Date: 20051026

Docket: T-101-05

Citation: 2005 FC 1454

Ottawa, Ontario, October 26, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE MACTAVISH

BETWEEN:

THE HONOURABLE MR. JUSTICE PAUL COSGROVE

Applicant

and

THE CANADIAN JUDICIAL COUNCIL AND THE ATTORNEY GENERAL OF CANADA

Respondents

and

THE ATTORNEY GENERAL OF ONTARIO THE CANADIAN SUPERIOR COURTS JUDGES' ASSOCIATION THE CRIMINAL LAWYERS' ASSOCIATION AND THE CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS

Interveners

REASONS FOR ORDER AND ORDER

TABLE OF CONTENTS

PARA.

[1] While judicial accountability and judicial independence are each essential to the maintenance of public confidence in our justice system, the two do not always co-exist comfortably. At issue in this application is whether a provision of the *Judges Act* intended to ensure judicial accountability is invalid as an impermissible infringement of judicial independence.

Introduction

[2] Anyone who is of the view that a federally-appointed judge has misconducted him- or herself is entitled to complain to the Canadian Judicial Council ("CJC"). In most cases, the complaint will be subjected to an initial screening process within the CJC itself. An inquiry into the judge's conduct will only be held where the CJC determines that the matter may be sufficiently serious as to potentially warrant the judge's removal from office.

[3] However, where a request is made by the federal Minister of Justice or by a provincial attorney general, subsection 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, mandates that the CJC inquire into the judge's conduct. As a result, these requests automatically bypass the CJC's initial triage or screening process.

[4] In April of 2004, the Attorney General of Ontario requested that an inquiry be commenced into the conduct of Justice Paul Cosgrove. At the commencement of the inquiry, Justice Cosgrove brought an application challenging the validity of subsection 63(1) of the *Judges Act*, asserting that it infringes the constitutionally protected independence of the judiciary. Justice Cosgrove further

argued that the provision also violates his right to freedom of expression, contrary to subsection 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, and that it does so in a way that cannot be justified under section 1 of the *Charter*.

[5] Justice Cosgrove's application was rejected by the Inquiry Committee. This is an application to judicially review the Committee's decision. While acknowledging that judges do not act with impunity, and must be accountable for their misconduct, Justice Cosgrove nevertheless submits that the Inquiry Committee erred in law in finding that subsection 63(1) of the *Judges Act* was constitutionally valid, and that, as a consequence, the decision should be quashed. He further seeks a declaration that subsection 63(1) of the *Judges Act* violates the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5, as well as section 2(b) of the *Charter*, and is therefore invalid.

[6] For the reasons that follow, I find that insofar as subsection 63(1) of the *Judges Act* confers the right on a provincial attorney general to compel the CJC to inquire into the conduct of a judge, the provision does not meet the minimal standards required to ensure respect for the principle of judicial independence, and is thus invalid.

Background

[7] Justice Cosgrove was appointed to Ontario County Court in 1984. As a result of the restructuring of the courts of Ontario, he sits on what is now known as the Superior Court of Ontario, in the Eastern Ontario Region.

[8] Since 1984, Justice Cosgrove has presided over hundreds, if not thousands, of matters, including hundreds of matters involving the Attorney General of Ontario as a litigant.

The Elliott Trial

[9] In September of 1997, Justice Cosgrove began hearing preliminary motions in relation to the trial of Julia Elliott, who was charged with second degree murder and interference with a dead body. Although the trial was originally projected to last five to six weeks, the proceedings against Ms. Elliott continued over the next two years, culminating in a stay of proceedings being granted by Justice Cosgrove on September 7, 1999. Justice Cosgrove also ordered that the Crown pay Ms. Elliott's legal costs from the outset of the proceedings.

[10] Over the course of the Elliott trial, Justice Cosgrove found that there had been in excess of 150 violations of Ms. Elliott's *Charter* rights, thereby compromising her right to a fair trial. Amongst those implicated in the *Charter* violations were 11 Crown Counsel and senior members of the Ministry of the Attorney General. Also implicated were at least 15 named police officers from

three different police forces, unnamed members of the Ontario Provincial Police and the Royal Canadian Mounted Police, and officials of several other government agencies.

[11] Many of the alleged *Charter* breaches were serious, involving, amongst other things, allegations of perjury, the fabrication of evidence, the deliberate destruction and non-disclosure of evidence, witness tampering, and the making of false or misleading representations to the Court.

[12] The Crown appealed Justice Cosgrove's decision staying the proceedings to the Ontario Court of Appeal. Although the Notice of Appeal was served in September of 1999, the appeal was not actually heard until September of 2003. Throughout this period, Justice Cosgrove continued to sit, presiding over both civil and criminal matters in which the Crown was a litigant.

The Decision of the Ontario Court of Appeal

[13] In a decision released on December 4, 2003, the Court of Appeal allowed the Crown's appeal, setting aside Justice Cosgrove's decision staying the proceedings, as well as his order requiring that the Crown pay Ms. Elliott's costs. In addition, the Court of Appeal ordered a new trial for Ms. Elliott.

[14] The decision of the Ontario Court of Appeal was highly critical of Justice Cosgrove's conduct of the trial, describing his rulings against the Crown and his findings with respect to the various *Charter* breaches as "unwarranted", "unfounded", "ill advised", "completely without

foundation", "peculiar", "erroneous", "troubling", "factually incorrect", and "not borne out by the evidence".

[15] The Court of Appeal further found that Justice Cosgrove's findings with respect to the alleged *Charter* breaches typically shared the following common elements:

> 1. There was no factual basis for the findings.
> 2. [Justice Cosgrove] misapprehended the evidence.
> 3. [Justice Cosgrove] 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. [Justice Cosgrove] misunderstood the reach of the *Charter*.
> 6. [Justice Cosgrove] proceeded in a manner that was unfair to the person whose conduct was impugned. [at ¶ 123]

[16] In addition, under the heading of "Abuse of the Contempt Power", the Court of Appeal discussed its concerns with the way that Justice Cosgrove used his contempt jurisdiction, finding that it appeared that he misunderstood the purpose of the contempt power. In discussing one incident where Justice Cosgrove indicated that he was contemplating citing Crown counsel for contempt, without apparent justification, the Court of Appeal observed that "A reasonable observer might be concerned that the trial judge appeared to be biased against the police and their counsel because of this unfortunate incident". [at ¶ 144]

[17] The Court of Appeal also found that Justice Cosgrove's use of the *Charter* to 'remedy' frivolous and baseless claims brought the *Charter* and the administration of justice into disrepute.

[18] The Ontario Court of Appeal's decision received a significant amount of publicity.

[19] No application for leave to appeal to the Supreme Court of Canada was brought with respect to the Court of Appeal's decision, and the time for bringing such an application expired on February 2, 2004.

The Attorney General's Request

[20] By letter dated April 22, 2004 to the Right Honourable Beverly McLachlin, Chief Justice of the Supreme Court of Canada and Chair of the Canadian Judicial Council, Michael Bryant, the Attorney General of Ontario, requested that, pursuant to subsection 63(1) of the *Judges Act*, an inquiry be commenced into the conduct of Justice Cosgrove during the course of the Elliott trial. The Attorney General indicated that he was seeking the inquiry in order to determine whether Justice Cosgrove should be removed from office for any of the reasons set out in paragraphs 65(2)(b) to (d) of the *Judges Act*.

[21] Paragraphs 65(2)(b) to (d) of the *Judges Act* provide that the CJC may recommend the removal of a judge where the Council is of the opinion that the judge has become incapacitated or disabled from the due execution of the office of judge by reason of having been guilty of misconduct, having failed in the due execution of his or her office, or having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of the office. Paragraph

65(2)(a), which is not in issue in this case, contemplates removal for incapacity due to age or infirmity.

[22] In his letter to Chief Justice McLachlin, the Attorney General of Ontario stated that:

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

[23] The Attorney General of Ontario went on to review, at some length, the history of the proceedings in the Elliott matter, and provided the CJC with a detailed summary of the findings of the Ontario Court of Appeal.

