Canadian Judicial Council

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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:

REPORT OF THE CANADIAN JUDICIAL COUNCIL TO THE MINISTER OF JUSTICE

Pursuant to its mandate under the *Judges Act*, and after inquiring into the conduct of Justice Cosgrove, the Canadian Judicial Council hereby recommends to the Minister of Justice, pursuant to section 65 of the *Judges Act*, that the Honourable Paul Cosgrove be removed from office, for the reasons outlined in this Report.

Presented in Ottawa, 30 March 2009

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INTRODUCTION

[1] Public confidence in the judiciary is essential in maintaining the rule of law and preserving the strength of our democratic institutions. All judges have both a personal and collective duty to maintain this confidence by upholding the highest standards of conduct. After inquiring into the conduct of the Honourable Paul Cosgrove, we find that he has failed in the due execution of his office to such an extent that public confidence in his ability to properly discharge his judicial duties in the future cannot be restored. In the result, we conclude that a recommendation be made to the Minister of Justice that Justice Cosgrove be removed from office.

BACKGROUND

[2] On 27 November 2008, we received the *Report to the Canadian Judicial Council of the Inquiry Committee Appointed to Conduct an Investigation Into the Conduct of Mr. Justice Paul Cosgrove, a Justice of the Ontario Superior Court of Justice* (the "Inquiry Committee Report"). This inquiry resulted from the request made by the Attorney General of Ontario on 22 April 2004 pursuant to subsection 63(1) of the *Judges Act*.

[3] From 1997 to 1999, Justice Cosgrove presided over the murder trial of Julia Elliott. A stay of proceedings was granted on 7 September 1999 after Justice Cosgrove concluded that there had been over 150 violations of Ms Elliott's rights under the *Canadian Charter of Rights and Freedoms*. On appeal, the stay of proceedings was set aside, and a new trial was ordered. The Court of Appeal remarked (*R.* v. *Elliott (2003)*, 179 O.A.C. 219, at paragraph 166):

> We conclude this part of our reasons as we began. The evidence does not support most of the findings of Charter breaches by the trial judge. The few Charter breaches that were made out, such as non-disclosure of certain items, were remedied before the trial proper would have commenced had the trial judge not entered the

> stay of proceedings. The trial judge made numerous legal errors as to the application of the Charter. He made findings of misconduct against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.

[4] Following a challenge to the constitutionality of subsection 63(1) of the *Judges Act* by Justice Cosgrove, and subsequent appeals, the Inquiry Committee proceedings resumed on 2 September 2008. The full procedural history of the complaint, the Inquiry, and the related proceedings, is set out in the Inquiry Committee Report at paragraphs 3 to 26.

[5] In its review of the judge's conduct, the Inquiry Committee adopted the reasoning of the Supreme Court of Canada in *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 (paragraph 58):

> In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

[6] The Inquiry Committee found that the judge's conduct included: an inappropriate aligning of the judge with defence counsel giving rise to an apprehension of bias; an abuse of judicial powers by a deliberate, repeated and unwarranted interference in the presentation of the Crown's case; the abuse of judicial powers by inappropriate interference with RCMP activities; the misuse of judicial powers by repeated inappropriate threats of citations for contempt or arrest without foundation; the use of rude, abusive or intemperate language; and the arbitrary quashing of a federal immigration warrant.

[7] The members of the Inquiry Committee then agreed unanimously as follows (paragraph 167):

> In our opinion, the evidence we have characterized as lack of restraint, abuse of judicial independence, or abuse of judicial powers fully warrants a recommendation for removal from office, subject to whatever effect may be given to the judge's statement [of apology] of 10 September 2008.

[8] After considering the judge's statement and the submissions, four out of the five members of the Inquiry Committee concluded as follows (paragraph 189):

> For the reasons given above, the words used and the conduct engaged in by Justice Cosgrove, over a prolonged period of time, constitute a failure in the due exercise of his office by abusing his powers as a judge. They give rise to a reasonable and irremediable apprehension of bias. Regrettably, his statement is insufficient to offset the serious harm done to public confidence in the concept of the judicial role, as described in the Marshall test. He has rendered himself incapable of executing the judicial office.

[9] Chief Justice Allan Wachowich, a member of the Inquiry Committee, indicated in dissenting reasons that while he agreed with the conclusion of the Committee as quoted at paragraph 7 of these reasons, he accepted the view of Independent Counsel, following Justice Cosgrove's apology, that the judge could be strongly admonished and not removed from office.

