IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

MOTION RECORD OF THE HONOURABLE JUSTICE PAUL COSGROVE

Dated: October 18, 2004

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IN THE MATTER OF:

Canadian Judicial Council
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TAB 1

IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

NOTICE OF MOTION

The Honourable Paul Cosgrove will make a motion to the Inquiry Committee of the Canadian Judicial Council challenging the constitutional validity of s. 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended and the investigation into whether he has been incapacitated or disabled from the due execution of the office of judge in a hearing before an Inquiry Committee appointed under the *Judges Act* to be heard on December 8 and 9, 2004.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. A declaration that s. 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended, violates the *Constitution Act, 1867* and/or the *Canadian Charter of Rights and Freedoms,* and are therefore invalid and of no force or effect;

2. An order declaring that this Inquiry Committee has no jurisdiction to proceed with this Inquiry; and

3. Such further relief as Counsel may advise and this Inquiry Committee permits.

THE GROUNDS FOR THE MOTION ARE:

1. This Inquiry Committee has the jurisdiction to determine the constitutional validity of the legislation from which it purports to derive its jurisdiction, and which it is called upon to interpret and apply in the determination of a matter before it.

2. Mr. Justice Cosgrove is a judge of the Ontario Superior Court of Justice which is a superior court pursuant to s.96 of the *Constitution Act, 1867*.

3. This proceeding is an inquiry by a committee of the Canadian Judicial Council (the Council") pursuant to s. 63(1) of the *Judges Act*, 1985, c. J-1, as amended (the "Inquiry").

4. This Inquiry was commenced by the Council upon the request of Ontario Attorney General Michael Bryant (the "Attorney General") pursuant to his authority under s. 63(1) of the *Judges Act*.

5. The Attorney General's request to the Council explicitly indicates that the request is based upon Justice Cosgrove's conduct throughout the proceedings in the matter of *R. v. Elliott*, which concluded on September 7, 1999, when Justice Cosgrove entered a stay of those proceedings. During the course of proceedings, and in his decision, Justice Cosgrove was critical of the conduct of a number of agents of the Attorney General. Justice Cosgrove's decision in that matter was set aside by the Court of Appeal in December 2003, and a new trial has been scheduled.

6. Pursuant to the provisions of s. 63 (1) of the *Judges Act* the Council is *required* to conduct an inquiry when requested by the Attorney General of Canada, or of a province. Both the fact that an inquiry has been commenced and its proceedings are public.

7. While any other person in Canada is entitled to file a complaint with the Council against a judge, the by-laws of the Council set out a comprehensive scheme whereby the complaint is assessed by various members of the Council. Specifically, the by-laws prescribe that a complaint must be scrutinized at three different stages prior to an inquiry. The complaint may be resolved on a variety of

bases, including a determination that "the matter is not sufficiently serious to warrant removal". In such cases, the matter will not be referred to the inquiry stage.

8. While the Council provides a public summary of the basis upon which complaints are resolved, the judge against whom the complaint is received is not identified, nor is the complaint process a public one.

9. In the more than four and one half years between the release of Justice Cosgrove's decision in the *R. v. Elliott* matter and the Attorney General's request for this Inquiry, Justice Cosgrove continued with his active duties, including dozens of civil and criminal matters involving representatives of the Attorney General, without the Crown, or from anyone else requesting his recusal.

10. Since the public announcement of this Inquiry, Justice Cosgrove has been asked by the Chief Justice of the Ontario Superior Court to refrain from presiding over any cases. He has complied with that request.

11. The public announcement of this Inquiry and its public proceedings will erode the public's perception of Justice Cosgrove's credibility and integrity, which may never be recovered, even if the Committee or the Council ultimately determines that a recommendation for removal is not warranted. As a result, the ability of Justice Cosgrove to resume active judicial duties has been seriously undermined.

12. The power of an Attorney General under s. 63(1) to require a public inquiry into a judge's capacity, even in cases where the Attorney General was an unsuccessful litigant before that judge, creates a chilling effect in the minds of judges, who are routinely called upon to decide cases involving the Attorney General. This power gives the Attorney General the unilateral ability to "sideline" a judge while the inquiry is ongoing, and to impair his or her ability to return to active duty.

13. The provisions of s. 63 (1) of the *Judges Act* are unconstitutional in two respects:

    a. they violate the constitutionally guaranteed principle of judicial independence; and/or

    b. they violate the provisions of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and are not justified by s.1 thereof.

14. The constitutional guarantee of judicial independence includes a guarantee of security of tenure. This includes the requirement that a superior court judge may only be removed under section 99 of the *Constitution Act, 1867* after a "judicial determination" of incapacity.

15. The process required in any "judicial determination" of incapacity must be consistent with and protect the purposes and objects underlying judicial independence. Sub-section 63(1) of the *Judges Act* is inconsistent with these purposes and objects. It exposes the judge to a public allegation of serious misconduct without the opportunity for an internal judicial assessment of the merit of any complaint, including an assessment of whether or not the complaint is sufficiently serious to warrant removal.

16. In addition, the ability of the Attorney General to require an investigation pursuant to s. 63(1) will invariably require a judge to step aside from active duties, at least until the inquiry is resolved. Moreover, the attendant publicity surrounding the inquiry will seriously undermine the ability of the judge to resume active duties in cases where the Council does not recommend removal. As a result, s. 63(1) gives the Attorney General the *de facto* unilateral power to remove a judge temporarily, and potentially permanently, without any judicial determination of incapacity.

17. In cases where the Attorney General exercises his power of referral based upon a judge's treatment of the Attorney General himself, or his agents, this power effectively allows the Attorney General to be the judge in his own cause.

18. Further, the ability of the Attorney General to require an inquiry in cases where the basis for the request arises from a case where the Attorney General was an unsuccessful litigant before the judge will give rise to the reasonable apprehension in the minds of judges that they are at risk if they criticize or find against the Crown. It creates a "chilling effect" that will undermine the ability of judges to adjudicate fearlessly cases as justice requires. This chilling effect undermines and is wholly inconsistent with judicial independence.

19. The separation of powers between the executive and judicial branches of government, necessary to uphold the rule of law, requires that the process for removal of a superior court judge impair security of tenure as minimally as possible.

20. The ability of the Attorney General to require an inquiry unilaterally is wholly unnecessary to the achievement of any legitimate public purpose in the administration of justice. Requiring the Attorney General to submit a complaint to the Council in the same fashion as any other person in Canada will permit serious and meritorious complaints to proceed to inquiry, while judicially screening out unmeritorious complaints and those that could not warrant removal, without interfering with a judge's ability to exercise his or her judicial duty.

21. The by-laws of the Council (developed by judges, rather than Parliament) with respect to the handling of public complaints, reflect this sensitive balancing between the protection of judicial independence, and need for public accountability.

22. Requiring the Attorney General to comply with the complaints process of the Council fully protects the Attorney General's legitimate public interest in the administration of justice, while at the same time interfering with judicial independence as little as possible.

23. In addition, requiring the Attorney General to submit a complaint to the Council in the same fashion as any other person in Canada eliminates any perception that the Attorney General has a special ability to "punish" a judge.

24. The test for judicial independence demands that the courts be free from both actual and apparent or perceived interference by the executive arm of government.

25. The Attorney-General's dual role as both a member of the executive branch of government and a frequent litigant before the court places an onus on Parliament to ensure that the process by which complaints made by the Attorney-General is perceived by the public to uphold an independent judiciary.

