CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY REGARDING
THE HONOURABLE JUSTICE PAUL COSGROVE

NOTICE TO JUSTICE PAUL COSGROVE
(Pursuant to section 5(2) of the Inquiries and Investigations By-laws)

The Canadian Judicial Council (the "Council"), upon receipt of a complaint from the Minister of the Attorney General of Ontario dated April 22, 2004 (the "complaint") and pursuant to subsection 63(1) of the *Judges Act*, R.S.C., 1985, c J-1, as amended (the "*Act*"), has commenced an inquiry to consider the conduct of the Honourable Justice Paul Cosgrove ("Justice Cosgrove") (the "Inquiry").

In accordance with subsection 63(3) of the *Act,* the Council has constituted an Inquiry Committee (the "Committee") to conduct the 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 subsection 65(2) of the *Act,* such as to warrant a recommendation for removal of office from the Committee to the Council.

In accordance with section 3(1) of the Council's Inquiry and Investigations By-laws ("the By-laws"), Earl A. Cherniak, Q.C. was appointed Independent Counsel in this matter, charged with the duty to present the case to the Committee. This Notice is provided pursuant to section 5(2) of the By-laws.

THE COMPLAINT AND BACKGROUND

In the complaint, the Minister of the Attorney General opined that the conduct of Justice Cosgrove during the course of the trial and multiple *voir dire* proceedings which ultimately led to a stay of the prosecution of *Regina v. Julia Elliott* "had undermined public confidence in the administration of justice in Ontario and has rendered Justice Cosgrove incapable of executing his judicial office."

By decision dated December 4, 2003, the Court of Appeal allowed the Crown's appeal, set aside the order of Justice Cosgrove staying the proceedings, and ordered a new trial.

In its decision, the Court of Appeal found that Justice Cosgrove had:

- without basis, permitted defence counsel to call eight Crown counsel to testify on various motions and hampered Crown counsel by making "unwarranted non-communication orders the effectively prevented successor counsel from preparing these Crown counsel as witnesses and preparing for the prosecution of the motions and the trial proper";

- appeared to make these orders based on an unfounded "suspicion that the former Crown counsel would somehow taint the new counsel or would fabricate evidence";

- made a finding that the Assistant Deputy Attorney General had given instructions to mislead the court in the absence of hearing from him and in the absence of evidence in support, thereby giving "the appearance of a failure by [Justice Cosgrove] to conduct the proceedings impartiality (sic) and fairly";

- brought the *Charter* and the administration of justice into disrepute by using it "to "remedy" baseless and frivolous clams";

- erroneously found in excess of 150 *Charter* breaches, the errors of which shared these elements:

  "1. There was no factual basis for the findings.

  2. [He] misapprehended the evidence.

  3. [He] made a bare finding of a *Charter* breach without explaining the legal basis for the finding.

  4. In any event, there was no legal basis for the finding.

  5. [He] misunderstood the reach of the *Charter*.

6. [He] proceeded in a manner that was unfair to the person whose conduct was impugned."

- misused or at least misunderstood the contempt power such that, in respect of at least one incident, "a reasonable observer might be concerned that [Justice Cosgrove] appeared to be biased against the police and their counsel";

- "permitted defence counsel to delve into areas that had no possible impact on the respondent's right to a fair trial."

- failed in his duty to halt the "deplorable" strategy of defence counsel, leading the Court of Appeal to comment: "Whether his failure stemmed from a misunderstanding of the basic principles that govern the *Charter* and its application or from his bias toward the Crown or both, we need not finally decide"; and

- in summary, "made numerous legal errors as to the application of the *Charter.* He made findings of misconduct against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case".

MATTERS FOR CONSIDERATION BY THE COMMITTEE

At the hearing of the Inquiry before the Committee, and pursuant to his obligations as set out in the By-Laws, Independent Counsel will present facts, complaints and allegations for the Committee's consideration as to whether the conduct of Justice Cosgrove in *Regina v. Julia Elliott* was "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".

