensure that the matter was addressed with the urgency that the situation required.**
>
> **During the subsequent eighteen day hearing Justice Cosgrove made himself available to ensure that the matter proceeded expeditiously. Throughout the hearing he treated counsel fairly.**
>
> **In my appearances before Justice Cosgrove he has, in my view, exemplified the ethical principles for Judges as outlined on page 13 paragraph 7 of the Notice to Justice Paul Cosgrove. I believe that on those occasions where I have had an opportunity to observe Justice Cosgrove he has acted in good faith and attempted to perform his duties to the best of his abilities and in doing so has acted in a manner so as to exhibit and promote the high standards of judicial conduct which**

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[118] *Letter of Clinton H. Culic* at pp. 1-2, Book of Documents, Tab 10w.

> **in my view would reinforce public confidence in fair-minded and informed persons observing those proceedings.[119]**

140. Finally, Justice Cosgrove wishes to highlight a letter written by Mildred Craig, a citizen of Brockville:

> **I am pleased to write this letter to assist you on behalf of Judge Paul Cosgrove. Although I have no legal educational background or experience, I have followed this judge's decisions very closely over many years. Our local newspaper, The Recorder and Times, carried the Brockville proceedings quite thoroughly in the past. I was always struck with the wisdom of Justice Paul Cosgrove's opinions, as they were regularly reported. I suppose it is easy to agree with someone who seems to make a similar decision to what you would have made in the same situation. I admit that it became a bit of a guessing game, waiting for Judge Paul Cosgrove's verdicts in cases that were a particular interest to me. I would like to be more explicit, however, I can say without reservation that I was particularly attracted to cases involving younger citizens that were accused of crimes and subsequently prosecuted. The manner, in which Judge Paul Cosgrove considered the ages of the young offenders and their family circumstances, and how he managed them as young people impressed me greatly.**
>
> **On many occasions I felt that Judge Paul Cosgrove looked well beyond the presenting facts or the dramatics of the cases, and, took time to look carefully at any motives while examining the extenuating circumstances surrounding the crimes. I often felt that he went back to examine what had caused the incidents to occur in the first place and how and why the victim and the accused had come to together. He seemed to carefully consider and weigh the background situations and the cultural influences of the cases. The reasons how relationships had originally been established, and why they had gone wrong, apparently mattered in his deliberation. In other words, I felt Judge Paul Cosgrove went back to the first principles in the cases that he was judging and I admired his transparent lack of biases, especially on gender issues. In addition, I felt the outcomes of any decisions were thoroughly and widely examined for their financial and social impacts.**
>
> **I know Judge Paul Cosgrove only as a professional within the small city of Brockville and I am not considered his personal friend, however, I do believe that Judge Paul Cosgrove has always been a man of character and of personal integrity. He appears not to easily tolerate unfairness, perceived set-ups or coercion. As a family acquaintance, I know that he is an impeccable family man and a true and fine gentleman. I believe that justice is his prime reason for being a judge. I also know him to be a proud and protective citizen of Brockville, and of Canada, and indeed he may be loyal, honourable and conscientious beyond the norm.**
>
> **I have no hesitation as a life long citizen of Brockville, a former hospital nurse, a nursing teacher, a college administrator, and a public school board trustee for**

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[119] *Letter of Peter Hagen* at pp. 1-2, Book of Documents, Tab 10x.

> **Brockville for the past fourteen years, in stating that I have admired the careful work of Judge Paul Cosgrove. To me, he exudes a high intelligence, a sincerity of purpose to improve our society, and a noble desire to eliminate fraud and deception by honouring and upholding the truth for the common good.[120]**

141. Justice Cosgrove submits that the Inquiry Committee erred in principle when it failed to consider the character letters. In particular, this evidence was relevant to the sanction phase of the proceedings and ought to have been considered by the Inquiry Committee in that context.

142. The Inquiry Committee concerning the Hon. P. Theodore Matlow (the "Matlow Inquiry Committee") also gave no weight to the character letters provided by Justice Matlow and held:

> **[33] On reconsideration, the Inquiry Committee does not consider the letters relevant to the Complaint. Nothing in any of the letters bears upon the question of whether Justice Matlow has been guilty of misconduct, has failed in the due execution of his duties, or been placed, by his conduct or otherwise, in a position incompatible with the due execution of the office of judge. For those reasons the Inquiry Committee gave the letters no weight in its consideration of the matters before it, beyond establishing that numerous judges and lawyers hold a high opinion of Justice Matlow.[121]**

143. However, in the *Matlow Report*, the CJC held that such an approach was an error in principle. The CJC held that such letters may be relevant to why the acts occurred, whether the acts were committed without malice and without bad faith, and what recommendations should flow from a finding of judicial misconduct:

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[120] *Letter of Mildred Craig* at pp. 1-2, Book of Documents, Tab 10aa.