[10] In accordance with section 9 of the *Canadian Judicial Council Inquiries and Investigations By-Laws*, Justice Cosgrove advised Council that he wished to appear in person to make an oral statement about the Report of the Inquiry Committee. Justice Cosgrove and Independent Counsel provided written submissions for Council's consideration.

[11] At the Council meeting held on 6 March 2009 to consider the Inquiry Committee Report and the response of Council to it, both Justice Cosgrove and his Counsel, Mr Chris Paliare, spoke.

[12] In his statement to Council, Justice Cosgrove confirmed that his personal statement of 10 September 2008 to the Inquiry Committee was intended to be an unqualified recognition of his judicial misconduct and an unqualified apology. He repeated these sentiments in his statement before us. Justice Cosgrove asked that Council, in assessing its recommendation to the Minister of Justice in this matter, take into account his entire judicial career and that the conclusion of the majority of the Inquiry Committee be rejected.

[13] In his submissions on behalf of Justice Cosgrove, Mr Paliare confirmed that the Committee findings of judicial misconduct were not disputed, but asked that Council not recommend to the Minister of Justice that Justice Cosgrove be removed from office. In his submission, the letters of support filed in support of Justice Cosgrove, the opinion expressed by Independent Counsel that a strong admonition was an appropriate sanction, the fact that Justice Cosgrove had sat effectively without incident for 4½ years after the events at issue and, finally, his statement to the Inquiry Committee and his remarks to Council, should lead to the application of a lesser sanction than removal.

[14] Independent Counsel, Mr Earl Cherniak, also spoke. He reiterated his view that "significant weight can be placed on the apology made by Justice Cosgrove" so that a strong admonition was an appropriate outcome in the circumstances, but also noted that both conclusions (removal or a lesser sanction) were open on the evidence. He emphasized that, in the end, the decision was for Council to make and not Independent Counsel.

ISSUES

[15] In discharging our duties pursuant to subsection 65(2) of the *Judges Act*, we must follow a two-stage process, as described in the *Majority Reasons of the Canadian Judicial Council In the Matter of an Inquiry into the Conduct Of the Honourable P. Theodore Matlow, 3 December 2008* (see, in particular, paragraph 166). First, we must decide whether or not the judge is "incapacitated or disabled from the due execution of the office of judge" within the meaning of subsection 65(2) of the *Judges Act*. If this question is answered in the affirmative, we must then proceed to the second stage and determine if a recommendation for removal is warranted.

[16] Counsel for Justice Cosgrove, in his written submission, acknowledges that the judge engaged in judicial misconduct and that "it falls within paragraph 65(2)(b) of the *Judges*

Act." He also repeated, in relation to the judge's apology, that it "was, and was intended to be, a sincere admission of judicial misconduct."

> Submissions of the Honourable Paul Cosgrove, 26 January 2009, paragraph 107.

[17] Independent Counsel shares this view. He agrees (at paragraph 32 of his written submission) that the misconduct as found by the Inquiry Committee would certainly warrant removal in the absence of a genuine apology: "Independent Counsel was, and is, of the view that, absent Justice Cosgrove's apology, the facts presented to and found by the Inquiry Committee were capable [of] supporting a recommendation for removal to the Minister of Justice."

[18] Given the thorough and cogent analysis of the extensive evidence before the Inquiry Committee, we have no difficulty in agreeing and adopting as our own the conclusions reached by the Committee as expressed in paragraph 167 of its Report. There can be no doubt that Justice Cosgrove engaged in serious judicial misconduct, within the meaning of the *Judges Act*.

[19] Accordingly, it remains for Council to proceed to the second stage and determine if public confidence in the judge's ability to discharge the duties of his office has been undermined to such an extent that a recommendation for removal is warranted. In this regard, we adopt the standard identified by Council in the *Marshall* matter and widely applied in other cases since then:

> 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?

[20] In order to assess the judge's conduct in relation to this standard, we must answer the following three questions:

1. What is the effect of Justice Cosgrove's statements of apology made before the Inquiry Committee and again before the Council?

2. What is the effect of the views expressed by Independent Counsel regarding removal?
3. What is the effect of taking into account the judge's entire judicial career, character and abilities, as described in the letters of support and submissions from counsel?