[24] The Attorney General's letter concludes with the observation that:

> In these most unfortunate of circumstances, it is my view that the conduct of Justice Cosgrove during the course of this trial was such that nothing short of an inquiry by the Judicial Council can restore public confidence in the due administration of justice in connection with this matter.

Proceedings Before the CJC and the Inquiry Committee

[25] Upon receiving the Attorney General's letter of request, the CJC advised Justice Cosgrove of the request for an inquiry, and of the CJC's intention to issue a press release regarding same.

[26] On April 27, 2004, the CJC publicly announced that there would be an inquiry into the conduct of Justice Cosgrove as a result of the request of the Attorney General of Ontario. The fact that the CJC would be holding an inquiry received significant media attention.

[27] On April 29, 2004, the Honourable Heather Smith, the Chief Justice of the Superior Court of Ontario, contacted Justice Cosgrove and asked that he not preside over any matters until such time as the inquiry was resolved. Matters that were pending before Justice Cosgrove were reassigned to other judges, and he has not sat since that time.

[28] An Inquiry Committee was established by the CJC, consisting of two Chief Justices and an Associate Chief Justice. Two senior members of the Ontario Bar were also appointed to the Inquiry Committee by the Federal Minister of Justice, in accordance with the provisions of subsection 63(3) of the *Judges Act*.

[29] By Notice of Motion dated October 18, 2004, Justice Cosgrove moved for a determination that subsection 63(1) of the *Judges Act* violates the *Constitution Act, 1867* as well as section 2(b) of the *Canadian Charter of Rights and Freedoms*. Justice Cosgrove asserted that the power of a provincial attorney general to require that an inquiry be conducted pursuant to subsection 63(1) of the *Judges Act* threatened his judicial independence, as well as his right to freedom of expression.

[30] On the same date, Justice Cosgrove filed a detailed Notice of Constitutional Question, outlining the facts upon which he relied in support of his contention that subsection 63(1) was unconstitutional. Justice Cosgrove identified the constitutional questions to be determined by the Inquiry Committee as:

> (i) Is subsection 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1 of no force and effect pursuant to section 52 of the *Constitution Act, 1982* because it contravenes the principles of judicial independence inherent in the *Constitution Act, 1982* and the *Constitution Act, 1867*?
>
> (ii) Is subsection 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1 of no force and effect pursuant to section 52 of the *Constitution Act, 1982* because it contravenes the right to freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*?

[31] Justice Cosgrove's motion was heard by the Inquiry Committee on December 8 and 9, 2004. Both the Attorney General of Canada and the Attorney General of Ontario appeared before the Inquiry Committee as interveners, as did the Canadian Superior Court Judges Association (the "CSCJA"), the Criminal Lawyers' Association and the Canadian Council of Criminal Defence Lawyers. The Attorneys General supported the constitutionality of the legislation, whereas the CSCJA and the criminal lawyers' associations supported Justice Cosgrove's position.

[32] Also appearing at the hearing was Earl Cherniak, Q.C.. Mr. Cherniak is the Independent Counsel appointed by the CJC with respect to this case. Mr. Cherniak argued in favour of the constitutionality of the legislation.

The Inquiry Committee's Decision

[33] In a decision dated December 16, 2004, the Inquiry Committee dismissed Justice Cosgrove's motion, finding that subsection 63(1) of the *Judges Act* was constitutional as it offended neither the principle of judicial independence nor section 2(b) of the *Canadian Charter of Rights and Freedoms*.

[34] In coming to this conclusion, the Inquiry Committee held that while the principle of judicial independence was inviolate, judicial conduct is properly subject to scrutiny by other branches of government. The unique position assigned to attorneys general as guardians of the public interest, as well as their historically recognized role with respect to the administration of justice, serve to explain why they are given the power to compel an inquiry in cases where there are allegations of serious judicial misconduct.

[35] In this regard, the Inquiry Committee noted that subsection 63(1) of the *Judges Act*:

> [...] enables the public's primary representative in the legal system, an attorney general, to ensure that allegations of serious judicial misconduct are examined, first by judges and ultimately, if necessary, by Parliament itself. We do not think that this can be unconstitutional. [at ¶ 29]

[36] The Inquiry Committee also found that subsection 63(1) of the *Judges Act* provided federally-appointed judges with every substantive protection that he or she could reasonably expect, the result of which was to provide "a strong insulation against any apprehension of undue influence thought to be accorded to an attorney general or the Minister under subsection 63(1)." [at ¶ 21]

[37] The Inquiry Committee considered the affidavit evidence of Justice Cosgrove and the Honourable James Chadwick, Q.C., who the Committee described as "a respected former judge of the Ontario Superior Court", as to the alleged "chilling effect" of subsection 63(1) of the *Judges Act*. In this regard, the Inquiry Committee stated that:

> Our own experience, including that of three judges and two senior lawyers on this Inquiry Committee, provides no basis for concluding that judges are even remotely intimidated by the knowledge that an attorney general can compel their fellow judges on the CJC to inquire into their conduct. [at ¶ 41]

[38] In relation to the issue of judicial independence, the Inquiry Committee concluded that:

> A balancing of competing interests arises in every constitutional analysis. In our view, when Parliament in subsection 63(1) gave to the senior law officers in the country the power to compel the CJC to commence an inquiry in the public interest, into allegations of serious misconduct, Parliament created a minimal and reasonable limitation on the independence of the judiciary. [at ¶ 38]

[39] In relation to Justice Cosgrove's alternative argument that subsection 63(1) *Judges Act* violates subsection 2(b) of the *Charter* and has a chilling effect on judicial speech, the Inquiry Committee held that subsection 2(b) could not possibly have any application to this case. In the Committee's view, the *Charter* was never intended to protect one branch of government from another.

[40] Moreover, the Inquiry Committee held that the protections which attach to judicial expression are entirely encompassed by the constitutional guarantee of judicial independence. The Committee observed that:

> In the discharge of their duties, judges were as free before 1982 when the *Charter* was adopted, as they have been since, to express themselves fully, openly and candidly, provided only that they do so in good faith and do not abuse the powers of their office. The *Charter* has altered nothing in this regard. [at ¶ 47]

[41] In concluding that subsection 2(b) is not engaged in the circumstances of this case, the Inquiry Committee held that the *Charter* is a shield for the benefit of individuals, and was never intended to protect either the legislative or judicial branches of government in the exercise of their powers or functions.

The Issues Before the Court

[42] Although they differ slightly as to the wording to be used, the parties are agreed that there are three issues before the Court. They are:

1. What is the appropriate standard of review?

2. Did the Inquiry Committee err in determining that s. 63(1) of the *Judges Act* is valid as it does not infringe the constitutionally protected independence of the judiciary?

3. Did the Inquiry Committee err in determining that s. 63(1) of the *Judges Act* does not infringe section 2(b) of the *Charter* in a manner that cannot be justified under section 1?

The Standard of Review

[43] The parties are in agreement that insofar as the Inquiry Committee was called upon to decide constitutional questions, the appropriate standard of review is that of correctness. However, counsel for the Minister of Justice, as well as the Independent Counsel himself, submit that to the

extent that the Inquiry Committee made findings of fact, these findings should be reviewed against a standard of patent unreasonableness.

[44] In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, 2004 SCC 54 (at ¶ 6), the Supreme Court noted that the proper standard of review is a question of law which must be decided by the Court, even in cases where the parties are in agreement as to what that standard should be.

[45] That said, in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, Justice Gonthier held that decisions of administrative tribunals based upon the *Canadian Charter of Rights and Freedoms* will always be subject to review on the standard of correctness. The Court went on to observe that "[a]n error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court." [at ¶ 31] (See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at ¶ 66 and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 39, 2005 SCC 40, at ¶ 37, where the Supreme Court of Canada recently reaffirmed that questions of law are reviewable on a standard of correctness.)