In particular, Independent Counsel will put forward the following facts, complaints and allegations, which are founded in the transcripts and evidence from the proceedings in *Regina v. Julia Elliott* and which, in the view of Independent Counsel, if accepted by the Committee, are

capable of meeting the test for removal from judicial office under subsection 65(2) of the *Act*, so as to warrant that recommendation by the Committee:

1. By the conclusion of the multiple *voir dire* proceedings and motions commenced by defence counsel, Justice Cosgrove found that Crown counsel, police and others had committed in excess of 150 breaches of the *Charter of Rights and Freedoms* (the "*Charter*"). Most of these breaches were not sustained on appeal, but rather were found by the Court of Appeal to be, among other adjectives, "ill-founded", "unwarranted" and "completely without foundation". The Court of Appeal concluded that Justice Cosgrove's use of the *Charter* to remedy baseless and frivolous claims brought the administration of justice into disrepute. The number of unsustainable findings of breaches of the *Charter* demonstrates either a profound lack of knowledge of the appropriate use and interpretation of the *Charter*, or a bias against the Crown and police, which is particularized further below;

2. Throughout the course of the trial in *Regina v. Julia Elliott*, Justice Cosgrove adopted a suspicious attitude towards the Crown and government agencies, including but not limited to the provincial Ministry of the Attorney General and its counsel, the police, the Federal Crown, and immigration authorities. This attitude by Justice Cosgrove has been the subject of previous comment by the Court of Appeal in relation to other unrelated matters. Such an attitude was manifest in this case in the actions by and comments of Justice Cosgrove which, when viewed in their totality, are capable of leading a reasonable observer to believe that Justice Cosgrove is not capable of acting impartially in matters involving governmental agencies. These unfounded allegations unfairly marred the reputations of Crown counsel, police and others, and the conduct, in and of itself, eroded the necessary confidence in the integrity of the administration of justice and of the bench. The particulars of this conduct include:

    (a) Justice Cosgrove found that numerous Crown counsel, police officers, and former Assistant Deputy Attorney General Murray Segal had deliberately deceived the court or had undertaken steps which were calculated to deliberately mislead the court and were knowingly in breach of court orders. These serious findings were made despite a lack of evidentiary foundation and, at times, despite previous findings by Justice Cosgrove to the contrary;

(b) With respect to Mr. Segal, Justice Cosgrove made these findings despite the fact that Mr. Segal was not a party, was not counsel of record, and had no opportunity to respond to the allegations before the finding was made;

(c) Absent an evidentiary foundation to do so, Justice Cosgrove repeatedly caused successive Crown counsel to testify on the *voir dires*, thereby disqualifying them as Crown counsel and denying Crown the right of counsel of its choice;

(d) Justice Cosgrove further denied the Crown counsel of its choice by disqualifying James Stewart from being counsel, and requiring that future Crown counsel involved in the trial must have had no prior involvement whatsoever in the case. In doing so, Justice Cosgrove denied the Crown the ability to have counsel who had any knowledge of the case and appeared to suggest, without basis, that the fact of previous involvement inhibited Crown counsel from carrying out his or her duties;

(e) Without a basis in the evidence, Justice Cosgrove expressed concern on numerous occasions that Crown counsel was "woodshedding" its witnesses or that Crown counsel were attempting to tailor their evidence, and then ordered Crown counsel not to speak to any of its witnesses, including police witnesses and Crown counsel who had been ordered to testify, thereby denying the Crown the ability to properly prepare its case;

(f) Justice Cosgrove further denied the ability of new Crown counsel to prepare its case by ordering that previous Crown counsel (disqualified by virtue of being witnesses on the *voir dire*) could not communicate with new Crown counsel or to police witnesses, thereby denying one party, the one representing the Attorney General of Ontario and charged with representing the public interest, the ability to prepare its case and of obtaining instructions from other more senior Crown counsel. One result was that, in final submissions on the stay motion, defence counsel at the trial argued that the Crown's inability to know its case resulted in an unfair trial *for the accused*. Justice Cosgrove commented that the inability of the Crown to prepare should have been to the advantage of the accused;

(g) In his interactions with Crown counsel during the course of evidence, Justice Cosgrove used intemperate or denigrating language, was unfair and exhibited bias towards the Crown, and acted in a manner that was prejudicial to the Crown. Particulars include:

(i) When Crown Ramsay objected to cross-examination of a witness that required the witness to comment on the honesty of another, Justice Cosgrove admonished him for making a "frivolous objection" and threatened that if he continued, he would not be able to interrupt at all;

(ii) Justice Cosgrove refused to allow Crown counsel to see notes that a police officer (Cst. Denis) was referring to, in the course of his evidence, while defence counsel was able to review the notes;

(iii) When defence counsel objected that Crown Cavanaugh had misrepresented the facts in submissions, Justice Cosgrove aligned himself with defence counsel, stating that "we have a distinct problem", being that Mr. Cavanaugh demonstrated "ignorance" of the facts (albeit in "good faith"), was "misinformed" and that a further review of the evidence would be "humbling" for Mr. Cavanaugh. The evidence was, in fact, as Mr. Cavanaugh stated;