[21] We will address each question in turn.

The Apologies

[22] As noted, Justice Cosgrove apologized in person before both the Inquiry Committee and the Canadian Judicial Council. We wish to highlight some key passages from the transcripts of the lengthy hearing before the Inquiry Committee:

> ... 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 the proceedings. ...
>
> ... 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. ...
>
> ... For the **significant errors** that I have described, I sincerely and unreservedly apologize...
>
> 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.
>
> *Transcript of the proceedings before the Inquiry Committee, 10 September 2008, pages 1660 to 1665 – emphasis added*

[23] We also highlight the following passages from the hearing before Council:

> I understood, and I accepted that judgement. Nevertheless, I was sustained by my view that **notwithstanding the errors I had clearly made, those errors had been made in good faith** and what was now obviously a misguided attempt to achieve justice in the case. ...
>
> ... Moreover, I would like [to] apologize, again, to the family of the victim of the crime who, **as a result of my errors**, have experienced a significant delay in

> achieving the closure arrived at by having the criminal prosecution reach its substantive conclusion.
>
> *Transcript of proceedings before the Canadian Judicial Council, 6 March 2009, pages 8 and 11-12 – emphasis added*

[24] We note that the focus of the apologies appears to be directed more to the "errors" made during the *Elliott* trial and less on a recognition that many of these "errors" were caused by, or constituted in and of themselves, serious misconduct that was damaging both to the administration of justice and the public's confidence in the judiciary. These errors went far beyond the types of errors that can be readily corrected by appellate courts.

[25] As found by the Inquiry Committee, the judge's conduct included: giving rise to an apprehension of bias; repeated and unwarranted interference in the presentation of the Crown's case; inappropriate interference with RCMP activities; inappropriate threats of citations for contempt or arrest without foundation; the use of rude, abusive or intemperate language; and the arbitrary quashing of a federal immigration warrant. These are not mere judicial errors.

[26] Justice Cosgrove made these additional comments before us:

> The last thing that I would hope for would be to bring disrespect to this office. I realize that by my actions and my judicial misconduct, I may have done that. I deeply and acutely regret the prospect that my actions may have done damage to this office.

[27] Counsel for Justice Cosgrove argues that the judge's apology 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.
>
> *Submissions on behalf of the Honourable Paul Cosgrove, 26 January 2009, paragraph 100.*

[28] Independent Counsel's view is that:

> The recognition of errors made by Justice Cosgrove, his apparent understanding and recognition of the impact of his conduct, and the set of full and unreserved apologies he provided led Independent Counsel to the opinion that, in his view, it is unlikely that this conduct will happen again, such that public confidence in the administration of justice could be restored by a pointed and strong admonition.
>
> *Submissions of Independent Counsel, February 2009, paragraph 41.*

[29] We agree that an apology is an important factor for Council to consider in assessing the future conduct of a judge and, specifically, whether the judge recognizes that they have engaged in misconduct and, further, whether there is a reasonable prospect that the judge will sincerely strive to avoid inappropriate conduct in future.

[30] Justice Cosgrove's apology in this case addresses both of these aspects. Even accepting that the judge's apology was sincere, we must consider an additional – more important – aspect in deciding whether a recommendation for removal is warranted: the effect upon public confidence of the actions of the judge in light of the nature and seriousness of the misconduct.

[31] For Council, therefore, the key question is whether the apology is sufficient to restore public confidence. Even a heartfelt and sincere apology may not be sufficient to alleviate the harm done to public confidence by reason of serious and sustained judicial misconduct. The Supreme Court of Canada in *Moreau-Bérubé* considered the factors that must be considered by a Judicial Council in such circumstances:

> [72] The comments of judge Moreau-Bérubé, as well as her apology, are a matter of record. In deciding whether the comments created a reasonable apprehension of bias, the Council applied an objective test, and attempted to ascertain the degree of apprehension that might exist in an ordinary, reasonable person.... In discharging its function, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to kill the expression of unpopular, honestly held views in the context of court proceedings. It must also be equally sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect.

[32] Although the New Brunswick Judicial Council in the *Moreau-Bérubé* matter noted that a timely apology had been made, three days after the misconduct, the Supreme Court of Canada did not disturb the decision of the New Brunswick Judicial Council that, in light of the severity of the judge's misconduct, the application of the identified objective test required the removal of the judge despite the judge's apology.