[46] A challenge to the constitutionality of legislation admits of only one answer - the legislation is either constitutional or it is not. As a consequence, I am satisfied that to the extent that the

Inquiry Committee decided questions of constitutionality, its decision should be reviewed against the correctness standard.

[47] However, I am also satisfied that in the course of making its constitutional determination, the Inquiry Committee made several findings of fact, including the finding that in light of the reasons of the Ontario Court of Appeal in *Regina v. Elliott*, there could be no reasonable suggestion that in requesting an inquiry into Justice Cosgrove's conduct, the Attorney General of Ontario was relying upon subsection 63(1) for an improper purpose. The Inquiry Committee also found as a fact that subsection 63(1) does not have an intimidating or chilling effect on members of the judiciary.

[48] The question, then, is the degree of deference that this Court should show to these factual findings. It should be noted that in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, the Supreme Court of Canada observed, in relation to a provincial judicial council, that "[a] tribunal charged with the task of disciplining provincial court judges does not fit into the more traditional specialized against non-specialized dichotomy for purposes of evaluating the appropriate standard of review". The Court then went on to note that "it would be nonsensical for a single judge or an appellate court to show low deference to decisions of the Council in an area in which they have no additional expertise." [at ¶ 44 and 50]

[49] The Court's comments in *Moreau-Bérubé* were, however, made in the context of a discussion as to the standard of review to be applied with respect to a judicial council determination

as to a judge's capacity to remain in office, and not in the context of a challenge to the constitutionality of legislation. In the context of this case, it is therefore necessary to conduct a pragmatic and functional analysis in order to determine the appropriate standard of review to be applied in relation to the Inquiry Committee's factual findings.

[50] A review of the four factors outlined by the Supreme Court of Canada in cases such as *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, discloses that:

i) There is no privative clause in the *Judges Act*. This suggests that less deference should be paid to findings of an Inquiry Committee. At the same time, there is no appeal procedure in the *Act*, which suggests that decisions of the Inquiry Committee are to be accorded deference;

ii) As was noted by the Supreme Court of Canada in *Moreau-Bérubé*, judicial councils are unique tribunals, with some degree of specialization, and which are at least if not more qualified than reviewing courts in relation to matters of judicial discipline. As such, the findings of judicial councils in relation to a judge's capacity to remain in office should be accorded a great degree of deference [at ¶ 53]. In my view, notwithstanding the fact that the Supreme Court's comments were made in the context of a review of the merits of a complaint of judicial misconduct, these comments suggest that findings of fact made by judicial councils should be accorded significant deference. Moreover, the specialized expertise of the judicial members

of the Inquiry Committee stems, in part, from their experience as sitting judges. This suggests that findings of fact made by the Inquiry Committee should be accorded significant deference;

iii) Insofar as the purpose of the legislation is concerned, section 63 of the *Judges Act* is part of a legislative scheme designed to ensure that the removal of a judge from office is carried out in accordance with judicial independence. This purpose involves the application of constitutional principles, and militates against deference; and

iv) the questions in issue are questions of fact, suggesting a high degree of deference.

[51] The purpose of the pragmatic and functional analysis is to ascertain Parliament's intent as to the level of deference to be accorded to a decision-maker, in light of the nature of the question that the decision-maker is called upon to answer.

[52] In this case, one of the four factors militates against deference being paid to the Inquiry Committee's findings of fact. However, in light of the comments of the Supreme Court in *Moreau-Bérubé* as to the expertise of judicial councils, and having regard to the considerable expertise of the Inquiry Committee in relation to findings of fact, I am satisfied that the factual findings of the Committee should nonetheless be accorded significant deference, and should thus be reviewed against the standard of patent unreasonableness.

[53] With this understanding of the standard of review, I turn now to consider the merits of Justice Cosgrove's application for judicial review.

Did the Inquiry Committee Err in Determining That Subsection 63(1) of the *Judges Act* Is Valid as it Does Not Infringe the Constitutionally Protected Independence of the Judiciary?

[54] Before turning to consider the arguments of the parties, it is important to have an understanding of the judicial discipline process, as it relates to superior court judges. As much depends on the specifics of the process to be followed and the protections that are afforded to judges who are the subject of complaint, it is necessary to review this process in some detail.

i) **The Scheme of the *Judges Act* and the Judicial Discipline Process**

[55] The starting point in this discussion must be subection 99 of the *Constitution Act, 1867*, which provides that:

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.	99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.	(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.

[56] Prior to 1971, the only mechanism in place to ensure judicial accountability was the power of the Minister of Justice to establish an inquiry under the *Inquiries Act*, R.S. 1985, c. I-11, to review the conduct of a judge of a superior court. Following such an inquiry, a report would be made to the Minister, which could result in a joint address of the Senate and the House of Commons, and the removal of the judge by the Governor General.

[57] The CJC was created in 1971, through amendments to the *Judges Act*. These amendments were introduced, at least in part, as a result of concerns that had arisen with respect to the *ad hoc* nature of the judicial discipline process. These concerns came into the forefront in the 1960's, as a result of perceived flaws in the proceedings involving Justice Leo Landreville: see Professor Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (1995, Canadian Judicial Council) at p. 88.

[58] As a consequence, the CJC was given a specific role to play in relation to the removal process. As part of the CJC's mandate to improve the quality of judicial service in superior courts by fostering judicial accountability, consistent with the independence of the judiciary, paragraph 60(2)(c) of the *Judges Act* empowers the CJC to make inquiries in relation to and to investigate complaints or allegations of judicial misconduct.

[59] As noted earlier, section 63 of the *Judges Act* contemplates that inquiries and investigations with respect to judicial conduct may be commenced in one of two ways. The relevant portions of section 63 provide that:

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).	63. (1) Le Conseil **mène** les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)a) à d).
(2) The Council **may** investigate any complaint or allegation made in respect of a judge of a superior court. [emphasis added]	(2) Le Conseil **peut** en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.

[60] Thus subsection 63(1) mandates that there be an inquiry, whereas subsection 63(2) gives the CJC the discretion to investigate, and the corresponding discretion not to investigate a complaint of judicial misconduct.

[61] Although neither term is defined in the *Judges Act*, the Inquiry Committee found that an "inquiry" contemplates a more formal pre-hearing and hearing process than does an "investigation", which, at least at the outset, will be less structured.

[62] At this juncture, it should be observed that while the English version of the legislation uses different terms in the two subsections ("inquiry" in subsection 63(1) versus "investigation" in subsection 63(2)), the French version of the legislation uses variations of the same term in both subsections: "enquêtes" in subsection 63(1), and "enquêter" in subsection 63(2).

[63] As the Supreme Court of Canada recently restated in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, 2005 SCC 51, at ¶ 25, bilingual legislation is to be interpreted by applying the "shared or common meaning rule". That is, where two versions of bilingual legislation do not say the same thing, the shared meaning, which is normally the narrower meaning, ought to be adopted, unless for some reason, that meaning is unacceptable: See also Ruth Sullivan, *Sullivan and Dreidger on the Construction of Statues*, 4th ed. (London: Butterworths, 2002) at p. 80.

[64] "Enquêtes" and "enquêter" contemplate both investigations and inquiries, whereas I agree with the Inquiry Committee that the English terms "inquiry" and "investigation" are slightly different, with "inquiry" having a slightly narrower meaning, contemplating a more formal pre-hearing and hearing process than does "investigation". Applying the shared or common meaning rule, I am therefore satisfied that section 63 should properly be interpreted in the manner suggested by the Inquiry Committee. This is also consistent with the way that the CJC itself has interpreted the legislation.

[65] Subsection 63(3) deals with the constitution of Inquiry Committees, whereas subsection 63(4) deals with the powers of Committees to compel the attendance of witnesses and the production of documents. Subsections 63(5) and (6) deal with the public nature of the process, with the CJC being empowered to determine the extent to which the process will be public in nature.

The one limitation on the power of the CJC to determine how public the process will be is that the Minister of Justice can require that an investigation or inquiry be held in public. No such request was made in this case.