(iv) Justice Cosgrove found that a discussion between Crown Cavanaugh and Crown Bair (who was the prosecutor on an unrelated murder trial involving the same case manager as the Elliott trial – the Cumberland trial - and who was to be a witness on the *voir dire*) had "pre-empted cross-examination" and was "totally irregular", resulting in Justice Cosgrove directing no communication between Crown counsel and any Crown counsel who may testify as witnesses; and

(v) With respect to questions which elicited hearsay evidence that the Crown stated was only being elicited to ascertain the state of mind of the author (and not the truth), Justice Cosgrove commented that for fifteen years on the bench, he had rejected the Crown's argument on hearsay "by every *crown* counsel who has put it before me" and had "never been overruled;"

(h) Justice Cosgrove refused to allow Crown Ramsay to bring a motion to recuse Justice Cosgrove on the basis that different Crowns would be taking over, even though the Crown was, at that time, represented by Crown Ramsay;

(i) In advance of completion of the evidence on certain issues, Justice Cosgrove made comments that suggested that he had prejudged that issue. The comments were often intemperate, or unfair to the witness or to the parties and served to further negatively affect the perception of the administration of justice. Such comments included:

(i) Prior to the completion of all of the evidence and argument, Justice Cosgrove found that Constable Laderoute had fabricated a note. In response to Crown Ramsay's comment that it was "suggested" that a fabrication had occurred, Justice Cosgrove stated: "No, it's not "suggested"; it's alleged, and I can put you at ease, - I accept that the Officer has said in this court that he did do that!" In fact, Cst. Laderoute's evidence, when viewed in its totality, did not support that finding, nor was it appropriate to make any finding at that stage of the proceeding;

(ii) Justice Cosgrove commented that new statements from the victim's family were "spectacular" without the Crown being provided an opportunity to respond, including with any evidence; and

(iii) When it was apparent that a police officer (Cst. Nooyen) was confused as to the identity of another officer to whom she spoke four years before and had changed her evidence on this point, and while she was still on the stand (but out of the room), Justice Cosgrove stated: "the witness is either a bald-faced liar or incompetent to be useful to the court in this area under questioning; I haven't decided which, but please go ahead.";

(j) In his ruling on the compellability of Crown Cavanaugh, Justice Cosgrove descended into the arena by indicating that there were matters of interest for the court on which Mr. Cavanaugh could testify, and that he would inquire into those areas himself, if they were not addressed by counsel when Mr. Cavanaugh was called as a witness;

(k) Justice Cosgrove required former Crown counsel, Mr. Cavanaugh, (disqualified because he was a witness on the *voir dire*) to attend to explain statements attributed to him in a newspaper article about police misconduct, following a withdrawal of an unrelated impaired driving charge against Radek Bonk. When Crown counsel objected to the motion by defence counsel to recall Mr. Cavanaugh, Justice Cosgrove indicated that he believed that there was a connection as it was relevant to Mr. Cavanaugh's status and credibility as a witness and, further, that he anticipated that defence counsel would raise this issue when he read the same article that morning;

(l) Justice Cosgrove inappropriately aligned himself with defence counsel. During the evidence of Crown counsel Cooper (counsel on the Cumberland trial), Justice Cosgrove indicated that he assumed the question he had for the witness would be the same as the one contemplated by defence counsel, then stated, "we'll see whether we are reading one another's mind". After asking his question of the witness, Justice Cosgrove sought confirmation from defence counsel whether he had read his mind about the question;

(m) Justice Cosgrove ordered disclosure to defence counsel of a memorandum prepared by Crown counsel on incidents of bias by Justice Cosgrove;

(n) Justice Cosgrove referred, during the course of evidence, to the "so-called independent investigation" by the RCMP into the former OPP case manager of the Elliot case (Det. Lyle MacCharles) (arising out of an unrelated incident), thereby denying its credibility and portraying the RCMP and OPP as colluding in that investigation, there being no evidentiary basis to do so;

(o) Justice Cosgrove improperly interfered with the RCMP investigation by requiring that the RCMP provide to the court, all of its investigative notes, *during the course of the investigation itself*, for review and inspection by the court, notwithstanding the very limited relevance of the evidence collected;