26. The authority granted to the provincial Attorney-General of a province and the Minister of Justice to circumvent the procedural safeguards established pursuant to ss.63(2) of the *Judges Act* and the Canadian Judicial Council by-laws is not provided to any private citizen. This extraordinary authority, granted despite the dual role of an Attorney-General, in conjunction with the *de facto* removal of a judge arising as a result of the public nature of a complaint under s. 63(1) of the *Judges Act* jeopardizes the public perception of the independence of the judiciary.

27. As a result, the process established pursuant to s. 63(1) of the *Judges Act* does not meet the standards constitutionally required by the principle of judicial independence. Consequently, s. 63(1) of the *Judges Act* is *ultra vires* the Parliament of Canada and the Council and Inquiry Committee have no jurisdiction to proceed with this Inquiry.

28. In addition, a judge's words and conduct during a judicial proceeding are expressive activity, protected by the Constitutional guarantee of freedom of expression.

29. All of Justice Cosgrove's actions which could potentially form the basis for this inquiry, whether it be his spoken or written words, his rulings, his orders, his judgments, his reasons or otherwise all constitute expressive activities, protected by s. 2(b) of the *Charter*.

30. Given the central role of the rule of law to Canadian society, a judge's conduct, particularly his or her conduct in the course of determining a case, is at the core of the values protected by the *Charter* and by s. 2(b) specifically. It is deserving of the strongest possible protection.

31. The provisions of s. 63(1) of the *Judges Act* infringe judicial freedom of expression in the following respects:

    a. Justice Cosgrove faces the threat of removal from his judicial office by the state as a result of his exercise of his *Charter* protected freedom of expression.

    b. The infringement of the freedom of expression is particularly clear on the facts of this case because it is apparent that the threat of removal has been invoked:

        i. By a state actor, acting pursuant to a discretionary power granted by Parliament;

        ii. Because of the content of his expression;

        iii. Because the content of his expression was unfavourable to and unflattering of the conduct of representatives of the state;

32. The infringement of judicial freedom of expression caused by s. 63(1) is not justified by s. of the *Charter* for the following reasons:

    a. There is no rational connection between any legitimate government objective (presumably the need to remove judges whose conduct has rendered them incapable to continuing to exercise their judicial office), and the means used to achieve that objective. There is no reason why the government's objective

cannot be completely protected by maintaining the right of the Attorney General to file a complaint with the Canadian Judicial Council and to have any such complaint processed in the ordinary manner.

b. In addition, the provisions of s. 63(1) of the *Judges Act* do not impair the freedom "as little as possible". The mere fact that a inquiry has been commenced, together with the public nature of its proceedings cause serious damage to the credibility and reputation of a judge, without any prior judicial assessment of the merit of the underlying complaint. By contrast the provisions of the complaints procedure of the Canadian Judicial Council provide a clear example of a process which sensitively balances the government's legitimate interests with the important societal interest in protecting judicial freedom of expression.

33. As a result, the provisions of s. 63(1) of the *Judges Act* are invalid and no force or effect pursuant to the provisions of s. 52 of the *Constitution Act, 1982*. Therefore, this Committee has no jurisdiction to proceed with this inquiry.

34. Such further or other grounds as counsel may advise and this Inquiry Committee permits.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. The affidavit of the Honourable Paul J. Cosgrove, sworn October, 14, 2004;

2. The affidavit of the Honourable James Chadwick Q.C., sworn October 12, 2004; and

3. Such further or other material as counsel may advise and this Inquiry Committee permits.

Dated: October 18, 2004

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TAB 2

IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

NOTICE OF CONSTITUTIONAL QUESTION

The Honourable Paul Cosgrove intends to question the constitutional validity of s. 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended and the investigation into whether he has been incapacitated or disabled from the due execution of the office of judge in a hearing before an Inquiry Committee appointed under the *Judges Act* to be heard on December 8 and 9, 2004.

THE FOLLOWING ARE THE MATERIAL FACTS GIVING RISE TO THE CONSTITUTIONAL QUESTION:

1. Mr. Justice Cosgrove is a judge of the Ontario Superior Court of Justice which is a superior court pursuant to s.96 of the *Constitution Act, 1867*.

2. This proceeding is an inquiry by a committee of the Canadian Judicial Council (the Council") pursuant to s. 63(1) of the *Judges Act*, 1985, c. J-1, as amended (the "Inquiry").

3. This Inquiry was commenced by the Council upon the request of Ontario Attorney General Michael Bryant (the "Attorney General") pursuant to his authority under s. 63(1) of the *Judges Act*.

4. The Attorney General's request to the Council explicitly indicates that the request is based upon Justice Cosgrove's conduct throughout the proceedings in the matter of *R. v. Elliott*, which concluded on September 7, 1999, when Justice Cosgrove entered a stay of those proceedings. During the course of proceedings, and in his decision, Justice Cosgrove

was critical of the conduct of a number of agents of the Attorney General. Justice Cosgrove's decision in that matter was set aside by the Court of Appeal in December 2003, and a new trial has been scheduled.

5. Pursuant to the provisions of s. 63 (1) of the *Judges Act* the Council is *required* to conduct an inquiry when requested by the Attorney General of Canada, or of a province. Both the fact that an inquiry has been commenced and its proceedings are public.

6. While any other person in Canada is entitled to file a complaint with the Council against a judge, the by-laws of the Council set out a comprehensive scheme whereby the complaint is assessed by various members of the Council. Specifically, the by-laws prescribe that a complaint must be scrutinized at three different stages prior to an inquiry. The complaint may be resolved on a variety of bases, including a determination that "the matter is not sufficiently serious to warrant removal". In such cases, the matter will not be referred to the inquiry stage.

7. While the Council provides a public summary of the basis upon which complaints are resolved, the judge against whom the complaint is received is not identified, nor is the complaint process a public one.

8. In the more than four and one half years between the release of Justice Cosgrove's decision in the *R. v. Elliott* matter and the Attorney General's request for this Inquiry, Justice Cosgrove continued with his active duties, including dozens of civil and criminal matters involving representatives of the Attorney General, without the Crown, or anyone else requesting his recusal.

9. Since the public announcement of this Inquiry, Justice Cosgrove has been asked by the Chief Justice of the Ontario Superior Court to refrain from presiding over any cases. He has complied with that request.

10. The public announcement of this Inquiry and its public proceedings will erode the public's perception of Justice Cosgrove's credibility and integrity, which may never be recovered, even if the Committee or the Council ultimately determines that a recommendation for removal is not warranted. As a result, the ability of Justice Cosgrove to resume active judicial duties has been seriously undermined.

11. The power of an Attorney General under s. 63(1) to require a public inquiry into a judge's capacity, even in cases where the Attorney General was an unsuccessful litigant before that judge, creates a chilling effect in the minds of judges, who are routinely called upon to decide cases involving the Attorney General. This power gives the Attorney General the unilateral ability to "sideline" a judge while the inquiry is ongoing, and to impair his or her ability to return to active duty.

THE FOLLOWING IS THE LEGAL BASIS FOR THE CONSTITUTIONAL QUESTION:

Justice Cosgrove challenges the constitutionality of s. 63(1) of the *Judges Act*. Since this Committee derives its jurisdiction from a request made by the Attorney General pursuant to that section, Justice Cosgrove submits that the request is of no force or effect, and this Committee lacks any jurisdiction to proceed. Justice Cosgrove submits that the provisions of s. 63 (1) of the *Judges Act* are unconstitutional in two respects:

1. they violate the constitutionally guaranteed principle of judicial independence; and

2. they violate the provisions of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and are not justified by s.1 thereof.

