IN THE MATTER OF THE CANADIAN JUDICIAL COUNCIL'S INQUIRY REGARDING JUSTICE PAUL COSGROVE

Inquiry Committee:

The Honourable Lance Finch
Chief Justice of British Columbia
Chair

The Honourable Allan Wachowich
Chief Justice of the
Alberta Court of Queen's Bench

The Honourable Michael MacDonald
Associate Chief Justice of the Supreme Court of Nova Scotia

John Nelligan, Q.C.
Ontario Bar

Kirby Chown
Ontario Bar

Counsel:

Counsel to the Inquiry Committee:	George K. Macintosh, Q.C.
Independent Counsel:	Earl A. Cherniak, Q.C.
Counsel for Justice Cosgrove:	Chris Paliare and Richard Stephenson
Counsel for the Attorney General of Canada:	Donald Rennie, Kathryn Hucal and Christine Mohr
Counsel for the Attorney General of Ontario:	Robert Charney and Zachary Green
Counsel for the Criminal Lawyers' Association of Ontario and the Canadian Council of Criminal Defence Lawyers:	Alan Gold
Counsel for the Canadian Superior Courts Judges Association:	Dr. Sheilah Martin, Q.C.

REASONS ADDRESSING THE CONSTITUTIONALITY OF SECTION 63(1) OF THE *JUDGES ACT*, R.S.C. 1985, c.J-1
(Application Heard in Toronto, Ontario December 8 and 9, 2004)

Part I: Introduction

1. On April 3, 2004, Ontario's Attorney General wrote to the Chief Justice of Canada in her capacity as Chair of the Canadian Judicial Council ("CJC"), asking the CJC to commence an inquiry into the conduct of Justice Paul Cosgrove in the case of *Regina v. Julia Yvonne Elliott*. The letter was written expressly pursuant to s. 63(1) of the *Judges Act*, an enactment of the Parliament of Canada.

2. Section 63 reads as follows:

Inquiries concerning Judges

Inquiries

63.(1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Investigations

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

Inquiry Committee

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be

designated by the Minister, shall constitute an Inquiry Committee.

Powers of Council or Inquiry Committee

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

Prohibition of information relating to inquiry etc.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

R.S., 1985, c.J-1, s.63; 1992, c.51, s.27; 2002, c.8, s.106.

3. After receiving the Attorney General's letter, the CJC appointed this Inquiry Committee pursuant to s.63(3) of the *Act*.

4. Justice Cosgrove has brought an application challenging the constitutionality of s.63(1). He says it infringes the constitutionally-protected independence of the judiciary. It gives the Minister of Justice and the attorneys general of the provinces a special standing, in contrast with the standing accorded all others, who may complain about a judge pursuant to s.63(2). As Justice Cosgrove points out, 63(1) *mandates* an inquiry, whereas 63(2) gives to the CJC the *discretion* to investigate, which of course gives it the accompanying discretion not to investigate if, for example, it deems the complaint frivolous. Furthermore, an inquiry under 63(1) is somewhat expedited in the sense that it bypasses the early screening mechanisms accorded by the CJC through its by-laws and complaints procedures under 63(2).

5. Justice Cosgrove says these concerns are exacerbated where, as here, the Attorney General's request to the CJC arises from a trial in which Justice Cosgrove stayed a charge of murder brought by the Attorney General against the accused, Ms. Elliott. The Court of Appeal for Ontario, in reasons pronounced December 4, 2003, substantially criticized what Justice Cosgrove had done as the trial judge in *Elliott*, and the Attorney General

requested an inquiry after the time had passed for Ms. Elliott to seek leave to appeal to the Supreme Court of Canada. In the result, as Justice Cosgrove points out, s.63(1) has given the Attorney the right to compel an inquiry into the conduct of a judge who found against the Attorney's position in a high-profile murder case. This, he says, creates at least the perception of there being an unfair power for attorneys general and a resulting "chilling" effect on judges.

6. At issue is whether these concerns, stemming from the status conferred by 63(1) on the Minister and attorneys general, are sufficient to render 63(1) unconstitutional. The answer depends upon an understanding of both the legislative context in which 63(1) is found and the particular role of an attorney general in the administration of justice in this country.

7. Earl Cherniak, Q.C. is the Independent Counsel appointed by the CJC for this case. He says that s.63(1) is valid and that when it is interpreted in context, a constitutional issue does not arise. If it does, he says 63(1) passes constitutional scrutiny.