[66] In enacting these provisions, Parliament has conferred a considerable amount of autonomy and discretion on the CJC to establish the procedures that it will follow in relation to the investigations and inquiries contemplated by section 63 of the *Judges Act*. In this regard, paragraph 61(3)(c) empowers the CJC to make by-laws respecting the conduct of inquiries and investigations.

[67] The CJC has exercised this power, and has adopted a series of by-laws and procedures which establish a comprehensive complaints process. The *Canadian Judicial Council Inquiries and Investigations By-laws* have been enacted as Regulations, in accordance with subsection 61(3) of the *Judges Act*, whereas the "Complaints Procedures" represent a more informal statement of policy of the CJC, as it relates to the processing of complaints.

[68] The "Complaints Procedures" govern the conduct of investigations and inquiries, including the public or private nature of the process, subject to the provisions of subsection 63(6) referred to above, which empowers the Minister of Justice to require that an investigation or inquiry be held in public. No such right is accorded to provincial attorneys general.

[69] Nothing in the *Judges Act* or in the CJC's *By-laws* or Complaints Procedures requires that the CJC keep the fact that a complaint has been made pursuant to subsection 63(2) confidential. Although it is the usual practice of the CJC to keep such investigations private, there have been cases where the CJC has publicized the conclusions of a panel regarding specific investigations.

[70] Moreover, there is nothing in either the *Judges Act* or in the CJC's *By-laws* and Complaints Procedures that would prevent the individual who initiated the complaint under subsection 63(2) from publicizing the fact that a complaint was made.

[71] Where a complaint is made to the CJC pursuant to subsection 63(2) of the *Judges Act*, it is subject to a screening procedure established by the CJC *By-laws*. The process provided for in the Complaints Procedures involves four stages:

1. Every complaint or allegation is received by the Executive Director of the CJC and is then referred to the Chair of the CJC's Judicial Conduct Committee. The Chair may close the file where the matter is "trivial, vexatious, or without substance". If these criteria are not met, the judge whose conduct is in question then has an opportunity to comment on the complaint or allegation, following which the file may then be closed for the same reasons mentioned above, or because it has been determined that the matter is clearly not serious enough to warrant the removal of the judge in question.

2. The Chair of the Judicial Conduct Committee may also cause "further inquiries" to be made. These are usually conducted by an independent counsel. If further inquiries are made, the judge who is the subject of the complaint must be provided with the gist of the allegations against him or her, and must also be provided with the evidence which is uncovered through those inquiries. The judge must also be given the opportunity to respond to the allegations and evidence.

3. If the Chair has not closed the file by this point, it is referred to a panel of the Judicial Conduct Committee. The panel may decide that no investigation is warranted because the matter is without substance, or is clearly not serious enough to warrant removal. Alternatively, the panel may refer the matter to the CJC with its report and conclusion that an investigation pursuant to section 63(2) of the *Judges Act* is warranted.

4. A copy of the panel's report to the CJC must be provided to the judge whose conduct is under scrutiny. The judge is then entitled to make written and oral submissions to the CJC. The CJC will then decide whether or not an investigation pursuant to section 63(2) of the *Judges Act* is warranted. If such an investigation is found to be warranted, an Inquiry Committee will then be established pursuant to section 63(3).

[72] It is at this point that the process to be followed in relation to complaints brought under subsection 63(2) of the *Judges Act* merges with the process that will be followed where a request for an inquiry is received from the Minister of Justice or a provincial attorney general. In either case, section 64 of the *Judges Act* provides the judge whose conduct is in question with a range of procedural protections. These include the right to notice of the subject-matter of the inquiry or investigation, and of the time and place of the hearing. The judge also has the right to be heard, including the right to lead evidence, and to cross-examine witnesses.

[73] Regardless of how the complaint was initiated, the proceedings of the Inquiry Committee will be governed by the *Canadian Judicial Council Inquiries and Investigations By-laws*. When an Inquiry Committee is established, section 3 of the *By-laws* requires that the Chairperson or Vice-Chairperson of the Judicial Conduct Committee appoint an independent counsel, who must have been a member of a provincial bar for at least 10 years, and who must also be recognized within the legal community for his or her ability and experience.

[74] As was noted earlier in these reasons, in this case, Earl Cherniak, Q.C. was appointed as the independent counsel to the Inquiry Committee.

[75] Subsection 3(b) of the *By-laws* makes it the responsibility of the independent counsel to present the case to the Inquiry Committee; subsection 3(c) of the *By-laws* stipulates that the

independent counsel is to perform his or her duties impartially, and in accordance with the public interest.

[76] As was confirmed by the Supreme Court of Canada in *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, [1995] S.C.J. No. 100 at ¶ 72-73, the process before an Inquiry Committee "does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth". As a consequence, the Supreme Court found that "[a]ny idea of prosecution is thus structurally excluded".

[77] Subsection 6(1) of the *By-laws* requires that any hearing of the Inquiry Committee be conducted in public, unless the Inquiry Committee determines that the public interest and due administration of justice require that all or part of the hearing be held in private. This is, however, subject to the overriding provisions of subsection 63(6) of the *Judges Act*, which, as was previously noted, gives the Minister of Justice the right to require that the hearing be held in public.

[78] Section 8 of the *By-laws* mandates that the Inquiry Committee must submit a report to the CJC, setting out its findings and conclusions as to whether a recommendation should be made for the removal of the judge from office. If the hearing was conducted in public, subsection 8(3) of the *By-laws* requires that the Inquiry Committee's report be made available to the public.

[79] The judge whose conduct is in question is then provided with an opportunity to respond, orally or in writing, to the report of the Inquiry Committee. The CJC will then consider the report of the Inquiry Committee, along with any submissions that may have been made by the judge and the independent counsel.

[80] Subsection 65(1) of the *Judges Act* requires the CJC to then report its conclusions to the Minister of Justice, and to provide the Minister with the record of the inquiry or investigation. Where the CJC is of the view that the judge has become incapacitated or disabled from the due execution of the office of judge by reason of age or infirmity, by having been guilty of misconduct, by having failed in the due execution of that office, or by having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, subsection 65(2) of the *Judges Act* empowers the CJC to recommend to the Minister that the judge be removed from office.

[81] The CJC has described the test to be applied in deciding whether to recommend the removal of a judge as being:

> 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?" [see *Marshall Report (Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990)]

[82] Neither the Inquiry Committee nor the CJC can impose any kind of sanction on a judge, although the CJC will, from time to time, express its concern with respect to a judge's conduct. The conduct review process before the CJC can only result in a recommendation that a judge be removed from office. The actual power to remove a judge is reserved to the Governor General, on address of the Senate and House of Commons, in accordance with section 99(1) of the *Constitution Act, 1867*. The CJC's recommendation with respect to a judge is conveyed to Parliament through the Minister of Justice.

[83] Finally, even if the CJC declines to recommend the removal of a judge, the power of the two houses of Parliament to act under section 99(1) of the *Constitution Act, 1867* is preserved by section 71 of the *Judges Act*, which provides that:

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.	71. Les articles 63 à 70 n'ont pas pour effet de porter atteinte aux attributions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière de révocation des juges ou des autres titulaires de poste susceptibles de faire l'objet des enquêtes qui y sont prévues.

[84] As was noted by Justice Strayer in *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769 at pp. 802-3, 115 D.L.R. (4th) 81, it is Parliament that has the ultimate responsibility for deciding whether or not to use the mechanism of the joint address, and there is nothing in the *Judges Act* which precludes Parliament from acting under section 99 of the *Constitution Act, 1867* without first obtaining a recommendation from the CJC.

[85] It may thus be open to the Minister of Justice to, by way of example, appoint a Commission of Inquiry under the *Inquiries Act*, should the CJC fail to refer a case to Parliament. Similarly, the Minister could refer the issue of removal directly to Parliament.

ii) **The Experience With the Complaints Process for Federally Appointed Judges**

[86] With this understanding of the process to be followed in relation to the disciplining of federally-appointed judges, it is also helpful to have some appreciation as to how often these procedures have actually been used, and by whom.