1. Infringement of Judicial Independence

a. The constitutional guarantee of judicial independence includes a guarantee of security of tenure. This includes the requirement that a superior court judge may only be removed under section 99 of the *Constitution Act, 1867* after a "judicial determination" of incapacity.

i. The process required in any "judicial determination" of incapacity must be consistent with and protect the purposes and objects underlying judicial independence. Sub-section 63(1) of the *Judges Act* is inconsistent with these purposes and objects. It exposes the judge to a public allegation of serious misconduct without the opportunity for an internal judicial assessment of the merit of any complaint, including an assessment of whether or not the complaint is sufficiently serious to warrant removal.

ii. In addition, the ability of the Attorney General to require an investigation pursuant to s. 63(1) will invariably require a judge to step aside from active duties, at least until the inquiry is resolved. Moreover, the attendant publicity surrounding the inquiry will seriously undermine the ability of the judge to resume active duties in cases where the Council does not recommend removal. As a result, s. 63(1) gives the Attorney General the *de facto* unilateral power to remove a judge temporarily, and potentially permanently, without any judicial determination of incapacity.

iii. In cases where the Attorney General exercises his power of referral based upon a judge's treatment of the Attorney General himself, or his agents, this power effectively allows the Attorney General to be the judge in his own cause.

iv. Further, the ability of the Attorney General to require an inquiry in cases where the basis for the request arises from a case where the Attorney General was an unsuccessful litigant before the judge will give rise to the reasonable apprehension in the minds of judges that they are at risk if they criticize the Crown. It creates a "chilling effect" that will undermine the ability of judges to adjudicate fearlessly cases as justice requires. This chilling effect undermines and is wholly inconsistent with judicial independence.

b. The separation of powers between the executive and judicial branches of government, necessary to uphold the rule of law, requires that the process for removal of a superior court judge impair security of tenure as minimally as possible.

i. The ability of the Attorney General to require an inquiry unilaterally is wholly unnecessary to the achievement of any legitimate public purpose in the administration of justice. Requiring the Attorney General to submit a complaint to the Council in the same fashion as any other person in Canada will permit serious and meritorious complaints to proceed to inquiry, while judicially screening out unmeritorious complaints and those that could not warrant removal, without interfering with a judge's ability to exercise his or her judicial duty.

ii. The by-laws of the Council (developed by judges, rather than Parliament) with respect to the handling of public complaints, reflect this sensitive balancing between the protection of judicial independence, and need for public accountability.

iii. Requiring the Attorney General to comply with the complaints process of the Council fully protects the Attorney General's legitimate public interest in the administration of justice, while at the

same time interfering with judicial independence as little as possible.

iv. In addition, requiring the Attorney General to submit a complaint to the Council in the same fashion as any other person in Canada eliminates any perception that the Attorney General has a special ability to "punish" a judge.

c. The test for judicial independence demands that the courts be free from both actual and apparent or perceived interference by the executive arm of government.

i. The Attorney-General's dual role as both a member of the executive branch of government and a frequent litigant before the court places an onus on Parliament to ensure that the process by which complaints made by the Attorney-General is perceived by the public to uphold an independent judiciary.

ii. The authority granted to the provincial Attorney-General of a province and the Minister of Justice to circumvent the procedural safeguards established pursuant to ss.63(2) of the *Judges Act* and the Canadian Judicial Council by-laws is not provided to any private citizen. This extraordinary authority, granted despite the dual role of an Attorney-General, in conjunction with the *de facto* removal of a judge arising as a result of the public nature of a complaint under s. 63(1) of the *Judges Act*, jeopardizes the public perception of the independence of the judiciary.

As a result, the process established pursuant to s. 63(1) of the *Judges Act* does not meet the standards constitutionally required by the principle of judicial independence. Consequently, s. 63(1) of the *Judges Act* is *ultra*

vires the Parliament of Canada and the Council and Inquiry Committee have no jurisdiction to proceed with this Inquiry.

2. Infringement of s. 2(b) of the *Charter*

a. A judge's words and conduct during a judicial proceeding are expressive activity, protected by freedom of expression

i. All of Justice Cosgrove's actions which could potentially form the basis for this inquiry, whether it be his spoken or written words, his rulings, his orders, his judgments, his reasons or otherwise all constitute expressive activities, protected by s. 2(b) of the *Charter*.

ii. Given the central role of the rule of law to Canadian society, a judge's conduct, particularly his or her conduct in the course of determining a case, is at the core of the values protected by the *Charter* and by s. 2(b) specifically. It is deserving of the strongest possible protection.

b. The provisions of s. 63(1) of the *Judges Act* infringe judicial freedom of expression

i. Justice Cosgrove faces the threat of removal from his judicial office by the state as a result of his exercise of his *Charter* protected freedom of expression.

ii. The infringement of the freedom of expression is particularly clear on the facts of this case because it is apparent that the threat of removal has been invoked:

1. By a state actor, acting pursuant to a discretionary power granted by Parliament;
2. Because of the content of his expression;

3. Because the content of his expression was unfavourable to and unflattering of the conduct of representatives of the state;

c. The infringement of judicial freedom of expression caused by s. 63(1) is not justified by s. of the *Charter*

i. The ability of an Attorney General to require an inquiry into the conduct of a superior court judge is not a justifiable limit on judicial freedom of expression.

ii. There is no rational connection between any legitimate government objective (presumably the need to remove judges whose conduct has rendered them incapable to continuing to exercise their judicial office), and the means used to achieve that objective. There is no reason why the government's objective cannot be completely protected by maintaining the right of the Attorney General to file a complaint with the Canadian Judicial Council and to have any such complaint processed in the ordinary manner.

iii. In addition, the provisions of s. 63(1) of the *Judges Act* do not impair the freedom "as little as possible". The mere fact that a inquiry has been commenced, together with the public nature of its proceedings cause serious damage to the credibility and reputation of a judge, without any prior judicial assessment of the merit of the underlying complaint. By contrast the provisions of the complaints procedure of the Canadian Judicial Council provide a clear example of a process which sensitively balances the government's legitimate interests with the important societal interest in protecting judicial freedom of expression.

As a result, the provisions of s. 63(1) of the *Judges Act* are invalid and no force or effect pursuant to the provisions of s. 52 of the *Constitution Act, 1982*. Therefore, this Committee has no jurisdiction to proceed with this inquiry.

Dated October 18, 2004

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Doc. No. 574386

TAB 3

In the matter of:

Canadian Judicial Council Inquiry of Justice Paul Cosgrove

Affidavit of the Honourable Paul J. Cosgrove

I, PAUL COSGROVE, of the City of Brockville in the Province of Ontario, make oath and say as follows:

1. I am presently 69 years of age.

2. I was sworn in as the County Court judge for the County of Leeds and Grenville on September 8, 1984.

3. By virtue of a restructuring of the courts of Ontario, I became a judge of the Ontario Court (General Division) in 1989. This court was subsequently renamed the Superior Court of Ontario.

4. Since 1984 I have sat in the Eastern Region of Ontario, centred out of the City of Brockville. I was the local administrative Judge for County of Leeds and Grenville until February 2002. In addition, I was a travelling judge, appearing in Courts across the province. The majority of my time in recent years has been in the court in Ottawa.

5. Since 1984, I have presided over hundreds, if not thousands of different matters in my court, including hundreds of matters involving the Attorney General of Ontario. These include both civil and criminal matters.