8. Several parties intervened in this application. Justice Cosgrove was supported in his challenge by the Criminal Lawyers' Association for Ontario and the Canadian Council of Criminal Defence Lawyers, and by the Canadian Superior Courts Judges Association. The position taken by Independent Counsel was supported by the interventions of the Attorney General of Canada and the Attorney General of Ontario.

Part II: The Statutory Context

9. Section 63 of the Judges Act is quoted above. Sections 64 and 65 are also relevant:

Notice of hearing

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

R.S., 1985, c.J-1, s.64; 2002, c.8, s.111(E).

Report and Recommendations

Report of Council

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

Recommendation to Minister

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

(a) age or infirmity,

(b) having been guilty of misconduct,

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

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

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

R.S., 1985, c.J-1, s.65; R.S., 1985, c.27 (2nd Supp.), s.5; 2002, c.8, s.111(E).

10. There are three differences between 63(1) and 63(2). First, as noted earlier, 63(1) is mandatory for the CJC and 63(2) is discretionary. Second, 63(1) addresses inquiries and 63(2) addresses investigations. ("Inquiry" and "investigation" are not defined in the *Judges Act*, but in our view, an inquiry in this context contemplates a more formal pre-hearing and hearing process than does an investigation. An investigation, at least to begin with, is less structured.) Third, 63(1) focuses upon only the most serious question, whether a judge should be removed from office, whereas 63(2) embraces complaints about any conduct, ranging from the smallest judicial indiscretion to the most serious instances of wrongdoing.

11. This third point is informative. When the statute restricts mandatory inquiries under 63(1) to only the most serious cases, it cannot be assumed that an attorney general will resort to it lightly. Certainly on the evidence before us, including the reasons of the Court of Appeal for Ontario in *Regina v. Elliott*, there can be no reasonable suggestion that the Attorney General has relied upon 63(1) for any improper purpose whatever. That is corroborated by the usage, or rather lack of usage of 63(1). In the 33 year history of this provision, the Attorney General of Ontario has never resorted to it before. It has been used by other attorneys general or the Minister of Justice a total of only seven times.

12. 63(3) authorizes the CJC to create this Inquiry Committee and authorizes the Minister of Justice to add senior lawyers to the Committee's membership, as was done here. 63(3) contemplates employing an Inquiry Committee for both inquiries and investigations for the obvious reason of efficiency given the comparatively large size and geographical disposition of the CJC membership.

13. Section 64 encapsulates the principles of natural justice to protect a judge subjected to an allegation under s.63 if it leads to an inquiry or investigation.

14. These provisions, and related provisions in the CJC's by-laws, ensure that it is judges, sometimes with the participation of senior members of the bar, and not an attorney general, who examine the judicial conduct which forms the subject of an inquiry, whether the process originates under 63(1) or 63(2).

15. The applicable by-laws of the CJC are authorized under s.61(3)(c) of the *Judges Act*. The current by-laws addressing inquiries and investigations came into force January 1, 2003.

16. These by-laws provide for the Independent Counsel and by-law 3 addresses this position as follows:

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.

17. Independent counsel is given a strong mandate. He or she must first consider whether the matter even warrants a case being brought forward to the Inquiry Committee for deliberation. Independent counsel can obtain the position of the respondent judge as to whether there is a case to present and, if so, how that case should be framed. These powers, implicit in the position of Independent Counsel, serve as an initial protection against unfounded allegations proceeding at all, and against any case proceeding on a basis unfair to the respondent judge.

18. The by-laws further codify the elements of procedural fairness one would expect in a proceeding of this importance.

19. By-law 5 gives the Inquiry Committee the discretion to consider a complaint or allegation and ensures the respondent judge has the opportunity to respond fully.

20. By-laws 8 to 11 provide a respondent judge the opportunity to make submissions to the CJC after it receives the report of the Inquiry Committee and before it reports its conclusions and recommendations to the Minister of Justice in accordance with s.65 of the *Act*.

21. All of these procedural safeguards provide, in our view, a strong insulation against any apprehension of undue influence thought to be accorded to an attorney general or the Minister under s.63(1).

22. It must also be remembered that in the case of federally-appointed judges, the conduct review process can lead only to a recommendation for a judge's removal from office, which is conveyed to Parliament by the Minister of Justice. Parliament alone can remove a federally-appointed judge from office, pursuant to section 99 of the *Constitution Act, 1867*:

Tenure of office of Judges

> **99.**(1) … the Judges of the Superior Courts shall hold office during good behaviour, but shall be removed by the Governor General on Address of the Senate and House of Commons.