[33] The Inquiry Committee Report, in Part III, reviews and quotes in some detail the uncontested testimony of four witnesses on the severe effects on them of Justice Cosgrove's conduct in the *Elliott* case (paragraphs 109 to 120). In accepting the uncontradicted evidence as reliable, the Inquiry Committee noted "the credibility of the witnesses was beyond question and they gave compelling evidence" (paragraph 108). We agree.

[34] In this case, it is our conclusion that the misconduct by Justice Cosgrove was so serious and so destructive of public confidence that no apology, no matter its sincerity, can restore public confidence in the judge's future ability to impartially carry out his judicial duties in accordance with the high standards expected of all judges. This was not a single instance of misconduct but, rather, misconduct that was pervasive in both scope and duration.

[35] We endorse the majority's conclusion in regard to the judge's apology (paragraph 187):

> Given the judge's serious misconduct over an extended period of time, this statement, even viewed in its most positive light, cannot serve to restore public confidence in the judge, or in the administration of justice.

[36] In our opinion, the statement made before us by Justice Cosgrove did not add to, or change, the nature and effect of his earlier apology.

[37] It is significant to note that Justice Cosgrove acknowledges that public confidence in his ability to preside certain cases has been seriously shaken. He explains:

> However, under the circumstances, in the event I am assigned to hear cases in the future, it would be inappropriate for me to sit in cases involving the Attorney

> General of Canada or Her Majesty The Queen in Right of Canada, or the Attorney General of Ontario or Her Majesty The Queen in Right of Ontario, and I would take steps to ensure that that would not occur.
>
> *Transcript of proceedings before the Inquiry Committee, 10 September 2008, page 1667.*

[38] The Inquiry Committee pointed out (at paragraph 188 of its report): "One may well ask what such a direction would say about the ability of the judge to execute his office." We agree. It seems to us that this concession is a tacit acknowledgement that a significant segment of those persons involved in litigation before the court, including federal and provincial Crown attorneys, may not have confidence in the judge's ability to judge impartially.

Timing of the apology of September 2008

[39] Much has been said about the timing of the apology. At paragraph 113 of his written submission, counsel for Justice Cosgrove argues that "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 marshal[l]ed by Independent Counsel in order to complete their mandate." Independent Counsel, in his oral submission to the Inquiry Committee, appears to suggest that Justice Cosgrove could not apologize earlier, given his challenge to the constitutionality of the process.

[40] While it is not strictly necessary to address this issue, given the decision just made, we make the following points. It was open to Justice Cosgrove to offer, at any time, an apology about his conduct but he did not. It appears that the judge did not, for years after the fact, appreciate that he had engaged in serious misconduct.

[41] Justice Cosgrove acknowledged his late realization:

> Recently, I began to prepare for the current hearing. My preparation has profoundly affected my appreciation of the circumstance 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 of the time.
>
> Finally, I have spent days in this room hearing independent counsel reading passages of the evidence from the proceedings.
>
> All of these steps have caused me to relive the trial, but, for the first time, from an entirely different perspective.
>
> *Transcript of proceedings before the Inquiry Committee, 10 September 2008, page 1666.*

[42] The tardiness of the judge's apology reveals both his lack of insight and his lack of appreciation of the impact of his egregious misconduct on public confidence in the judiciary.

[43] It must also be emphasized that the apology was not made any time soon after the constitutional issue was resolved against Justice Cosgrove. In fact, it was only on the seventh day of the eight days of the hearings before the Inquiry Committee that Justice Cosgrove finally tendered his apology. It's not surprising that the Inquiry Committee, after considering all the relevant circumstances, including the timing of Justice Cosgrove's statement, found the apology insufficient to restore public confidence. We agree fully with this conclusion.