6. With respect to criminal matters, I have no idea what proportion of the time the Crown was "successful" before me. Certainly, I presided over many criminal matters in which convictions were entered.

7. To my recollection, prior to the *Elliott* matter, I do not believe that I had ever been asked by the Crown to recuse myself in any criminal or civil case. This includes the approximately three murder trials I presided over prior to the *Elliott* matter.

8. I presided over the *Elliott* matter for a period of approximately 22 months.

9. Through the course of the *Elliott* proceeding, I was asked to issue a stay of proceedings on three separate occasions. On the first two occasions I declined to do so. Ultimately, I issued a stay of proceedings of the prosecution by Reasons dated September 7, 1999. The Crown appealed that decision to the Court of Appeal.

10. My decision staying the proceedings attracted significant attention at the time, both in the legal, and in the general media.

11. The Court of Appeal allowed the Crown's appeal from my decision of September 7, 1999 on December 7, 2003.

12. In the more than four years between September 1999 and December 2003, I presided over dozens, if not hundreds, of different matters, including dozens of civil and criminal matters involving the Crown. In no case was I asked by any party, including the Crown, to recuse myself.

13. Between September 1999 and December 2003, I presided over at least two different matters where Mr. Alan Findlay appeared. He was one of the Crown Attorneys that had worked on the *Elliott* matter. On neither occasion did Mr. Findlay ask me to recuse myself. He also appeared before me on numerous procedural appearances on a variety of different matters, all without any request for recusal.

14. Similarly, in the weeks following December 7, 2003 I continued to sit on a variety of matters in the ordinary course, including matters civil and criminal involving the Crown. In no case was I asked by any party, including the Crown, to recuse myself.

15. On April 23, 2004, the Honourable Michael Bryant, Attorney General of Ontario wrote to the Right Honourable Justice Beverly McLachlin, Chairperson of the Canadian Judicial Council ("CJC"), requesting pursuant to s. 63 (1) of the *Judges Act*, that an inquiry to be undertaken into my conduct. A copy is attached as Exhibit A.

16. I received a copy of Exhibit A by correspondence from Mr. Norman Sabourin, Executive Director, CJC dated April 26, 2004. A copy is attached as Exhibit B.

17. On April 27, 2004 the CJC issued a press release announcing the fact that there would be an inquiry into my conduct arising from the request made by the Attorney General. A copy is attached as Exhibit C. No one from the CJC consulted with me in any way regarding the press release prior to it being issued.

18. The fact of the CJC had commenced an inquiry into my conduct received significant media coverage, locally, provincially and nationally.

19. On or about April 29, 2004 I was contacted by Chief Justice Heather J. Smith of the Superior Court of Ontario. She indicated to me that I should not sit on any cases until the inquiry was resolved. I have not done so.

20. As a result of this action, approximately ten matters on which I was seized have been reassigned and recommenced before different judges.

21. It is understandable to me why the Chief Justice considers it necessary that I not sit on any cases while this inquiry is pending. I believe that a critical element of any judge's ability to exercise his or her duties effectively is the confidence that the public perceives in the credibility and integrity of that judge. Although I have received many expressions of support, I perceive that the public announcement of this inquiry and the subsequent press reports have undermined the perception that members of the public are likely to have toward me. It would be very difficult to exercise my authority effectively as a judge in these circumstances.

22. I am hopeful that this inquiry can be concluded as quickly as possible, and without any recommendation for my removal. It is my desire to resume

my active duties as a judge as soon as possible thereafter. Nevertheless, for the reasons expressed in paragraph 21, I fear this may be exceedingly difficult.

23. I am concerned that the damage to my reputation caused by the publicity surrounding the announcement of this inquiry will be compounded many times over by the publicity that is likely to accompany any hearing. It is my expectation that the sensationalism of the story of a "murderer" having been "set free" will inevitably drown out the less dramatic but essential principles that underlie the concepts of judicial independence.

24. In addition, in the course of defending myself, I anticipate that it may be theoretically possible that I might give evidence, including evidence with respect to my thought processes in connection with the matters that occurred before me in the *Elliott* matter. Ordinarily, these matters are subject an absolute privilege, and are never disclosed. I am apprehensive that there is a very real prospect that such evidence could be misconstrued by the media, and/or misunderstood by the public.

25. As a result, I am very concerned that, in the event this Inquiry ultimately determines that grounds do not exist to recommend my removal, my ability to return to the bench, and to resume active duties will be seriously undermined.

26. In addition, I am concerned that the unilateral ability of the Attorney General to exercise his powers under s. 63(1) of the *Judges Act*, absent judicial input, creates a "chilling effect" in the minds of other judges. This chilling effect will be particularly acute in a case where, as here, the complaint arises from the judicial findings made by the judge against the

interests of the Attorney General in a case where the Attorney General was an unsuccessful litigant before that judge. Specifically, I am concerned that other judges will feel constrained to fearlessly criticize or find against the Attorney General or his agents in cases before them.

27. It appears that I am not alone in my concern with respect to this chilling effect. At least two judges have publicly expressed the concerns that they have with respect to the power of the Attorney General under s. 63(1), as exercised in this case. Attached as Exhibit D is a copy of an article that appeared in *The Lawyers Weekly*, dated September 3, 2004 entitled "Judges Fear AG's Complaint Power Could Chill Judicial Independence".

28. Public expressions of concern by judges regarding the role of the Attorney General are not new. Attached as Exhibit E is a copy of an article that appeared in *The Lawyers Weekly*, dated September 11, 1992 entitled "Judges under Attack...What Will They do to Fight What They see as Threats to Their Independence?".

SWORN BEFORE ME at the)
City of Brockville on this 14th day)
Of October, 2004.)
)
_____)
A Commissioner, etc.

John Polyzogopoulos
Doc. No. 575014
416-593-2953

Hon. Paul J. Cosgrove

TAB A

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

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

The Hon. Michael Bryant

L'hon. Michael Bryant

Ontario

Ministry of the Attorney General
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Our Reference #: M04-00798

The Right Honourable Beverly McLachlin, P.C., C.J.C.
Chairperson
Canadian Judicial Council
15-150 Metcalfe Street
Ottawa, ON
K1A 0W8

Dear Chief Justice McLachlin:

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

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

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

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

.../2

This is Exhibit A referred to in the affidavit of Hon. Paul Cosgrove sworn before me, this 14th day of Oct 2004

A COMMISSIONER FOR TAKING AFFIDAVITS

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

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

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

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

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

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

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

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

(*Supra*, at paragraph 164)

.../3

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

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

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

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

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

.../4

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

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

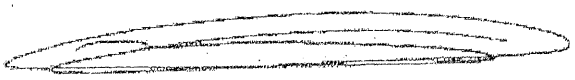
b) A copy of the transcript of proceedings before Justice Cosgrove (approximately 130 volumes, 32,500 pages);

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

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

e) Any additional information that the Council might require.

Yours truly,



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

Enclosure

APPENDIX
History of Proceedings

The Trial – 1995-1999

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

The Stay of Proceedings

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

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

The Crown Appeal

1) The position of the Crown on appeal

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

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

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

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

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

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

2) **Defence counsel's concession on appeal**

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

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

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

The Decision of the Court of Appeal for Ontario

1) Overview

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

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

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

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

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

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

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

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

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

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

[¶¶123-124]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TAB B

CANADIAN JUDICIAL COUNCIL

CANADA

CONSEIL CANADIEN DE LA MAGISTRATURE

PERSONAL AND CONFIDENTIAL

Our file: 04-007

This is Exhibit B referred to in the affidavit of Hon. Paul Cosgrove sworn before me, this 14th day of October 2004.