[121] *Report of the Inquiry Committee concerning the Hon. P. Theodore Matlow*, May 28, 2008, at para. 33, see *Matlow Report* at para. 146, Book of Documents, Tab 9; Counsel for Justice Cosgrove brought this ruling to the attention of the Inquiry Committee, but urged that the Inquiry Committee depart from the reasoning of the Matlow Inquiry Committee, see *September 10 Transcript* at p. 1711, Book of Documents, Tab 7.

> **[149] The reasons of the Inquiry Committee indicate that it viewed this evidence as partisan and, in any event, as representative of a small segment of the public only. We do not disagree with this assessment. But we also find the evidence to be relevant. Positing the opposite question, what if there were a deluge of letters from the local community, including Justice Matlow's peers and lawyers, to the effect that he was unfit to hold office? Would that be relevant as part of our deliberations? We think it may properly be. So too, are the support letters which have been accepted as evidence.**
>
> **[150] Character is certainly relevant to the assessment of a judge's attributes. The letters deal with various aspects of Justice Matlow's character, that is his integrity, honesty, conscientious work ethic, and commitment. While these letters are not relevant to whether the conduct complained of occurred, they may be relevant to why the acts occurred, the context of the acts, and whether the acts were committed without malice and without bad faith. Character is also highly relevant to the issue of what recommendations should flow from a finding of judicial misconduct. While the weight to be given to this evidence is admittedly for the inquiry committee, and while an inquiry committee may elect to give it little weight, still it is an error in principle to simply ignore this kind of evidence for all purposes. In particular, the evidence is relevant to the sanction phase of the proceedings and ought to have been considered in that context. It was not.[122]**

144. The CJC took the character evidence letters into account when determining whether or not it would recommend that Justice Matlow be removed from the Bench:

> **[178] Moreover, we have explained why it is appropriate to place on the sanction scale the character evidence letters Justice Matlow submitted to the Inquiry Committee. These letters speak to public support and confidence in Justice Matlow albeit from a certain part of the local community only. …**
>
> **[181] We have carefully considered the articulated test for removal from the Bench, the findings of the Inquiry Committee Report as modified by these Reasons, <u>the evidence tendered by way of letters of support to the Inquiry Committee,</u> Justice Matlow's address to the CJC at the Public Meeting and the extent of his expressions of regret contained therein, previous decisions of the CJC and other judicial councils and the relevant jurisprudence.[123]**

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[122] *Matlow Report* at paras. 149-150, Book of Documents, Tab 9.

[123] *Matlow Report* at paras. 178, 181, Book of Documents, Tab 9.

145. There was no reason for the Inquiry Committee to depart from the principle articulated in the *Matlow Report*. Moreover, Independent Counsel did not object to the letters being introduced into evidence.[124]

> **[Mr. Paliare]: So on all of those bases, I would like to tender -- Mr. Macintosh has them -- the letters and ask that they be made the next exhibit.**
>
> **THE CHAIR: You don't oppose this, Mr. Cherniak?**
>
> **MR. CHERNIAK: I do not. I do not. If I can just say my view is they would not have had any effect on the first question, but they do, in my view, affect the question of what the ultimate recommendation might be.[125]**

146. Nevertheless, the Inquiry Committee 'left the letters to the side' and gave no weight at all to the character letters submitted by Justice Cosgrove. The Inquiry Committee dealt with the letters in a very perfunctory fashion. The Inquiry Committee first, correctly in the submission of Justice Cosgrove, indicated that they would not take two prior decisions of the Court of Appeal that criticized Justice Cosgrove into consideration in determining whether or not Particular 2 had been established. However, having decided that they were not going to determine whether or not Justice Cosgrove had engaged in judicial misconduct in the earlier cases, the Inquiry Committee then decided not to consider the character letters:

> **[38] The reference above to previous appellate comment is to passages in two decisions of the Court of Appeal for Ontario pronounced in June, 1997, *Perry v.***

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[124] *September 10 Transcript* at p. 1712, line 17 to p. 1713, line 1, Book of Documents, Tab 7.

[125] *September 10 Transcript* at p. 1712, line 17 to p. 1713, line 1, Book of Documents, Tab 7; Independent Counsel later added that he did not take the letters into account when he reached his conclusion that the record was no longer capable of supporting a recommendation for removal from office, but that agreed that the letters were relevant to the disposition short of a recommendation for removal: "My view is that those letters, they certainly form no part of the view I took, and I would say that they are relevant to whatever disposition that the panel made if it were short of a recommendation for removal, but I suggest they don't one way or the other tip the balance on the question of whether there should be a recommendation for removal or not."