[87] In recent years, approximately 165 complaints a year have been filed in accordance with subsection 63(2) of the *Judges Act*. Many of these complaints relate to judges' decisions, as opposed to their conduct. Since 1971, only six of these complaints have been deemed by the CJC to have been sufficiently serious as to warrant the establishment of an Inquiry Committee.

[88] In the same time frame, the federal Minister of Justice and provincial attorneys general have requested the establishment of an inquiry into the conduct of a judge on seven occasions, apart from the request of the Attorney General of Ontario in relation to Justice Cosgrove.

[89] In two of these cases, the judge in question resigned before the Inquiry Committee could commence its inquiry into the merits of the complaint. In at least three of the five cases that

proceeded through the inquiry stage, the judges who were the subject of the complaint resumed active judicial duties after the Inquiry Committees established to deal with the complaints released reports that did not recommend the judge's removal.

[90] This case represents the first time that the Attorney General of Ontario has requested an inquiry into the conduct of a judge in accordance with subsection 63(1) of the *Judges Act*.

iii) **The Nature, Purpose and Content of Judicial Independence**

[91] In determining whether the provisions of subsection 63(1) of the *Judges Act* pass constitutional muster, or represent an unjustifiable encroachment on the independence of the judiciary, it is necessary to have an appreciation of the nature, purpose and content of judicial independence.

[92] A starting point for this discussion is Article 2.02 of the *Universal Declaration on the Independence of Justice* (reproduced in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Boston, Mass.: M. Nijhoff, 1985), 447, at p. 450), which states that:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [Emphasis added.]

[93] Judicial independence in Canada finds its origins in unwritten constitutional principles, whose origins can be traced to the *Act of Settlement* of 1701: *Reference Re Remuneration of Judges*

of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577, at ¶ 83. These principles find textual recognition and affirmation in the preamble to the *Constitution Act, 1867*, in the judicature provisions of that same instrument (ss. 96 to 101), and in subsection 11(d) of the *Charter* which provides, in part, that:

> 11. Any person charged with an offence has the right
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
>
> 11. Tout inculpé a le droit :
> d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable.

[94] In *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at ¶ 21, 30 D.L.R. (4th) 481, the Supreme Court of Canada stated that:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [See also *Valente v. The Queen*, [1985] 2 S.C.R. 673, per Le Dain J., at 685.]

[95] In *Gratton*, *supra*, at ¶ 16, Justice Strayer echoed this sentiment, noting that "it is equally important to remember that protections for judicial tenure were 'not created for the benefit of the judges, but for the benefit of the judged'".

[96] That is, the purpose of judicial independence is not to confer on judges a special position of privilege, but rather to ensure that those appearing before Canadian judges can have confidence in the impartiality of those judging them.

[97] Judicial independence has both an individual and an institutional dimension, each of which depends on there being objective conditions or guarantees to ensure the judiciary's freedom from interference from any other entity: *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at ¶ 18.

[98] Because the goal of judicial independence is the maintenance of public confidence in the impartiality of the judiciary, judges must not only be independent in reality: they must also be seen to be independent. Thus, in determining whether a judge enjoys the necessary objective conditions or guarantees of judicial independence, the question to be asked is "what would an informed person, viewing the matter realistically, and practically - and having thought the matter through - conclude?" (See *Valente, supra*, at pp. 684 and 689)

[99] In answering this question in the circumstances of this case, it is also necessary to have regard to what the courts have had to say about the content of judicial independence.

[100] The Supreme Court of Canada has determined that there are three essential conditions of judicial independence: security of tenure, financial security and institutional independence with respect to administrative matters bearing on the exercise of judicial functions: *Valente*, *supra*, at pp. 694, 704 and 708. See also *PEI Judges Reference*, *supra*, at ¶ 115.

[101] These conditions are not exhaustive, however, and it has long been recognized that the scope of the constitutional guarantee of judicial independence, as it relates to the independence of

individual judges, extends beyond matters that might lead directly to the removal of the judge. Judicial independence can also require that judges be insulated from external influences that could potentially be seen to undermine their ability to adjudicate impartially.

[102] By way of example, in the *PEI Judges Reference*, *supra*, at ¶ 226, the Supreme Court found that a provision in the Alberta *Provincial Court Judges Act* that allowed for the Attorney General of Alberta to determine where a given judge had to reside, even after the judge's appointment, created the reasonable apprehension that the power could be used to punish judges whose decisions did not please the government of the day, or alternatively, to benefit judges whose decisions favoured the government. As a result, this provision was determined to violate the administrative independence of the Alberta Provincial Court.

[103] Similarly, in *Taylor v. Attorney General (Canada)*, [2000] 3 F.C. 298, the Federal Court of Appeal observed that judicial independence would be severely compromised if legal action could be taken against judges in relation to their decisions. If judges could be sued for their decisions, these decisions:

> [M]ight not be based on a dispassionate appreciation of the facts and law related to the dispute. Rather, they might be tempered by thoughts of which party would be more likely to bring an action if they were disappointed by the result, or by thoughts of whether a ground-breaking but just approach to a difficult legal problem might be later impugned in an action for damages against that judge, all of which would be raised by the mere threat of litigation. In Lord Denning's words, a judge would "turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?" [quoting *Sirros v. Moore*, [1974] 3 All ER 776 (C.A.)][at ¶ 28]

[104] How, then, if at all, do these principles apply in this case?

iv) **Analysis**

[105] In order to ensure the integrity of the justice system, it is essential that there be suitable mechanisms in place to ensure that judges are held to account when they misconduct themselves. Indeed, conduct review is necessary for the preservation of the integrity of the judiciary as a whole and of public confidence in the system.

[106] At the same time, the judiciary must remain independent, in order that individual citizens can be confident that judicial decisions affecting them are arrived at untainted by external influences.

[107] As was observed by Professor Friedland, there is a tension between the public interest in judicial accountability and the public interest in judicial independence. The challenge identified by Professor Friedland is to devise a system that provides for accountability, yet, at the same time, is fair to the judiciary, and does not curtail the ability of a judge to rule honestly, and according to the law. (*A Place Apart: Judicial Independence and Accountability in Canada, supra,* at p. 129.)

[108] The question, then, is whether the power conferred on the Minister of Justice and provincial attorneys general by subsection 63(1) of the *Judges Act* to compel the CJC to inquire into the

conduct of a judge is a reasonable means of ensuring judicial accountability, or whether it represents an impermissible infringement of the independence of the judiciary.

[109] As was noted earlier, the test to be applied is "what would an informed person, viewing the matter realistically, and practically - and having thought the matter through - conclude?". There are a number of factors that have a bearing on the answer to this question, each of which will be considered in turn.

a) Does 63(1) of the Judges Act in Fact have a Chilling Effect on Judges?

[110] A reasonable and informed person would start by considering whether subsection 63(1) of the *Judges Act* does, in actual fact, have a chilling effect on judges.

[111] In this case, the Inquiry Committee found that subsection 63(1) does not, in fact, have a chilling effect on members of the judiciary. While acknowledging that this is not a finding of fact in the traditional sense, Justice Cosgrove nevertheless contends that the Inquiry Committee erred in coming to this conclusion, by rejecting the uncontradicted, sworn evidence before it, and by substituting the personal views of the members of the Inquiry Committee for the opinions of the deponents.

[112] It is noteworthy that despite the fact that each has enjoyed a lengthy career on the Bench, and the fact that subsection 63(1) of the *Judges Act* has been in place for over 30 years, neither

Justice Cosgrove nor Mr. Chadwick asserts that he himself ever felt chilled by the existence of the power conferred on the Minister of Justice and provincial attorneys general by subsection 63(1).