A COMMISSIONER FOR TAKING AFFIDAVITS

26 April 2004

The Honourable Mr Justice Paul Cosgrove
Superior Court of Justice
The Court House
550 King Street West
Brockville, Ontario
K6V 3T2

Dear Mr Justice Cosgrove:

I am writing to inform you that the Council has received a letter on Friday, April 23rd, from the Attorney General of Ontario, the Honourable Michael J. Bryant, requesting that Council commence an inquiry into your conduct during the trial over which you presided in the case of *R. v. Elliott*. A copy of Mr Bryant's letter is attached for your reference.

Pursuant to the provisions of the *Judges Act* and the *Canadian Judicial Council Inquiries and Investigations By-laws* (a copy of which are attached), the Council will be constituting an Inquiry Committee to investigate this matter. The Committee will then be required to submit a report to Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made that you be removed from office.

I have provided Mr Bryant's letter to the Chair of the Council's Judicial Conduct Committee, the Honourable Richard J. Scott, Chief Justice of Manitoba. The judicial members of the Inquiry Committee will be appointed shortly. As you may know, the Minister of Justice has the authority, under the *Judges Act*, to designate senior members of the Bar to sit on an Inquiry Committee and I will be writing to the Minister to ask if he intends to do so in this case. In the past, the Minister has exercised his discretion to make appointments to inquiry committees.

An independent counsel will also be appointed shortly in this matter. The duties of the independent counsel are set out in section 3 of the *Inquiries and Investigations By-laws*.

.../2

The independent counsel is expected to present the case to the Inquiry Committee. I draw your attention to paragraph 5(2) of the *Inquiries and Investigations By-laws*, which provides that:

> The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

Please be assured that I will inform you as soon as the members of the Inquiry Committee are designated. I will also let you know the name of the independent counsel who is appointed.

Finally, I want to let you know that the Council will soon be issuing an informational press release regarding this matter.

If I can provide any additional information regarding the above, please feel free to contact me. You can reach me by telephone at 613-949-2246 or by email at nsabourin@judicom.gc.ca

Yours sincerely,

Norman Sabourin
Executive Director and General Counsel

Attachments

c. Chief Justice Smith

CANADIAN JUDICIAL COUNCIL INQUIRIES AND INVESTIGATIONS BY-LAWS

INTERPRETATION

1. The definitions in this section apply in these By-laws.

"Act" means the *Judges Act*. (*Loi*)

"Judicial Conduct Committee" means the committee of the Council established by the Council and named as such. (*comité sur la conduite des juges*)

CONSTITUTING AN INQUIRY COMMITTEE

2. (1) An Inquiry Committee constituted under subsection 63(3) of the Act shall consist of an uneven number of members, the majority of whom shall be members of the Council designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee.

(2) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee shall choose one of the members of the Inquiry Committee to be the chairperson of the Inquiry Committee.

(3) A person is not eligible to be a member of the Inquiry Committee if

(*a*) they are a member of the court of which the judge who is the subject of the inquiry or investigation is a member; or

(*b*) they participated in the deliberations, if any, of the Council in respect of the necessity for constituting the Inquiry Committee.

INDEPENDENT COUNSEL

3. (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee shall appoint an independent counsel, who shall be a member of the bar of a province having at least 10 years standing and who is recognized within the legal community for their ability and experience.

(2) The independent counsel shall present the case to the Inquiry Committee, including making submissions on questions of procedure or applicable law that are raised during the proceedings.

(3) The independent counsel shall perform their duties impartially and in accordance with the public interest.

COUNSEL TO THE INQUIRY COMMITTEE

4. The Inquiry Committee may engage legal counsel to provide advice and other assistance to it.

INQUIRY COMMITTEE PROCEEDINGS

5. (1) The Inquiry Committee may consider any relevant complaint or allegation pertaining to the judge that is brought to its attention.

(2) The independent counsel shall give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

6. (1) Any hearing of the Inquiry Committee shall be conducted in public unless, subject to subsection 63(6) of the Act, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest.

7. The Inquiry Committee shall conduct its inquiry or investigation in accordance with the principle of fairness.

INQUIRY COMMITTEE REPORT

8. (1) The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office.

(2) After the report has been submitted to the Council, the Executive Director of the Council shall provide a copy to the judge, to the independent counsel and to any other persons or bodies who had standing in the hearing.

(3) If the hearing was conducted in public, the report shall be made available to the public.

JUDGE'S RESPONSE TO THE INQUIRY COMMITTEE REPORT

9. (1) Within 30 days after receipt of the report of the Inquiry Committee, the judge may

(*a*) make a written submission to the Council regarding the report; and

(*b*) notify the Council that he or she wishes to appear in person before the Council, with or without counsel, for the purpose of making a brief oral statement regarding the report.

(2) If the judge is unable, for any reason beyond the judge's control, to meet the time limit set out in subsection (1), the judge may request an extension of time from the Council.

(3) The Council shall grant an extension if it considers that the request is justified.

10. (1) If the judge makes a written submission regarding the inquiry report, the Executive Director of the Council shall provide a copy to the independent counsel. The independent counsel may, within 15 days after receipt of the copy, submit to the Council a written response to the judge's submission.

(2) If the judge makes an oral statement to the Council, the independent counsel shall also be present and may be invited by the Council to make an oral statement in response.

(3) The judge's oral statement shall be given in public unless the Council determines that it is not in the public interest to do so.

CONSIDERATION OF THE INQUIRY COMMITTEE REPORT BY THE COUNCIL

11. (1) The Council shall consider the report of the Inquiry Committee and any written submission or oral statement made by the judge or independent counsel.

(2) Persons referred to in paragraph 2(3)(*b*) and members of the Inquiry Committee shall not participate in the Council's consideration of the report or in any subsequent related deliberations of the Council.

12. If the Council is of the opinion that the report of the Inquiry Committee is unclear or incomplete and that clarification or supplementary inquiry or investigation is necessary, it may refer all or part of the matter in question back to the Inquiry Committee with specific directions.

REPORT OF COUNCIL

13. The Executive Director of the Council shall provide the judge with a copy of the report of its conclusions presented by the Council to the Minister.

COMING INTO FORCE

14. These by-laws come into force on January 1, 2003.

TAB C

To: Justice Cosgrove

CANADIAN JUDICIAL COUNCIL

CANADA

CONSEIL CANADIEN DE LA MAGISTRATURE

FAX: (613) 239-1507

Ottawa Courthouse

CANADIAN JUDICIAL COUNCIL TO CONDUCT AN INQUIRY AT THE REQUEST OF THE ATTORNEY GENERAL OF ONTARIO

Ottawa, 27 April 2004 – The Canadian Judicial Council announced today that there will be an inquiry into the conduct of Mr Justice Paul Cosgrove, after receiving a request on Friday, April 23rd, from The Honourable Michael J. Bryant, Attorney General of Ontario. In his letter, Mr Bryant asks the Council to investigate the conduct of Justice Cosgrove during the trial over which he presided in the case of *R. v. Julia Yvonne Elliott.*

Whenever a complaint is received by the Canadian Judicial Council, it is promptly reviewed and acted upon. In this case, the request comes from an Attorney General and, in accordance with the provisions of the *Judges Act*, the Council has an obligation to designate an Inquiry Committee to investigate the matter.