> ***Ontario*** **(1997), 33 O.R.(3d) 705 and** ***Lovelace v. Ontario*** **(1997), 33 O.R. (3d) 735. We have decided not to give weight to the impact of those decisions, and we have instead confined our analysis to what happened in the** ***Elliott*** **trial, which itself occupied more than 1 and ½ years. We mention here also that we are not giving weight to the letters submitted to us on behalf of Justice Cosgrove in our determination of whether his conduct in Elliott should lead to a recommendation for removal. One element in some of the letters was that what Justice Cosgrove did in Elliott was isolated conduct. The two Court of Appeal decisions, Perry and Lovelace, might have suggested otherwise. We are leaving both the letters and the two decisions to the side and, as we said, confining our analysis to what happened in** ***Elliott*****.**[126]

147. Justice Cosgrove further submits that the CJC should consider the character letters he submitted when determining whether or not to recommend that he be removed from the Bench.

### *F. Prior decisions of the CJC support that a recommendation for removal is not necessary in this case*

148. Justice Cosgrove submits that prior decisions of the CJC do not compel the conclusion that the CJC should recommend his removal from the Bench. In contrast, Justice Cosgrove submits that prior CJC decisions support the position that a strong admonition would be sufficient.

149. Justice Cosgrove submits that his case is distinguishable from that of Justice Bienvenue. The Inquiry Committee concerning the Hon. Jean Bienvenue (the "Bienvenue Inquiry Committee") concluded that Mr. Justice Bienvenue misused the office of judge when he used it to express his personal beliefs about women, Holocaust victims and suicidal persons and to criticize jurors in the criminal case of *R. v. Theberge*. The Bienvenue Inquiry Committee noted that the breaches of ethics were

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[126] *Inquiry Committee Report* at para. 38, Book of Documents, Tab 1.

serious and had not been retracted by the judge. The Bienvenue Inquiry Committee recommended that Justice Bienvenue be removed from office and wrote:

> **We also particularly took account Mr. Justice Bienvenue's testimony during the trial. We find that the judge has shown an aggravating lack of sensitivity to the communities and individuals offended by his remarks or conduct. In addition -- the evidence could not be any clearer -- Mr. Justice Bienvenue does not intend to change his behaviour in any way.**[127]

150. When the CJC considered the report of the Bienvenue Inquiry Committee, it emphasized the fact that Justice Bienvenue had demonstrated no intention of changing his ways. The CJC wrote:

> **No attempt has been made by Mr. Justice Bienvenue since the delivery of the report of the Inquiry Committee to indicate any intention on his part to, in fact, change his behaviour.**[128]

151. Justice Cosgrove submits that in the *Bienvenue* case the CJC placed significant weight on the evidence and position of the judge in question. In particular, the CJC focussed on whether or not Justice Bienvenue recognized and understood how the judge fell into error and an assurance that the conduct would not happen again.

152. Justice Cosgrove submits, for the reasons set out above, that his statement, unlike Justice Bienvenue's conduct, demonstrated his understanding of his errors and contained a strong assurance that such errors would not be repeated. For this important reason, Justice Cosgrove submits that his case is distinguishable from Justice Bienvenue's situation.

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[127] *Report of the Inquiry Committee concerning the Hon. Jean Bienvenue*, June 25, 1996, at p. 61, Book of Documents, Tab 11.

[128] *September 10 Transcript* at p. 1674, lines 14-20, Book of Documents, Tab 7.

153. Justice Cosgrove submits that his situation is more analogous to that of Justice Flynn. The CJC appointed the Inquiry Committee concerning the Hon. Bernard Flynn (the "Flynn Inquiry Committee") as a result of a request from the Québec AG to inquire into Justice Flynn's conduct with respect to statements he made in a newspaper relating to a property transaction involving his wife. The Flynn Inquiry Committee concluded that Justice Flynn should have refrained from making comments to the media, which they characterized as inappropriate and unacceptable. The Flynn Inquiry Committee held that Justice Flynn had spoken out on matters of a controversial nature which were likely to come before the Superior Court of which he was a member, and that he had had failed in the due execution of his office given the duty to act in a reserved manner.