[113] Justice Cosgrove deposes that he is "concerned that the unilateral ability of the Attorney General to exercise his powers under subsection 63(1) of the *Judges Act*, absent judicial input, creates a chilling effect in the minds of *other judges*." Mr. Chadwick's concern is that the ability of an Attorney General to initiate an inquiry against a judge in a case such as this is very likely to send a strong message to judges across Ontario, and perhaps nation-wide that if the judge decides a case in a manner that is unsatisfactory to the Attorney General, the judge could then face a very public examination of his or her actions.

[114] While the views of Justice Cosgrove and Mr. Chadwick are undoubtedly sincerely held, at the end of the day, they represent nothing more than the views of two individuals, albeit two very experienced judges. Members of the Inquiry Committee were equally well situated to hold opinions on the issue, and given the considerable expertise of the members of the Inquiry Committee, it was, in my view, open to the Committee to reject the evidence of Justice Cosgrove and Mr. Chadwick, to the extent that it did not accord with their own experience.

[115] Justice Cosgrove also points to the fact that there were a number of newspaper articles before the Inquiry Committee in which the views of various judges from across Canada were reported as to the chilling effect that they believe is created by subsection 63(1) of the *Judges Act*.

Given that these articles amount to nothing more than untested hearsay, it was reasonably open to the Inquiry Committee to choose to give this evidence little or no weight: *Public School Boards' Association of Alberta v. Alberta* (Attorney General), [2000] 1 S.C.R. 44, 2000 SCC 2, at ¶ 14.

[116] As a consequence, I see no basis for interfering with the Inquiry Committee's finding that subsection 63(1) of the *Judges Act* does not, in fact, have a chilling effect on members of the judiciary.

[117] However, whether subsection 63(1) of the *Judges Act* does, in fact, have a chilling effect on members of the judiciary is only half of the equation. As the Supreme Court of Canada noted in *Mackin v. New Brunswick (Judicial Council)* [2002] 1 S.C.R. 405, 2002 SCC 13, at ¶ 38 "... not only does a Court have to be truly independent but it must also be reasonably seen to be independent". The Supreme Court went on to say:

> Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement. [at ¶ 38]

[118] Thus, even if judges do not in fact permit themselves to be influenced or 'chilled' by the presence of subsection 63(1) in the *Judges Act*, consideration must also be given to whether subsection 63(1) could create *the perception* in the minds of reasonable and informed people that judges could feel intimidated in the discharge of their judicial responsibilities by the ability of the Minister of Justice or a provincial attorney general to force them to submit to an inquiry. Such an

examination is necessary, as the perception that a judge might have been influenced "could harm the esteem in which our system of justice is held": *MacKeigan v. Hickman* [1989] 2 S.C.R. 796, at ¶ 71, 61 D.L.R. (4th) 688.

[119] There are a number of factors at play in the context of this case that could influence the perception of the reasonable and informed person, each of which will be discussed below.

b) The Potential for Political Interference

[120] A reasonable person would want to consider whether subsection 63(1) of the *Judges Act* could potentially be abused by an attorney general, for political purposes.

[121] As Albert Béchard, the Parliamentary secretary to the Minister of Justice noted in 1971, on second reading of Bill C-243, the legislation amending the *Judges Act*, and creating the CJC:

> The executive or legislative branches of government should not ordinarily intervene in the management or control of the judiciary. To do so might result in an abuse of the executive power of government and would diminish the respect and independence now held by the bench, and destroy the delicate balance of powers that Canadian democracy has enjoyed since Confederation. [Hansard, June 14, 1971 at p. 6665]

[122] In *A Place Apart: Judicial Independence and Accountability in Canada*, Professor Friedland considered whether there is any policy justification for provincial attorneys general to have special powers pursuant to subsection 63(1). In coming to the conclusion that no such justification existed, Professor Friedland stated:

> ... should the provincial Attorneys General have the same right? In fact, it has rarely been exercised. There has been only one instance in which a provincial Attorney General has ordered an Inquiry. That was in the case involving the appeal court judges in the Marshall case. *Nevertheless, in my view, only the federal Minister of Justice should have the power to order an inquiry. A provincial Attorney General can always ask the Council to examine a matter, but then it is up to the Council to determine whether the matter warrants a full formal Inquiry. The danger in giving this power to the provincial Attorneys General is that they may order an inquiry for political purposes, although it is conceded that it has not so far been abused. If a provincial Attorney General wants a public inquiry, he or she, in my view, should have to persuade the Council to undertake one or the federal Minister of Justice to order one.* [at p. 139, emphasis added].

[123] While Professor Friedland's comments also represent nothing more than one person's view as to the potential for political interference arising out of the power conferred on provincial attorneys general by virtue of subsection 63(1) in the *Judges Act*, surely it cannot be said that Professor Friedland is not a reasonable and fully informed person. Nor can it be said that he has not given this issue considerable thought over the years.

[124] Moreover, I am satisfied that the concerns articulated by Mr. Béchard and Professor Friedland are ones that would be shared by the reasonable and informed person.

c) The Impact of the Inquiry Process on Judges

[125] In assessing the perception created by subsection 63(1) in the *Judges Act*, a reasonable and informed person would also have regard to what the Courts have had to say about the potential impact of judicial accountability processes on individual judges.

[126] By way of example, in *Moreau-Bérubé, supra*, at ¶ 44, the Supreme Court recognized the need for judicial accountability to ensure public confidence in the justice system. Nevertheless, the Court adopted Professor Friedland's observation that such accountability could have an inhibiting or chilling effect on judges' actions.

[127] Insofar as the impact that inquiry process may have on individual judges whose conduct is under scrutiny is concerned, an inquiry into allegations of judicial misconduct is a "traumatic ordeal" for a judge. [Sopinka J. dissenting, but not on this point in *Ruffo, supra*.]

[128] While *Ruffo* involved a provincially-appointed judge, and, as a result, engaged different constitutional considerations, I am nevertheless satisfied that the same may be said of the impact of the inquiry process on a federally-appointed judge.

[129] Moreover, even though the record demonstrates that judges can, and do, continue their judicial careers after inquiries have found insufficient grounds for their removal, a judge's reputation may nevertheless be badly damaged by the mere holding of the inquiry: *Gratton, supra*, at p. 803.

[130] A reasonable and informed person would thus understand that the power to compel the CJC to inquire into the conduct of a judge is one that will have significant, negative consequences for the judge whose conduct is under scrutiny.

d) The Procedural Safeguards in the Inquiry and CJC Processes

[131] Consideration would also have to be given to the procedural safeguards that are afforded to judges through the inquiry and CJC processes.

[132] In this regard, the Inquiry Committee found that once a judge is before the Committee, he or she will be accorded a full range of procedural protections, in order to ensure the fairness of the process. Moreover, any recommendation with respect to the removal of the judge in question will be made by the CJC itself, and that, at the end of the day, section 99 of the *Constitution Act, 1867* ensures that no superior court judge will be removed from office except by the Governor General, on joint address of Parliament. According to the Inquiry Committee, these protections provide judges with numerous 'screenings' before the matter is referred to Parliament.

[133] While I accept that these afford significant protection for judges' security of tenure, they do not, however, address the concern that arises in this case - that is, the unfettered right of the Minister of Justice or a provincial attorney general to subject a judge to the ordeal of an inquiry - a right that is not accorded to any other litigant.

[134] While this is problematic in any case, it is all the more troubling where, as here, the source of the complaint are the rulings made by a judge, in the exercise of his judicial discretion, in a case to which the Attorney General of Ontario was a party.

e) The Role of the Attorney General in the Justice System

[135] A reasonable and informed person would also have regard for the role of the Minister of Justice and provincial attorneys general in the justice system.

[136] In this regard, counsel for the Minister of Justice and for the Attorney General of Ontario contend that their clients are not like other litigants. They understand the object of the judicial discipline process, and thus are unlikely to file frivolous complaints. They are presumed to act in good faith, and there is no suggestion in the historical record that the power conferred by subsection 63(1) of the *Judges Act* has ever been abused.