Judicial members of the Inquiry Committee will be appointed shortly, in accordance with Council By-laws. The Minister of Justice of Canada can also appoint members to the Committee. Once the Inquiry Committee is established, it will investigate the details of the Attorney General's request. Hearings of the Committee are normally held in public. After concluding its inquiry, the Committee will report its findings to the Canadian Judicial Council. The Council is then expected to make recommendations to the Minister of Justice on the matter.

Formal referrals by an Attorney General are very infrequent. Attached is background information on the complaints and inquiry processes.

The Canadian Judicial Council is composed of the chief justices and associate chief justices of Canada's superior courts. Information about the Council is available at http://www.cjc-ccm.gc.ca

Contact
Norman Sabourin
Executive Director and General Counsel
(613) 949-2246

nsabourin@judicom.gc.ca

This is Exhibit "G" referred to in the affidavit of Paul Cosgrove sworn before me, this 14th day of October 2004

A COMMISSIONER FOR TAKING AFFIDAVITS

TAB D

The Lawyers Weekly
Vol. 24, No. 16
September 3, 2004

Judges fear AGs' complaint power could chill judicial independence

By Cristin Schmitz

Ottawa

The Canadian Judicial Council (CJC) has moved ahead, at the command of Ontario's Attorney General, with an inquiry into whether Superior Court Justice Paul Cosgrove should be removed from the Bench in connection with a now-reversed judgment that awarded substantial costs against the province for Ontario Crown and police misconduct.

Last April, Michael Bryant employed the rarely used power of the federal justice minister and provincial attorneys general, under s. 63(1) of the Judges Act, to compel the CJC to investigate unspecified, alleged lapses by Justice Cosgrove in his conduct of a trial of a second-degree murder charge against a woman accused of dismembering her ex-lover.

The hearings, which many members of the federal judiciary see as a threat to their independence, will be presided over by Chief Justice Lance Finch of the B.C. Court of Appeal.

Marred by an extremely tense relationship between the Crown and defence, the murder trial dragged on through four years of pre-trial motions before the judge issued a stay of proceedings in 1999. As the senior regional judge for Eastern Ontario later observed in quashing contempt citations Justice Cosgrove made against two police officers, "a trial is not a tea party and emotions can run very high. ... The trial judge was obviously drawn into this tense situation and had to make numerous difficult findings. The citation for contempt ... was obviously an attempt to diffuse and control a very difficult situation."

After making what the Ontario Court of Appeal later labeled "unwarranted findings of misconduct," Justice Cosgrove ordered costs against the Crown for abuse of process, holding that Julia Elliot's right to a speedy and fair trial had been compromised.

Terming his finding that Crown counsel and senior officials in the Ministry of the Attorney General had committed more than 150 Charter breaches "baseless and frivolous," the appeal court held that the judge's use of the Charter to remedy meritless claims brought the Charter and administration of justice into disrepute.

Neither Bryant nor the CJC would release details of Bryant's complaint, but Justice Cosgrove was also pulled from duty (albeit left on full pay) by his senior regional judge pending the inquiry's outcome.

Superior Court Justice Colin McKinnon, president of the Ontario Superior Court Judges Association, says the extraordinary power s. 63(1) of the Judges Act gives the ministers does not sit well with many judges.

"The reason that is of concern is that the attorney general in each province, and the minister of justice, is the dominant litigant in the courts of law," he told The Lawyers Weekly. "It is the litigant in all criminal matters and numerous civil matters, so that the right of an attorney general who is the chief prosecutor within the province to mandate a hearing, without going through the normal complaint process, without the usual prescreening and all the safeguards, when a judge's decision is seen to be inappropriate, to me might be regarded as an inappropriate power."

Justice McKinnon recently wrote to both the Canadian Superior Courts Judges Association, and the federal

Commissioner for Judicial Affairs, raising his members' concerns about s. 63(1).

He said the calling of a formal public inquiry, at the attorney general's behest, after a judge has made a costs award against the Crown could be seen as impinging on judges' freedom to speak openly, directly and bluntly about matters of public interest in their judgments - a hallmark of judicial independence.

Stressing he was speaking as a matter of general principle, and not commenting on the merits of the Cosgrove inquiry, he acknowledged that judges "go wrong sometimes," adding: "That's what court of appeals exist for."

Noting that courts are increasingly using the common law and Charter to make costs awards against the Crown for inappropriate conduct, he said, "you wouldn't want the judge chilled in correcting inappropriate conduct by virtue of a fear that the attorney general may react and ... they mandate a hearing and it becomes immediately public."

He suggested a provincial attorney general, "like all other complainants in any given case, should be subject to the same rules. They should not enjoy special prerogatives given their pervasive presence in our courts and the potential chilling effect on judicial independence."

Justice McKinnon added: "One would have to pose the question whether an attorney general would mandate a hearing where a judge went overboard in favour of Crown witnesses, police witnesses and castigated the defence in harsh terms."

Some judges have noted that s. 63 looks like a tempting weapon for an attorney general who decides it's "payback time" for an unwelcome costs award. But a spokesperson for Bryant emphasized that the attorney general has a duty to ensure the proper administration of justice.

"The attorney general is not involved beyond making the request for an inquiry. The Canadian Judicial Council is independent, and is administered by judges and the inquiry is an independent process."

She would not comment further because the Cosgrove inquiry is ongoing and there is a related criminal matter before the courts.

Inquiries under s. 63(1) are unusual. There have been only five since the CJC's inception in 1971, some of which were launched following concerns expressed by chief justices. In 2002, Quebec's attorney general complained against Superior Court Justice Bernard Flynn for making statements that "lacked reserve" to a journalist. In 2003, the same office was the source of a complaint that Superior Court Justice Jean-Guy Boilard had improperly recused himself from a long-running criminal trial. In neither case, did the Council recommend removal from the Bench.

In 1983, federal Justice Minister Mark MacGuigan requested an inquiry into a judge who was alleged to be autocratic and arbitrary on the Bench, but the judge resigned before the Inquiry could start. In 1977, federal Justice Minister Ron Basford requested an inquiry on receiving police reports that a judge had paid dancers to come to his hotel room. The judge maintained nothing untoward occurred, and the inquiry found firing him would be out of all proportion to his "imprudent action."

In 1990, Nova Scotia's attorney general called for an inquiry into whether three Nova Scotia Court of Appeal judges should be removed for making inappropriate comments in their judgment about Donald Marshall Jr., who had served 10 years in prison after being wrongfully convicted for murder. The inquiry concluded that the judges' inappropriate remarks were not "reflective of conduct so destructive that it renders the judges incapable of executing their office impartially and independently with continued public confidence."

Justice Cosgrove has attracted the ire of the Ontario Crown, and rebuke from the Ontario Court of Appeal, more than once. In its notice of appeal of the stay of proceedings against Elliott, the Crown asserted the judge was biased against the Crown, noting that the Court of Appeal had complained in 1997 of his "heavy handed approach to a

highly sensitive matter" in the conduct of an aboriginal hunting and fishing rights case and termed "totally unsatisfactory" his denial of procedural fairness to the province of Ontario.

The Crown also alleged the judge erred, as he had in Lovelace v. Ontario, a high-stakes multi-million-dollar Métis rights case, where the appeal court held that his "suspicious attitude toward the government" caused him to misapprehend evidence.

In 2002, Justice Cosgrove was among several judges who reportedly angered Ontario Attorney General David Young by making Fisher orders during a legal aid crisis, requiring the government and its legal aid plan to pay $125 an hour on legal aid certificates, well above the going $88 rate.