23. This Parliamentary power would prevail even if the *Judges Act* had never been enacted, and s.71 of the *Judges Act*

verifies that the s.63 process does not curtail Parliament's powers in any way. Section 71 of the Judges Act provides:

Removal by Parliament or Governor in Council

Powers, rights or duties not affected

71. Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any powers, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge or any other person in relation to whom an inquiry may be conducted under any of those sections.

1974-75-76, c.48, s.18; 1976-77, c.25, s.15.

24. Viewed in this legislative and constitutional context, can it be said that s.63(1) infringes judicial independence by allowing an attorney general to compel the CJC to commence an inquiry?

Part III: The Constitutional Question

25. Justice Cosgrove submits s.63(1) unduly compromises the independence of the federal judiciary, and for this reason is unconstitutional.

26. There is no dispute as to the firmness of the constitutional foundation for an independent judiciary. It is a constitutional principle transcending any legislative provision and also one recognized in the

Constitution Act, 1867 and the *Canadian Charter of Rights and Freedoms*. An independent judiciary is the single most important element in the rule of law in a democratic society, followed closely by the necessity for an independent bar.

27. But it does not follow that judges are immune from the legitimate interests of the executive and legislative branches of government in ensuring the due administration of justice.

28. Federal judges are appointed to office by the Prime Minister or the Minister of Justice. Their salaries are authorized by Parliament. Similarly, it is common ground that judicial independence does not preclude conduct review. Justice Cosgrove acknowledges that an attorney general could launch a complaint under s.63(2) of the *Judges Act*.

29. Although judicial independence is inviolate, judicial conduct is properly subject to scrutiny by the other branches of government, and in particular by attorneys general, as guardians of the public interest in matters pertaining to the administration of justice.

30. The relationship between the judiciary and the other branches of government has been considered by the Supreme Court of Canada. In *Moreau-Bérubé v. N.B. (Judicial Council)*, 1 S.C.R. 249, the Court examined the decision of the New Brunswick Judicial Council, the body responsible for conduct review of provincially-appointed judges in New Brunswick. The judgment of the Court was delivered by Arbour J. At p.285, in paras, 58-59, she wrote:

> When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.
>
> The New Brunswick Judicial Council found that the comments of Judge Moreau-Bérubé constituted one of those cases. While it cannot be stressed enough that judges must be free to speak in their judicial capacity, and must be perceived to speak freely, there will unavoidably be occasions where their actions will be called into question. This restraint on judicial independence finds justification within the purposes of the Council to protect the integrity of the judiciary as a whole.

31. The Supreme Court also addressed the relationship among the branches of government in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. We quote two passages from the judgment of Cory and Iacobucci JJ.:

> 136 Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the

> constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.
>
> . . .
>
> 139 To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s.33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

32. These passages from *Vriend* albeit written in a different context have application here, particularly when the unique status and responsibilities of an attorney general in the administration of justice are kept in mind.

33. The unique position of an attorney general is essential to the efficient administration of our justice system. In the criminal law process, for example, an attorney general decides whether a charge will be laid, determines what information gathered by the state in a criminal investigation will be made available to the defendant,

and has the power to stay a criminal proceeding at any stage after it has been commenced. All of these powers are granted in the name of the public interest.

34. An attorney general is presumed to act in the public interest in the administration of justice and that presumption, in our view, extends to complaints brought against judges under s.63(1) of the *Judges Act*. As we noted earlier, 63(1) is confined in its scope to the most serious instances of alleged judicial misconduct, those calling for the removal of a judge from office.

35. Attorneys general derive their position from statute and from long practice originating centuries ago in England. Their special duties and powers are set out comprehensively in the factums of the Attorney General of Canada and the Attorney General of Ontario. Schedule “A” to these reasons contains pp.16-19, paras.40-48, from the factum of the Attorney General of Canada. Schedule “B” contains pp.7-15, paras.21-31, from the factum of the Attorney General of Ontario. We agree in general with those submissions, because they serve to explain why, in our opinion, an attorney general is given the right to

require a 63(1) inquiry whenever there are allegations of serious judicial misconduct.

36. The apparent tension presented by this application is between the public's interest in an independent judiciary and the public's interest as represented by the attorney general under s.63(1) of the *Judges Act*. 63(1) enables the public's primary representative in the legal system, an attorney general, to *ensure* that allegations of serious judicial misconduct are examined, first by judges and ultimately, if necessary, by Parliament itself. We do not think this can be unconstitutional.