[137] Moreover, they say, federal and provincial attorneys general have an important role to play in the administration of justice. Public confidence in an independent judiciary is not just the responsibility of judges. Rather the Minister of Justice and provincial attorneys general also have a duty to preserve public confidence in the justice system.

[138] I accept that attorneys general are not like other litigants, and that they play a special and important role in the administration of justice: *Proulx v. Québec (Attorney General)* [2001] 3 S.C.R. 9, 2001 SCC 66, at ¶ 81 per L'Heureux-Dubé J., dissenting, but not on this point.

[139] I also accept that some harm is simply not curable by the appeal process, and that there may well be occasions where an attorney general forms the opinion that public confidence in the administration of justice has been undermined by the conduct of a judge. However, in such cases, it would still be open to the attorney general to file a complaint with the CJC under subsection 63(2) of the *Judges Act*. If the complaint is truly one that could lead to a recommendation for the removal of a judge, one would expect to see it result in a CJC inquiry, and the preparation of a report to the Minister of Justice.

[140] Although the Minister of Justice submits that requests under subsection 63(1) of the *Judges Act* would not be made except in the most serious cases of judicial misconduct, the statute does not explicitly limit the power of the executive to request an inquiry to serious allegations of misconduct. Moreover, history has demonstrated that not every request made by a Minister of Justice or provincial attorney general has been sufficiently well-founded as to result in a recommendation for the removal of the judge in question: see, for example, the *Report to the Canadian Judicial Council Concerning Mr. Justice Bernard Flynn*, December 12, 2002, and the *Report of Inquiry Committee Members*, August 27, 1990 (the "Marshall Inquiry" report).

[141] Indeed, as was previously noted, in the *Boilard* case, the CJC found that the request filed by the Attorney General of Québec in this case did not even disclose a *prima facie* case of judicial misconduct.

[142] Nevertheless, as a consequence of the power conferred by subsection 63(1) of the *Judges Act*, the judges involved in these cases were subjected to the ordeal of the inquiry process, with the accompanying potential for damage to their reputations, without any prior judicial screening or "institutional filtering" of the requests.

f) The Presumption of Good Faith

[143] Regard would also have to be had to the fact that the Minister of Justice and provincial attorneys general are presumed to act in good faith, and in the public interest. Indeed, it bears repeating here that the Inquiry Committee found that in light of the reasons of the Ontario Court of Appeal in *Regina v. Elliott*, there could be no reasonable suggestion that, in requesting an inquiry into Justice Cosgrove's conduct, the Attorney General of Ontario was relying upon subsection 63(1) for an improper purpose. On the basis of the record before me, it appears that this finding is unassailable.

[144] However, I am not satisfied that the presumed good faith of attorneys general offers a sufficient objective guarantee of judicial independence. In this regard, it bears noting that in the *PEI Judges Reference*, *supra*, the power of the Attorney General of Alberta to designate the place of residence of a judge, after appointment, was found to infringe judicial independence. The Supreme Court of Canada came to this conclusion, notwithstanding the fact that, like any other attorney general, the Attorney General of Alberta would be presumed to act in good faith and in the public interest in deciding where an individual judge should reside.

[145] What concerned the Supreme Court in the *PEI Judges Reference* case was that the legislative provision in question created the reasonable apprehension that the power to designate the place of residence of a judge could be used to punish judges whose decisions displeased the government, or to reward judges whose decisions benefited the government. The same concern exists here.

[146] In an analogous vein, governments will also be presumed to act in good faith in negotiating salaries with judges. Nevertheless, the Supreme Court has determined that, in order to avoid the possibility of, or the appearance of, political interference through economic manipulation, an institutional buffer such as an independent commission must be interposed between the judiciary and the other branches of government: see *PEI Judges Reference*.

g) The CJC's Screening Process as an 'Institutional Filter'

[147] A reasonable and informed person would also want to consider the extent to which the CJC's screening process serves as an 'institutional filter'.

[148] The CJC *Inquiries and Investigations By-laws* and Complaints Procedures represent a carefully calibrated effort to reconcile the need for judicial accountability, with the preservation of the independence of the judiciary. This process includes an 'institutional filter' in the form of the judicial pre-screening process, which maintains an appropriate relationship between the judiciary

and outside influences. Complaints are considered internally, and are only referred for an inquiry where the CJC itself determines that the complaint is sufficiently serious and sufficiently meritorious as to potentially warrant the removal of the judge.

[149] This preliminary screening stage - which was recognized by Justice Strayer in the *Gratton* case as offering judges an important procedural protection against unmeritorious complaints - ensures that the adverse impact on an individual judge is minimized, while, at the same time, fully protecting the rights of individual complainants to a full hearing of their complaint, where circumstances warrant.

[150] However, subsection 63(1) of the *Judges Act* empowers a member of the executive branch of the federal or provincial government to by-pass this judicial triage process, and to compel the CJC to inquire into the conduct of a judge, without first affording the judge any right to respond to the allegations against him or her, and without any judicial pre-screening mechanism to ensure that the basis for the request is indeed of sufficient seriousness that it could warrant the removal of the judge.

[151] While the determination as to whether the inquiry process will play itself out in public is ordinarily a matter for the CJC to decide, and not for a provincial attorney general, even if the inquiry is held in private, the effect of the request will undoubtedly be traumatic for the judge. It may also be expensive, as the judge would likely have to retain counsel to represent him or her in

the inquiry process. Moreover, while the decision as to whether a judge will continue to sit while the inquiry process is ongoing is a matter for the Chief Justice of the court in question, and not the attorney general, as is demonstrated by the facts of this case, the reality is that the result of a request from the executive branch of government may be the suspension of a judge, further contributing to the traumatic effect.

h) The Inquiry Process as an 'Institutional Filter'

[152] Consideration would also have to be given as to whether the inquiry process itself serves as a sufficient institutional buffer between the members of the executive and the judiciary.

[153] As was noted earlier, the Minister of Justice points to the fact that a subsection 63(1) request simply puts the inquiry process in motion. The inquiry will still be carried out by the CJC, or by an Inquiry Committee appointed by the Council, and any recommendation for removal will still have to come from the CJC itself. In this regard, the Minister contends that the Inquiry Committee was correct in finding that this provides sufficient insulation against any apprehension of undue influence thought to be accorded to an attorney general or to the Minister.

[154] The flaw in this reasoning is, in my view, illustrated by analogy to the principle of judicial immunity from suit. If a judge could be sued for his or her comments or decisions, it matters not that, at the end of the day, the lawsuit would be tried by a member of an independent judiciary, who would be expected to provide the judge with a fair trial. As was noted by the Federal Court of

Appeal in the *Taylor* case, the damage is done by exposing judges to the risk of lawsuits. This exposure creates the potential for judges to be, or to be reasonably perceived to be, inhibited in the discharge of their judicial responsibilities by the risk of litigation, thereby compromising judicial independence.

[155] Similarly, in this case, the fact that any inquiry into a judge's conduct will be carried out by the judge's peers does not take away from the fact that subsection 63(1) gives the Minister of Justice and provincial attorneys general the unfettered right to subject a judge the trauma of a CJC inquiry. Moreover, this power is not shared by the ordinary litigants who regularly appear opposite the federal or provincial government in the nation's courts.

i) The Purpose Served by Subsection 63(1) of the *Judges Act*

[156] Finally, a reasonable and informed person would look to the purpose served by subsection 63(1) of the *Judges Act*.

[157] Having carefully considered the matter, I am satisfied that no compelling case has been made as to why the special power conferred on provincial attorneys general by subsection 63(1) is necessary.

[158] Counsel for the Minister of Justice submits that subsection 63(1) of the *Judges Act* contemplates that requests from the Minister of Justice or provincial attorney general would only be

forthcoming in cases of alleged misconduct that were serious enough to potentially call for the removal of the judge in question. In this context, subsection 63(1) ensures that a proper record is created in such cases so that the Minister of Justice, as well as Parliament itself, can benefit from the best possible advice from the CJC in deciding whether or not to proceed with the joint address process. In addition, this report plays an integral role in restoring public confidence in the administration of justice. Absent subsection 63(1), the Minister of Justice says, there is no mechanism whereby the Minister could obtain the judiciary's view as to the capacity of a judge to continue to perform his or her duties.