The power given by s. 63(1) was discussed at the annual meeting in Winnipeg last month of the Canadian Superior Court Judges Association. Justice Neil Whitman of the Alberta Court of Appeal, co-chair of the association's conduct committee, told The Lawyers Weekly: "I think it's of some concern, there is some question as to the purity of the motive."

The inquiry, which will likely proceed later this year, will be before a panel of three judges and two lawyers: Chief Justice Finch, Associate Chief Justice Michael MacDonald of the Nova Scotia Supreme Court, Chief Justice Allan Wachowich of the Alberta Court of Queen's Bench, Sheila Block of Torys in Toronto and John Nelligan of Ottawa's Nelligan O'Brien Payne.

Earl Cherniak of Lerners in Toronto has been appointed independent counsel to present the case to the inquiry committee.

TAB E

The Lawyers Weekly, 12:18
September 11, 1992

This is Exhibit E referred to in the affidavit of Hon. Paul Cosgrove sworn before me, this 19 day of October 2004

A COMMISSIONER FOR TAKING AFFIDAVITS

Judges under attack ...

What will they do to fight what they see as threats to their independence?

By Cristin Schmitz

HALIFAX -- Canada's judges are working on a defensive strategy to combat what they view as widespread attacks on their independence.

At an Aug. 26 panel discussion here, members of the Canadian Judges' Conference -- the 900-member association which represents most of Canada's federally-appointed judges -- reacted with deep concern to developments which they fear could threaten their independence, including:

* pressure for mandatory training;

* creeping interference by the provincial bureaucracy into the management and day-to-day administration of the courts;

* calls to open up the judicial discipline process by having public hearings and including non-judges on the Canadian Judicial Council committee which investigates and decides complaints;

* calls for committees to evaluate judges' decisions and performance;

* calls for a written judicial conduct code; and

* unfair criticism of judges' decisions or "judge bashing" by the media, lawyers, pressure groups and politicians (see story p. 6).

The judiciary's growing apprehension about threats to its independence has already spurred the Canadian Judicial Council to take some action.

Alberta Chief Justice Catherine Fraser, a council member, told some 60 judges here attending a panel on judicial independence that the council decided last March to "press" for an explicit constitutional guarantee recognizing judicial independence (see: "C.J.C. seeks entrenched judicial independence in a new Constitution," Lawyers Weekly, Sept. 4, 1992, p. 1.)

(The chief justice elaborated on her remarks in a later interview with The Lawyers Weekly, see this issue, p. 6.)

Chief Justice Fraser also told the group that at that same meeting in March, the council -- composed of all the federally-appointed chief and associate chief judges of the country -- agreed that the top judges of each of the provinces should negotiate with their respective provincial attorneys general to attempt to secure control of their courts' operating budgets.

Those budgets are now controlled by the provincial governments.

Manitoba Chief Justice Richard Scott, also a panelist and Canadian Judicial Council member, told the judges that "despite its firm constitutional foundation, recent developments have prompted the public to seriously question the traditional independence of the judiciary."

He said the principle raises the hackles of some non-lawyers, and particularly of journalists, who see it as a cant phrase used to justify remoteness and privilege for judges.

Yet judicial independence, a cornerstone of democracy, has assumed even greater importance since the enactment of the Charter.

"Judicial independence is a hard sell in this era of overall budgetary restraint and public cynicism, but the sale must be made because the alternative is unthinkable," the chief justice warned.

"Somehow or other, through the [legal] profession or otherwise, governments must be made to see that the preservation of a truly independent judiciary is in the interests of everyone, even government itself."

Quoting from recent Supreme Court of Canada decisions affirming that core judicial institutional independence requires judicial control of the assignment of cases, court lists, assignment of courtrooms, sitting hours and direction of support staff, Chief Justice Scott said "one can only wonder at how quickly the worm has turned, and how we find ourselves in the year 1992 being increasingly defensive as we hear cries for judicial accountability."

The provincial attorneys general have, "almost without exception," he said, "declined to accept the necessary separation of the judiciary from the control of the executive branch of government arising from the inherent conflict of the attorney general as the principal litigator before the court on behalf of the government of the day."

There has been "a gradual but subtle intrusion by the provincial bureaucracies into the field of judicial administration, exacerbated in many cases by inadequate funding," he said.

"At the present time, court staff do not know who their master is and the relationship between staff and the judiciary is often ambivalent."

Chief Justice Scott said the judicial independence committee of the Canadian Judicial Council was unsuccessful in recent years in attempting to compose a written conduct code for federally- appointed judges (judges in many U.S. states adhere to such a code, as do the provincial judges in Quebec and B.C.).

"We sat down one day, a whole bunch of us around a table with a notepad and a bunch of pens, and we said: 'All right, let's do a statement of general principles.'

"We came up with the worst piece of junk you could possibly imagine, and it was that act, more than anything else, that caused us to conclude that any effort to produce or prepare a written code of judicial conduct would in fact be counterproductive, a view that I can assure you that we maintain to this day."

The chief justice also said he believes that Canadian judges should oppose any efforts to create a judicial conduct commission on the model of the U.S. commissions which review complaints against state judges. He said there are about 4,000 complaints per year against state judges, and about 400 public inquiries.

This compares to about 100 complaints per year against federally- appointed judges in Canada, almost all of which are handled in secret.

The U.S. commissions are often dominated by non-judges and non-lawyers.

They are aggressive, sometimes conducting outreach programs to encourage complaints, and many consider it part of their role to be "cops" and to instill fear in the hearts of "bad judges," he said.

There is "great antagonism" between the commissions and the many state judges, he said. U.S. judges have been "burned to a crisp" by the commissions.

"I bring this horror story to your attention simply to illustrate the direction that we must not take." he said.

"While the judicial conduct process may ultimately be broadened in various respects, we must not in my submission, lose control over our own destiny as they have done in the United States."

Panellist David Chipman of the Nova Scotia Court of Appeal said the public "can only have confidence in entrusting their disputes to judges if those judges are free from coercion -- direct or indirect -- from anyone, and in particular [from] the legislative and executive branches of government."

Mr. Justice Chipman said judges must be aware of increasing calls for judicial accountability. "We must decide the extent to which we should resist them, and the extent to which we should not resist them, but support them."

Judges must be sensitive to such issues as gender or racial bias, and take full advantage of education offered on such subjects, he suggested.

But demands for mandatory training or "indoctrination" are a direct attack on judges' independence, he said.

"The concept of imposing any form of training on judges is an attack on judicial independence of such a degree that I do not think that we can countenance it."

Mr. Justice Chipman also said that he would be "very wary indeed" about any suggestions from the Bar that it evaluate or rate individual judges.

"The question of judging the judges, watching the watchers, has been raised time and again, but in the last analysis somebody has to be the final judge.

"Is it going to be the evaluators -- these people in the [U.S.] state courts that have become so powerful and so frightening that they have the judiciary by the tail? Should there be a court of appeal from these evaluators?

"Such a regime," he said, "could very well become popularity contests or unpopularity contests, based on such things as the batting average of certain lawyers with certain judges.

"Such polling could be very unfair to individual judges who might be severely harmed by the actions of aggressive and misguided members of the Bar -- and there's lots of those out there."

Mr. Justice Chipman remarked that judicial independence doesn't preclude judicial accountability.

But in matters of adjudication, judges are answerable only to the rule of law, he said.

There are already enough checks on judges in this respect to keep them accountable, he said. These include review by appellate courts, as well as pressure from the chief justices, the Bar and the media.