Timing of the Attorney General's Request for an Inquiry

[44] Justice Cosgrove's counsel commented on the fact that the Attorney General did not request the commencement of an inquiry until 4 years had passed since the verdict in the *Elliott* matter. In his presentation before us, he argued:

> So if, in fact, there was a concern by the Attorney General about whether or not public confidence could be maintained with respect to Justice Cosgrove sitting, in my respectful view, there was no reason for him not to have written that letter sooner. These two processes could have gone on in parallel, and I simply put that forward to you as yet another factor which demonstrates clearly that Justice Cosgrove can and does have the confidence of the public to continue to sit as a judge.
>
> *Transcript of Council hearing, 6 March 2009, page 55.*

[45] This interpretation does not take into account the many duties of an Attorney General. Attorneys General have an overall responsibility to administer justice in the public interest. In regard to judicial conduct, Justice Sharlow, in *Attorney General of Canada* v. *Cosgrove* 2007 FCA 103, commented as follows:

> [35] An important aspect of the traditional constitutional role of the Attorney General of England is to protect the public interest in the administration of justice. In Canada, that role is now shared by all Attorneys General – the provincial Attorneys General within their respective provinces, and the Attorney General of Canada in federal matters.
>
> [36] The public interest in an appropriate procedure for the review of the conduct of judges is an aspect of the public interest in the administration of justice. Therefore, it seems to me to be consistent with Canadian constitutional principles for provincial Attorneys General to play a part in the review of the conduct of judges of the superior courts of their respective provinces.

[46] However, Attorneys General are also responsible for the prosecution of crimes. In discharging this duty, it is well established that Attorneys General must act with the highest standards of fairness. The *Crown Policy Manual* of the Attorney General of Ontario emphasizes that:

> Public confidence in the administration of criminal justice is bolstered by a system where Crown counsel are not only strong and effective advocates for the prosecution, but also Ministers of Justice with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime, and the public.
>
> *"Crown Policy Manual," Ministry of the Attorney General of Ontario, 2005*

[47] Given an Attorney General's role and duties, it is understandable that the Attorney General of Ontario at the time did not request that Council commence an inquiry into the conduct of Justice Cosgrove, since the matter giving rise to the complaint was the subject of an appeal by his own Crown counsel. For that reason, we place little weight on the fact that there was a delay between the time of the events in the *Elliott* trial and the time of the request of the Attorney General.

[48] In fact, the Attorney General acted less than 2 months after the appeal period in regard to the decision of the Court of Appeal in *Elliott* lapsed. We find that this timing does

not suggest, in any way, that the Attorney General's actions can be characterized as an indication of confidence in the abilities of Justice Cosgrove to properly discharge the duties of his office.

[49] Counsel for Justice Cosgrove also argues that no complaints were made by anyone during the 4½ years in question and that this, therefore, demonstrates continued confidence in Justice Cosgrove. However, the public would not have known of the existence or extent of the judicial misconduct until the time of the decision of the Court of Appeal in *Elliott*. The fact that there was no evidence presented to the Inquiry Committee about subsequent complaints does not lead to the conclusion advanced by Counsel for Justice Cosgrove.

The Views of Independent Counsel Regarding Removal

[50] Counsel for Justice Cosgrove argued that deference should be accorded to the views expressed by Independent Counsel in regard to removal.

[51] Independent Counsel did express his view, in his written submission to Council, that "public confidence in the administration of justice could be restored by a pointed and strong admonition."

[52] However, immediately after Justice Cosgrove made his statement to the Inquiry Committee on 10 September 2008, Independent Counsel had stated:

> I wish to say at the outset that nothing that I am about to say is intended to in any way fetter or interfere with the discretion that this panel has to find, conclude and recommend as you see fit should you see the case differently than I am about to tell you I see it.
>
> As I stated in my opening, my view is that judicial accountability is a matter entirely for the Canadian Judicial Council, including this panel, and not any other body, least of all independent counsel. In my view, that is the constitutional imperative of judicial independence.
>
> *Transcript of proceedings before the Inquiry Committee, 10 September 2008, page 1668.*

[53] At the hearing before us, Independent Counsel emphasized again that it was open to the Inquiry Committee to come to its own view and that both the majority and minority views regarding the judge's removal were defensible.

[54] The mandate of Independent Counsel, it must be remembered, is not that of a lawyer retained to achieve a certain result. His view is but one view, albeit a very important one, arrived at after considering all issues. It cannot be the case that the members of the Inquiry Committee are in a lesser position than Independent Counsel in coming to their own conclusion. Four of the five members of the Inquiry Committee were of the view that public confidence in the judge's ability to discharge his duties impartially could not be restored. We agree. Recommending that the judge be removed from office is a grave duty and, given the principle of judicial independence, one that must ultimately rest with Council.