37. At worst, s.63(1) authorizes a procedure which bypasses the first "screenings" to which other allegations against judges are subjected. But once a request is received under s.63(1), the inquiry which follows, over which judges preside at every stage, affords a respondent judge every substantial protection he or she could reasonably expect. In reality, after a 63(1) request is made to the CJC, there remain numerous "screenings", beginning with the broad mandate of the Independent Counsel, through the processes of the Inquiry Committee and then the deliberations of the CJC itself, all before the Minister

of Justice brings the matter to Parliament, the only forum having the power to remove judges.

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

Is There a "Chilling" Effect?

39. Justice Cosgrove and the intervenors supporting his position submit that the power granted in s.63(1) will inhibit judges in the discharge of their duties, and will therefore curtail or appear to curtail judicial independence, particularly independence from the most frequent litigant in our courts, the attorneys general.

40. We do not agree.

41. 63(1) has been in place for over 30 years. As we noted earlier, it has been used only seven times, and the Attorney General of Ontario has never used it before.

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

42. Justice Cosgrove filed the affidavit of a respected former judge of the Ontario Superior Court to support his argument that 63(1) carries this intimidating aspect with it. With the greatest of respect, we do not accept the opinions expressed in the affidavit.

43. Justice Cosgrove points to the adverse publicity related to this conduct review process as being an inevitable part of this “chilling” effect. It should be recalled that adverse publicity originated with the criticism of Justice Cosgrove by the Court of Appeal for Ontario in the *Elliott* appeal, and not with the request for an inquiry into his conduct presented by the Attorney General. Any person can publicize his or her complaint about a judge, although we note the Attorney General did not do that in this case. In fact, public notice of the

Attorney General's request came from the press release issued by the CJC.

44. Justice Cosgrove adds that he is on leave, with pay, as a result of the Attorney's request. His Chief Justice "indicated to [him] that [he] should not sit on any cases until the inquiry was resolved" (Cosgrove affidavit, para.19). It is reasonable to expect a Chief Justice might make such a request in the face of an allegation of this nature. It does not follow however that this renders the conduct review mechanism invalid.

Section 2(b) of the *Charter*

45. Justice Cosgrove makes an alternative argument that his impugned conduct is protected under s.2(b) of the *Canadian Charter of Rights and Freedoms*, which provides that everyone has the fundamental freedom of thought, belief, opinion and expression.

46. In our opinion, s.2(b) cannot possibly have application here. The *Charter* was never intended to protect one branch of government against another. Where would this argument lead? Would Parliament, in assessing Justice Cosgrove, under s.99 of the *Constitution Act, 1867*, be

stopped from doing so on the ground that whatever he said was protected under 2(b) of the *Charter*? This would turn the constitution on its head. We believe that the protections which attach to judicial expression are entirely encompassed by the constitutional guarantees of judicial independence.

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

48. Each branch of government derives authority to exercise its powers and functions from different parts of the constitution. While the separation of powers is by no means precise, the judiciary's role is to apply the *Charter* to protect the rights and freedoms held by individuals and groups from government interference. The *Charter* is a shield for the benefit of individuals and groups and was never intended to protect the powers or functions of either the legislative or judicial branches.

49. In our opinion s.2(b) of the *Charter* is not engaged in the circumstances of this case.

Part IV: Conclusion

50. For these reasons, we find s.63(1) of the *Judges Act* to be constitutional. It offends neither judicial independence nor s.2(b) of the *Charter*. Section 63(1) contemplates the commencement of an inquiry, which has now begun.

51. In his motion challenging the constitutional validity of s.63(1) counsel for Justice Cosgrove sought the following relief:

> 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 is therefore invalid and of no force or effect; and
>
> 2. An order declaring that this Inquiry Committee has no jurisdiction to proceed with this Inquiry.

52. For the reasons already expressed we decline to make either declaration sought.

53. The Inquiry Committee will await the proposals of Independent Counsel and Counsel for Justice Cosgrove as to the next steps the Inquiry will take.

Dated at Vancouver, B.C.
on Thursday the
16th day of December, 2004

_____"L.G. Finch"_____
The Hon. Lance Finch, CJBC
Chair of the Inquiry
Committee, on his own
behalf and on behalf of
the other Inquiry Committee
Members