"I think those are very strong factors in the high quality of professional output that Canadian federally-appointed judges have consistently come out with."

Mr. Justice Chipman explained that the judicial independence committee of the Canadian Judges' Conference has studied the present Judges Act provisions for the removal of judges for misconduct.

"And they are not satisfied that as now drawn they are entirely in the best interests of judicial independence."

The committee does not agree with the power of the federal Minister of Justice and the provincial attorneys

general to require the Canadian Judicial Council to conduct a formal inquiry into whether a judge should be removed. This bypasses the usual preliminary screening process used to determine whether there is even enough prima facie evidence to warrant a judge's removal from office, he said.

"That's political interference in our view with judges," he said, adding that the executive should have the same recourse for complaints as a private citizen.

The committee also disagrees with a provision permitting lawyers to be appointed as members of an inquiry committee.

This form of "outside control" is totally inconsistent with an independent judiciary, he said.

"Judges should not in the first instance be judged by any other than federally-appointed judges inasmuch as we are removable only on an address of both Houses of Parliament. That is the opportunity for the judges' conduct to be passed upon in the Commons by the people's elected representatives -- none of whom are judges, not one.

"The provision for the appointment by the Minister of such outsiders to the process is objectionable also because it is a form of outside control on the process exercised again by politicians, any number of whose nominees could constitute part of an inquiry."

Mr. Justice Chipman said the committee also takes issue with a provision that requires a judicial conduct inquiry to be held in public if the Minister of Justice so requests.

He noted that a 1985 Canadian Bar Association committee report on judicial independence generally opposed open hearings.

"We consider this power of the Minister to be a further interference in the process. Trial by media carries a risk of destroying the reputation of a judge who despite an eventual negative finding by an inquiry committee [i.e. no misconduct] might no longer be perceived as being competent to carry on his or her judicial duties."

In the committee's view, the Canadian Judicial Council "should be the defender and supporter, and not the prosecutor, of judges," he said.

"The price that society has to pay for a free and independent judiciary must of necessity include a certain amount of less-than-perfect performance which goes unchecked and unrebuked," he said.

"The only way you can get around that is to have a policing system of the types we are beginning to hear which would be far more destructive to judicial independence than the few errant cases that might slip out ... ."

Chief Justice Fraser of Alberta urged judges to "take back control" of the issue of judicial evaluations in order to ensure that judicial independence is preserved.

She queried "how happy the lawyers would be if we suggested that there should be an evaluation of them by their clients immediately after their cases have been heard by the court, the decision rendered, and their bill sent off to their clients.

"And I dare say the attitude would be very different if we were suggesting that type of legal evaluation."

Chief Justice Fraser said the relatively few judgments which have attracted severe public criticism do not justify interfering with the fundamental principle of independence.

However, some aspects of judicial performance -- such as how long it takes to render a decision -- can be evaluated, she acknowledged.

"But when it comes to looking at the decisions themselves I believe very strongly that that is where it has got to stop.

"I accept the proposition that some of these other objective standards can be looked at. But if we are going to proceed into the era of then evaluating the judgments themselves, then I suggest that we are going to have very difficult problems in preserving the concept of judicial independence as we know it."

Chief Justice Fraser said she "very strongly" believes that the judiciary must decide how to respond to the issues that arise as a result of the inherent tension between judicial accountability and independence.

"It's not going to go away. We have had judicial review committees, and they are moving into the era of judicial evaluation committees.

"Now if we want to respond to that we have to do so again with some sort of united front and position on this issue, and nothing less than the whole principle of judicial independence is at stake.

"But as I've said, please remember that there is a legitimate public concern here and we've got to be sensitive to that.

"And if we ignore it, then we are going to be dragged right into the whole process just like the U.S. has had happen where the judges there have effectively lost total control over the whole procedure."

TAB 4

In the matter of:

Canadian Judicial Council Inquiry of Justice Paul Cosgrove

Affidavit of the Honourable James Chadwick Q.C.

I, James Chadwick of the City of Ottawa, in the Province of Ontario, make oath and say as follows:

1. I was called to the Bar of the Province of Ontario in 1964. I was appointed a judge of the Supreme Court of Ontario (now the Superior Court of Ontario) in June, 1988. I retired from that office effective January 1, 2004. I served as the Senior Regional Judge for the Eastern Ontario Region of the Superior Court of Ontario from 1994 through 2000. I am a past-president of the Ontario Superior Court Judges Association.

2. Having sat as a judge for more than fifteen years, I understand that the ability of any judge to exercise his or her judicial authority effectively depends in significant part upon the public's perception of the judge's integrity and credibility. Publicity regarding the existence of a formal inquiry into a judge's conduct will almost inevitably have a serious adverse impact on that public perception. As a result, the announcement of a formal inquiry will make it virtually impossible for the judge to continue in his or her active duties, at least until the inquiry is resolved.

3. Moreover, the conduct of a public inquiry into a judge's conduct is almost certain to further undermine the public confidence in the judge, regardless of whether the judge is ultimately found to have engaged in any conduct that could warrant removal. The media and the public will almost invariably focus on the most

sensational aspects of such an inquiry, to the detriment of the judge's credibility. Meanwhile the judge will have little or no ability to respond publicly to or rebut public or media perceptions.

4. While the circumstances of each case will be different, it is apparent to me that there will be many cases where it will be difficult, if not impossible for a judge to resume active duties with any degree of effectiveness after a public inquiry into his or her conduct.

5. It is for this reason that both the Ontario Superior Court Judges Association and the Canadian Superior Court Judges Association have expressed their concerns regarding the unilateral power of a provincial Attorney General to require an inquiry into the conduct of a superior court judge under s. 63(1) of the *Judges Act*. The publication of the fact of the inquiry, together with its public proceedings are very likely to have a serious impact on the ability of the judge to resume his or her active duties, even where there is no recommendation for removal of that judge. One of the key issues that concern the Ontario Association and the Canadian Association is the likelihood that the judge will experience these consequences, without there being any prior judicial assessment that the underlying complaint has any merit whatsoever.

6. The Attorney General of Ontario is the single most frequent litigant in the courts of Ontario. I understand that the inquiry into Justice Cosgrove has been initiated by the Attorney General of Ontario arising from the conduct of Justice Cosgrove in the matter of *R. v. Elliott*. I am aware that the Attorney General of Ontario was the unsuccessful party before Justice Cosgrove, and that Justice Cosgrove was critical of the actions of a number to representatives of the Attorney General in the matter. I am also aware that the decision of Justice Cosgrove was reversed on appeal.

7. In my view, the ability of the Attorney General to initiate a public inquiry against a judge in a case like this is very likely to send a strong signal to judges across Ontario, perhaps across Canada. The clear message is that if a judge decides a case or treats the Attorney General in a manner that the Attorney General considers to be unsatisfactory, then the judge may be facing a very public examination of his or her actions.

8. Given the serious consequences that a public inquiry entails, there is a very real prospect that judges will hesitate before acting in a fashion that will engage the attention of the Attorney General. In my view, this is completely antithetical to the primary obligation of any judge to hear and decide cases in a completely impartial fashion, without fear or favour, regardless of who the litigants may be.

SWORN BEFORE ME at the City of Ottawa on this 12th day of October, 2004.

A Commissioner, etc.

Hon. James Chadwick Q. C.

Proceeding commenced at Toronto

MOTION RECORD OF THE HONOURABLE PAUL J. COSGROVE

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