(p) On two occasions, Justice Cosgrove refused to rescind his non-communication orders so that police witnesses could feel that they could speak to the RCMP without being in breach of the order, despite being advised that it was delaying

the RCMP investigation. Justice Cosgrove stated that he was "scandalized at what professed to be the professionalism of the RCMP in coming to the court to ask for an exception to that order." Justice Cosgrove subsequently criticized the RCMP for the delay in the completion of its investigation; and

(q) After staying the proceedings, and without any evidence or submissions by Crown counsel (Mr. Humphrey being denied the ability to make submissions), Justice Cosgrove quashed a federal immigration warrant for the accused and threatened the immigration officer with contempt if she tried to execute it;

3. Justice Cosgrove failed or refused to control the trial process and, in particular, allowed defence counsel to make unfounded, egregious allegations against the Crown, the police, and others. By both his failure to sanction or caution defence counsel and then by requiring Crown counsel or the witness to respond to the allegations, Justice Cosgrove gave credibility to allegations of corrupt and criminal behaviour of Crown counsel and others, thereby affecting the appearance of impartiality and the integrity of the administration of justice. Particulars include:

(a) In lieu of sanctioning or even cautioning defence counsel for the impropriety of the allegations, Justice Cosgrove called on Crown Ramsay to respond to the allegations made in defence counsel's submissions that Crown Ramsay was there to "play clean-up, to do damage control", was an "accessory after the fact" to murder (because, by acting for the Crown, was enabling the murderer to escape), and suggesting that two other Crowns (Crowns Flanagan and Findlay) were implicated in attempts to mislead the court directly or indirectly;

(b) Justice Cosgrove did nothing when Crown McGarry objected that defence counsel was maligning his reputation when he suggested that the conduct of Crown counsel "smells to high heaven" and was an abuse of process, and when defence counsel asked rhetorically, "What else with the Crown stoop to, to make this case work?";

(c) Justice Cosgrove failed to intervene during an abusive cross-examination of Bell Canada employees, despite the request of Crown counsel to do so;

(d) Following an altercation between defence counsel and the son of the victim, counsel for the son appeared in the face of a possible citation of contempt of court. Justice Cosgrove failed to sanction or otherwise curtail the submissions of defence counsel which attacked the reputation and ethics of counsel for the son, in which defence counsel alleged that counsel was "inexperienced", that his position was "ridiculous", "irresponsible" and that "he should be reported to the Law Society";

(e) Justice Cosgrove admonished both counsel to review the "code of conduct" after Crown McGarry complained that defence counsel had maligned his character and that of two other Crown counsel (Flanagan and Findlay), by suggesting that they would engage in impropriety;

(f) When Crown Sotirakos, as Regional Director of Central East, appeared to advise of the intention of the Crown to bring an application to quash subpoenas issued for Crown counsel, defence counsel suggested Mr. Sotirakos was "one in a series of pawns." When Mr. Sotirakos objected, Justice Cosgrove interrupted and gave credibility to the statement by indicating that Mr. Sotirakos "(did not) know enough about the case;"

(g) Justice Cosgrove failed to admonish defence counsel for his comparison of the Ministry of the Attorney General's office to "the last days of the Third Reich where Generals and members of the SS were scrambling, literally like rats deserting a sinking ship, to make arrangement for themselves…;"

(h) In the face of a Crown objection, Justice Cosgrove *required* an answer from the superintendent of the jail at which the accused was housed, to the following question/statement of defence counsel regarding a recent search of her cell: "This is like some cliched (sic) southern prison movie and you and your guards, sir, and your senior officials at the institution, I suggest to you, are bullying or allowing Miss Elliott to be bullied and intimidated to the point where you are abusing her verbally…and you've allowed these goons to go into her cell and trash it and destroy her personal property. And, sir, you come off like a cliché stereotype southern bigot…who is allowing that injustice to happen and it shouldn't be lost on anybody, sir, I suggest to you, that she's a black woman."