The Judge's Career, Character and Abilities

[55] Counsel for Justice Cosgrove referred to the many letters of support which in his view are evidence of the judge's character and integrity. As Council stated in its Report to the Minister in the Matlow matter in regard to comparable evidence:

> 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.
>
> *"Majority Reasons of the Canadian Judicial Council In the Matter of an Inquiry into the Conduct Of the Honourable P. Theodore Matlow," 3 December 2008, Paragraph 150*

[56] However, it is clear that the Inquiry Committee considered the letters of support but elected to give them no weight, given that there were unique circumstances before the Inquiry Committee not present in the *Matlow* matter (paragraph 38):

> 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*.

[57] We are of the view that the opinions of individuals, be they judicial colleagues or otherwise, who do not have the benefit of the evidentiary record and a complete knowledge and appreciation of the issues before Council, will generally be of little assistance in determining whether public confidence has been undermined to such an extent as to render a judge incapable of discharging the duties of their office. In this particular instance, we accord little weight to the letters of support. They may provide insight into the judge's character and work ethic, but they do not address the decisive issue before us, namely the damage done to public confidence by virtue of the judge's judicial misconduct. This is an issue that rightly rests with the Inquiry Committee and Council itself.

THE ISSUE OF INCOMPETENCE

[58] While not required to do so, we wish to make some observations about the issue of incompetence.

[59] The Inquiry Committee expressed the view that some of Justice Cosgrove's conduct demonstrated incompetence. They also expressed the view (at paragraph 151) that "such pervasive incompetence is of grave concern and is bound to undermine public confidence in the administration of justice." We agree.

[60] However, the Inquiry Committee was ultimately of the opinion that (paragraph 152):

> … [W]e consider that the public interest concern against removal for incompetence as expressed by Professor Shetreet should be given primacy. Protecting the judicial independence of all judges is more important than sanctioning the troubling incompetence of one.

[61] This perspective would appear to be based on the idea that since judicial independence protects a judge, after the fact, from having to justify or explain their decision, there should be no scrutiny of the judge's competence in arriving at a particular decision. However, we note the countervailing view, as indicated by Professor Shetreet, that incompetence could be grounds for removal in certain serious cases.

[62] In light of our earlier conclusion, we need not address whether incompetence could justify removal from office. The *Judges Act* refers in section 65 to a judge who "has become incapacitated or disabled" (in the French version "*est inapte*"). We are of the view that whether incompetence can be a ground for removal from office, in any given case, would best be dealt with another day, when the issue is more directly raised.

DECISION

[63] We agree with the conclusions reached by the majority of the members of the Inquiry Committee, as outlined in paragraph 189 of their report, which we now repeat:

> For the reasons given above, the words used and the conduct engaged in by Justice Cosgrove, over a prolonged period of time, constitute a failure in the due exercise of his office by abusing his powers as a judge. They give rise to a reasonable and irremediable apprehension of bias. Regrettably, his statement is insufficient to offset the serious harm done to public confidence in the concept of the judicial role, as described in the Marshall test. He has rendered himself incapable of executing the judicial office.

[64] We find that Justice Cosgrove has failed in the execution of the duties of his judicial office and that public confidence in his ability to discharge those duties in future has been irrevocably lost. We find that there is no alternative measure to removal that would be sufficient to restore public confidence in the judge in this case. Therefore, we hereby recommend to the Minister of Justice, in accordance with section 65 of the *Judges Act*, that Justice Cosgrove be removed from office.

Ottawa, 30 March 2009

List of Council Members who finalized this matter
(in order of seniority)

- The Honourable Richard J. Scott (Chair / président)
- The Honourable Catherine A. Fraser
- The Honourable Patrick D. Dohm
- The Honourable Joseph P. Kennedy
- The Honourable David D. Smith
- The Honourable Robert F. Ferguson
- The Honourable Beverley Browne
- The Honourable Donald I. Brenner
- The Honourable J. Derek Green
- The Honourable Robert Pidgeon
- The Honourable J.J. Michel Robert
- The Honourable Marc M. Monnin
- The Honourable Ernest Drapeau
- The Honourable Ronald Veale
- The Honourable François Rolland
- The Honourable Deborah K. Smith
- The Honourable André Wery
- The Honourable Robert D. Laing
- The Honourable John Klebuc
- The Honourable Gerald Rip
- The Honourable Eugene P. Rossiter
- The Honourable Glenn D. Joyal