154. However, given Justice Flynn's irreproachable career, the isolated nature of the incident complained of, the unlikelihood of a similar incident re-occurring and the judge's acknowledgment of having made a mistake in speaking to the journalist, the Flynn Inquiry Committee concluded that Justice Flynn was not disabled from the due execution of his office and there was no recommendation that he be removed from office. The Flynn Inquiry Committee wrote:

> **[77] In this connection, we particularly 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 acknowledgement of his remarks, his letter and the acknowledgement made by the 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.**[129]

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[129] *Report of the Inquiry Committee concerning the Hon. Bernard Flynn*, December 12, 2002, at para. 77, Book of Documents, Tab 12.

155. The CJC, in its report to the Minister, agreed with the Flynn Inquiry Committee's conclusion.

156. The evidence before the CJC demonstrates Justice Cosgrove's own irreproachable career, the isolated nature of the mistakes he made in the *Elliott* trial, the unlikelihood of a similar incident reoccurring, and his acknowledgment of his errors and acts of judicial misconduct. Justice Cosgrove submits that in these circumstances, as in the Flynn case, a recommendation for removal is not warranted.

157. Similarly, Justice Cosgrove submits that his situation is similar to that of Justice Matlow. The Matlow Inquiry Committee recommended that he be removed from the Bench. However, the CJC did not recommend to the Minister of Justice that he be removed from the Bench. The CJC, in the *Matlow Report*, wrote:

> **[178] Moreover, we have explained why it is appropriate to place on the sanction scale the character evidence letters Justice Matlow submitted to the Inquiry Committee. These letters speak to public support and confidence in Justice Matlow albeit from a certain part of the local community only.**
>
> **[179] Finally, unlike the Inquiry Committee, we have the benefit of Justice Matlow's oral statement to the CJC at the Public Meeting. In that statement, Justice Matlow reiterated that his contact with John Barber in October 2005, was "an error in judgment ..." He acknowledged that "he made many errors and engaged in various forms of inappropriate conduct." He apologized without reservation for errors of judgement and inappropriate conduct. Justice Matlow also concluded (Transcript of 21 July 2008, page 12):**
>
> > **The Inquiry Committee expressed concern that I would repeat the conduct that led them to recommend that I be removed from the bench.**
> >
> > **In response to that concern, I promise you today, in the most binding way that I can conceive, that if I am permitted to remain in office as a judge, I will never repeat conduct similar, in any way, to the conduct that might be found offensive by you. I will, without exception, conform to your views.**

> **If you grant me this opportunity, I promise you that I will never give you reason to regret your decision.**
>
> **[180] We are satisfied that in making these comments, and offering the acknowledgment of errors of judgement that he did that Justice Matlow was – and is – sincere about his expressions of regret and we are also satisfied that those expressions of regret before us extended beyond those acknowledged to the Inquiry Committee.**
>
> **[181] We have carefully considered the articulated test for removal from the Bench, the findings of the Inquiry Committee Report as modified by these Reasons, the evidence tendered by way of letters of support to the Inquiry Committee, Justice Matlow's address to the CJC at the Public Meeting and the extent of his expressions of regret contained therein, previous decisions of the CJC and other judicial councils and the relevant jurisprudence.**
>
> **[182] In doing so, it is important to place Justice Matlow's conduct in the context of his judicial career. Justice Matlow has served on the Bench for 27 years. During that time, apart from this case, there is no evidence before us of any improper or inappropriate behaviour on his part on or off the Bench.**
>
> **…**
>
> **[184] After taking into account all relevant materials and factors, it is our opinion that while Justice Matlow made serious errors of judgement which constituted judicial misconduct and also placed him in a position incompatible with the due execution of his office, that a recommendation for removal from the Bench is not warranted in this case. In all the circumstances, we are of the opinion that Justice Matlow's conduct is not "so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office." Accordingly, we do not recommend that he be removed from office.**[130]

158. Justice Cosgrove submits that the reasoning of the CJC in the *Matlow Report* is equally applicable to this situation.

### *G. Conclusion*

159. Justice Cosgrove submits that the Canadian Judicial Council ("CJC") should not recommend to the Minister of Justice that Justice Cosgrove be removed from the Bench

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[130] *Matlow Report* at paras. 178-182, 184, Book of Documents, Tab 9.

by virtue of having become incapacitated or disabled from the due execution of his office.

160. Justice Cosgrove's statement to the Inquiry Committee demonstrated utmost regret for his conduct, and his determination to exhibit and promote the high standards of judicial conduct, so as to reinforce public confidence in himself and the administration of justice. It satisfied Independent Counsel such that he concluded that the record no longer supported a recommendation for removal from the Bench.

161. Public confidence in the administration of justice does not require that Justice Cosgrove be removed from the Bench. He respectfully requests that you do not make such a recommendation.

All of which is respectfully submitted, January 26, 2009

_____"Original signed by Chris G. Paliare"_____

Chris G. Paliare
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