[159] I do not accept this submission. In the event that the judicial misconduct complained of is truly serious enough as to potentially warrant the removal of a judge, a complaint filed by the Minister of Justice or provincial attorney general under subsection 63(2) of the *Judges Act* would inevitably result in an inquiry being held by the CJC, with the accompanying development of a record for the Minister of Justice and Parliament.

[160] In the unlikely event that the CJC decided not to hold an inquiry into the judge's conduct in a truly serious case, the Minister or attorney general would not be left without a remedy. Assuming that the decision of the CJC did not cause the Minister or attorney general to re-think their position as to the severity of the judge's perceived misconduct, either could seek judicial review of the CJC's decision in this Court.

[161] Further, in accordance with section 71 of the *Judges Act*, the Minister of Justice arguably retains the power to appoint a Commission of Inquiry under the *Inquiries Act* into the judge's conduct, or to proceed directly to Parliament on a joint address**.**

[162] Moreover, despite the Minister's argument that subsection 63(1) *ensures* that an inquiry will be held and a full record prepared in relation to the conduct in question, it does not necessarily follow that there will, in fact, be a full examination of all of the facts and circumstances of every case, on its merits.

[163] That is, the CJC or an Inquiry Committee appointed by the Council may decline to deal with a request made by the Minister of Justice or a provincial attorney general pursuant to subsection 63(1) where the request for the inquiry does not, on its face, disclose an arguable case for removal: See *Report of the Canadian Judicial Council to the Minister of Justice under ss. 65(1) of the Judges Act Concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Québec*, December 19, 2003, at p. 3.

[164] Counsel for the Attorney General of Ontario and the Independent Counsel argue, quite correctly, that the test to be applied in a challenge to the constitutional validity of legislation such as this is not one of necessity. It is not for this Court, counsel say, to second-guess the wisdom of the policy choices made by Parliament in this regard. While this is true, as the Inquiry Committee observed in its reasons, in a constitutional challenge such as this it is necessary to balance

competing interests. In this case, these competing interests are the need to have effective mechanisms in place to ensure judicial accountability and the desirability of ensuring the independence of the judiciary.

[165] The fact that there is little or no compelling public interest served by conferring a special power on provincial attorneys general to compel the CJC to inquire into the conduct of a judge means that there is little to outweigh the threat to judicial independence posed by subsection 63(1) of the *Judges Act*.

j) Conclusion

[166] In these circumstances, I am satisfied that subsection 63(1) of the *Judges Act* creates a reasonable apprehension that the power to compel the CJC to inquire into the conduct of a judge could be used to punish judges whose decisions displease the government in question, and that as a result, it infringes the constitutionally protected independence of the judiciary.

[167] Subsection 63(1) of the *Judges Act* confers this power on both the federal Minister of Justice and provincial attorneys general. This case involves a request from a provincial attorney general, and not the federal Minister of Justice. I recognize that, given the role that the federal Minister of Justice plays in the removals process, there may be other considerations that affect the constitutionality of subsection 63(1) of the *Judges Act* insofar as the federal Minister is concerned.

[168] As a consequence, I prefer to leave the determination of the constitutionality of subsection 63(1) of the *Judges Act* as it relates to the federal Minister of Justice to be determined in a case involving a Ministerial request.

[169] However, to the extent that subsection 63(1) of the *Judges Act* confers the right on a provincial attorney general to compel the CJC to inquire into the conduct of a judge, I find that the provision does not meet the minimal standards required to ensure respect for the principle of judicial independence, and is thus invalid.

[170] As a consequence, the decision of the Inquiry Committee is set aside. Subsection 63(1) of the *Judges Act* is of no force and effect to the extent that it confers the right on a provincial attorney general to compel the CJC to inquire into the conduct of a judge. Thus, the subsection should be 'read down' to delete the words "or the attorney general of a province" and "ou le procureur général d'une province".

[171] As a result of my conclusion in this regard, it follows that the Inquiry Committee has no jurisdiction to proceed with this inquiry.

Did the Inquiry Committee Err in Determining That S. 63(1) of the *Judges Act* Does Not Infringe Section 2(b) of the *Charter* in a Manner That Cannot Be Justified under Section 1?

[172] Having found that subsection 63(1) of the *Judges Act* is constitutionally invalid to the extent

that it permits a provincial attorney general to require that the CJC inquire into the conduct of a judge, it is unnecessary to address Justice Cosgrove's arguments based upon section 2(b) of the *Charter*. Nevertheless, in the event that I am mistaken in relation to my findings on the constitutional issue, I will briefly address the *Charter* argument.

[173] The Inquiry Committee held that subsection 2(b) had no application to this case as the *Charter* was never intended to protect one branch of government from another. According to the Inquiry Committee, the protections which attach to judicial expression are entirely encompassed by the constitutional guarantee of judicial independence. The Inquiry Committee held that the *Charter* is a shield for the benefit of individuals, and was never intended to protect either the legislative or judicial branches of government in the exercise of their powers or functions.

[174] I agree with the conclusion of the Inquiry Committee that section 2(b) of the *Charter* does not assist Justice Cosgrove. In this regard, I adopt the reasoning of the Supreme Court of Canada in *Moreau-Bérubé*, where the Court stated that:

> While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole. [at ¶ 59]

[175] Were it otherwise, a judge could never be sanctioned for comments made from the Bench. This would have the effect of impairing public confidence in the integrity of the judiciary as a whole. Properly interpreted, the purpose of section 63 of the *Judges Act* is not to detract from a

judge's freedom to speak out in the due performance of his or her duties, but to prevent a misuse of the judicial power: *Allen v. Manitoba (Judicial Council)*, [1993] 3 W.W.R. 749 (Man. C.A.), at ¶ 27, [1993] M.J. No. 29.

Conclusion

[176] Judges do not operate with impunity in this country, and must be held to account when they misconduct themselves. By the same token, the judiciary must remain independent, in order that individual citizens can be confident that judicial decisions affecting them are arrived at untainted by external influences.

[177] Provincial attorneys general play an important role in the administration of justice, and, in discharging their responsibilities, it is essential that they have ready access to a complaints process where they are of the view that a judge has misconducted him or herself. Such a process is available to them under subsection 63(2) of the *Judges Act*.

[178] However, for the reasons given, I find that subsection 63(1) of the *Judges Act*, which allows a provincial attorney general to require that the Canadian Judicial Council inquire into the conduct of a judge, represents an unjustifiable interference with the independence of the judiciary.

[179] For these reasons, the application is allowed.

ORDER

[180] **THIS COURT ORDERS that:**

1. This application for judicial review is allowed;
2. The December 16, 2004 decision of the Inquiry Committee is set aside;
3. This Court declares that to the extent that subsection 63(1) of the *Judges Act* confers the right on a provincial attorney general to compel the Canadian Judicial Council to inquire into the conduct of a judge, the provision does not meet the minimal standards required to ensure respect for the principle of judicial independence, and is thus invalid;
4. This Court further declares that the Inquiry Committee is without jurisdiction to proceed with this inquiry; and
5. Costs were not sought, nor are they ordered.

"Anne Mactavish"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-101-05
STYLE OF CAUSE:	THE HONOURABLE MR. JUSTICE PAUL COSGROVE APPLICANT v. THE CANADIAN JUDICIAL COUNCIL AND THE ATTORNEY GENERAL OF CANADA RESPONDENTS and THE ATTORNEY GENERAL OF ONTARIO THE CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION THE CRIMINAL LAWYERS ASSOCIATION AND THE CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS INTERVENERS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	29/30 AUGUST 2005
REASONS FOR ORDER AND ORDER:	MACTAVISH, J.
DATED:	OCTOBER 26, 2005

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