Justice Cosgrove told Crown Cavanaugh, when he objected, to "please sit down" and directed Superintendent Hutton to answer the question; and

(i) When Mr. Humphrey (acting as a Crown) objected to the description of the actions of the Crown and police as "corrupt" on the basis that it was "absurd", Justice Cosgrove told him not to use the word "absurd". Justice Cosgrove did not admonish defence counsel;

4. Justice Cosgrove misused his judicial office when he offered, as an alternative to a potential contempt citation against the Ottawa Sun and Brockville Reporter for reporting on the retainer of two "outside" Crowns (on the basis that it violated his publication ban), that the media could repair any erroneous impressions left by the article by publishing another article, the content of which was suggested by Justice Cosgrove. The content included statements that the delay in the trial to date was due to fresh production by the Crown, thereby maligning the Crown in the eye of the public;

5. Justice Cosgrove repeatedly misused his judicial office by making threats of citations of contempt or of arrest, without basis. Particulars include:

(a) Ordering that a Bell Canada employee, Gilles Gauthier, attend court on the threat of a warrant for his arrest, in the absence of any evidence that Mr. Gauthier would not attend and without any urgency to the evidence. A subpoena had been left at Mr. Gauthier's office the previous day (after he had already left), requiring his attendance in 10 minutes. When Mr. Gauthier did attend on threat of arrest by Justice Cosgrove, Justice Cosgrove reiterated that he would have had him arrested had he not attended and criticized him for his response to the subpoena;

(b) Without any indication that he would not respond to the subpoena (and in his absence), Justice Cosgrove indicated that Dr. Li, a physician of Det. Insp. MacCharles (who had been on medical leave), would be arrested if he did not attend in court the next day to canvass his availability to re-attend some other day. On threat of a warrant of his arrest, Dr. Li was forced to attend court, from Pembroke (an hour away from where the court was being held), for a brief scheduling attendance. Justice Cosgrove later referred to this as a "circus",

when he threatened to have arrested the physician of Cst. Mahoney (who was also on medical leave) if that physician did not clear his/her schedule to attend on the date that Justice Cosgrove required;

(c) Justice Cosgrove threatened to cite Federal Crown, Eugene Williams, Q.C., for contempt for an allegedly unsatisfactory explanation of why one Federal Crown counsel, as opposed to another, had attended court that day (ie., a scheduling problem);

(d) Justice Cosgrove advised that he intended to cite five police officers (Officers Laderoute, Scobie, MacCharles, Mahoney and Connors) for contempt if they delayed in the production of additional notes;

(e) Justice Cosgrove cited Det. Insp. Bowmaster in contempt for pre-empting cross-examination of another police officer when he advised that officer that defence counsel was aggressive in cross-examination;

(f) Justice Cosgrove advised of an intention to cite Det. Cst. Ball in contempt of court for alleged interference with defence counsel out of court, without hearing any evidence in support of the citation and relying solely on defence counsel's rendition of events;

(g) Justice Cosgrove threatened to cite an immigration officer, Maria Iadinardi, in contempt if she carried out an immigration warrant for the arrest of the accused after the proceedings were stayed;

(h) Without any evidence to suggest that he would not attend as requested, Justice Cosgrove required Superintendent Hutton to re-attend to answer his questions relating to a downturn of referrals to a halfway house (which could possibly have been a bail surety for the accused) or, in the alternative, stated that he may cite him in contempt if he did not attend; and

(i) Justice Cosgrove advised Dept. Insp. Bowmaster that he could have been cited in contempt for advising another officer that, if he thought he wanted legal counsel for the purpose of the ongoing RCMP investigation, he should contact

his association, on the basis that there was a non-communication order and that he was potentially interfering with a RCMP investigation;

6. The totality of the evidence and the conduct of the proceedings supported the observation by the Court of Appeal that, due to the failure of Justice Cosgrove to control the proceedings, "on occasion, the proceeding seemed to resemble nothing so much as a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial"; and

7. The conduct of Justice Cosgrove, when viewed its totality, is inconsistent with the standards of conduct expected of judges, as discussed in the Canadian Judicial Council's "Ethical Principles for Judges", including:

   (a) That "judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence";

   (b) That "judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons";

   (c) That, in performing adjudicative duties with diligence, the judge is expected to strive for "impartial and even-handed application of the law, thoroughness, decisiveness, promptness, and the prevention of the abuse of process and improper treatment of witnesses";

   (d) That "judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case";

   (e) That judges are to "treat everyone before the court with appropriate courtesy"; and

   (f) That judges are obliged "to treat all parties fairly and even-handedly" and to "ensure that proceedings are conducted in an orderly and efficient manner".

The foregoing facts and allegations, if accepted by the Committee, are capable of providing a sufficient basis upon which the Committee could determine that Justice Cosgrove has become incapacitated or disabled from the due execution of the office of judge by reason of

having failed in the due execution of that office, and by reason of having engaged in conduct 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 Justice Cosgrove incapable of executing the judicial office, such as to found a recommendation for removal from office pursuant to subsection 65(2) of the *Act*.

Dated at Toronto, this 29th day of February, 2008

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