File No.: 13356

IN THE MATTER OF:

CANADIAN JUDICIAL COMMITTEE
INQUIRY OF JUSTICE PAUL COSGROVE

JUSTICE PAUL COSGROVE

- and -

CANADIAN JUDICIAL COUNCIL

Independent Counsel

- and -

THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF ONTARIO,
THE CANADIAN SUPERIOR COURT JUDGES ASSOCIATION,
THE CRIMINAL LAWYERS ASSOCIATION

Interveners

FACTUM OF THE ATTORNEY GENERAL OF CANADA

November 29, 2004

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OVERVIEW

> *Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.*
>
> *Canadian Judicial Council, Ethical Principles for Judges,* (1998), at p.14 ***[Attorney General of Canada's Authorities ("AGC's Authorities")], Tab 14***

1. Section 63(1) of the *Judges Act* is valid federal legislation. Its antecedence lies in the long recognized inter-relationship between judicial independence and public confidence in the integrity and impartiality of the judiciary. Section 63(1) is an integral part of a legislative framework whereby the Attorney General and the judiciary exercise their mutual and shared responsibilities to ensure accountability for judicial conduct that may undermine public confidence in the judiciary.

2. The motion before this Committee is fundamentally flawed in that it views independence of the judiciary from the perspective of a single judge alone, neglecting analysis of both the purpose of judicial independence and the requirement for ancillary mechanisms necessary to preserve public confidence. The motion assumes, incorrectly, that under our Constitution the judiciary and the judiciary alone have a responsibility to uphold public confidence in the administration of justice.

3. While our system of government is comprised of three branches, - the legislature, judiciary and the Crown, they do not work in splendid isolation from one another. There is a necessary and salutary convergence of interest when public confidence in the judiciary is in question. Part II of the *Judges Act* governs the interface between the Attorney General and the judiciary in these circumstances. Through the mechanism of the CJC, Parliament has crafted a nuanced legislative scheme to preserve public confidence in an independent judiciary. The independence of the judiciary is enhanced as judges are seen to be judging judges; the interests of individual judges are

protected through robust procedural safeguards, all within the framework of the Attorney General's responsibility to preserve the impartiality and independence of the Bench.

4. Judicial expression is not protected expression within section 2(b) of the *Charter of Rights and Freedoms*. The values which underlie each are unique, and to overlay them results in contradiction and confusion which undermines their respective purposes.

I. STATEMENT OF FACTS

History of proceedings

5. On September 7, 1999, Mr. Justice Cosgrove granted a stay of proceedings in a murder trial in *R v. Elliott*. The Attorney General of Ontario appealed. In a decision released on December 4, 2003, the Ontario Court of Appeal allowed the appeal, vacated the stay, and found, *inter alia*, that the administration of justice was brought into disrepute because Justice Cosgrove had used the *Charter* to remedy "baseless and frivolous claims". Time for seeking leave to appeal to the Supreme Court of Canada expired on February 2, 2004.

> *R. v. Elliott,* [2003] O.J. No. 4694 (CA), paragraph 129, ***Responding Motion Record, Tab 2***

6. On April 3, 2004, the Attorney General of Ontario requested that the Canadian Judicial Council ("*CJC*") establish an inquiry into the conduct of Mr. Justice Cosgrove. In exercising the discretion conferred under s. 63(1) of the *Judges Act*, the Attorney General of Ontario stated that:

> *...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.*

> *Letter to The Right Honourable Beverly McLachlin, P.C., C.J.C., Chairperson, C.J.C., from Michael Bryant, Attorney General for Ontario, received April 23, 2004,* ***Motion Record of Justice Cosgrove, Tab 3, Exhibit A***

7. Justice Cosgrove was advised by letter dated April 26, 2004 of the request for an inquiry and of the CJC's intention to issue a press release regarding same. A press release regarding the request for an inquiry into the conduct of Mr. Justice Cosgrove was issued April 27, 2004 by the Executive Director and General Counsel for the Canadian Judicial Council.

Letter from Norman Sabourin dated April 26, 2004, ***Motion Record of Justice Cosgrove, Tab 3, Exhibit B***

8. In his affidavit in support of this motion, Justice Cosgrove states: "The fact of the [sic] CJC had commenced an inquiry into my conduct received significant media coverage, locally, provincially and nationally." Justice Cosgrove further believes that this attention has "...undermined the confidence that members of the public are likely to have towards me." Justice Cosgrove concluded that "it would be very difficult to exercise my authority effectively as a judge in these circumstances."

Affidavit of Justice Cosgrove, paragraphs 18 and 21, ***Motion Record of Justice Cosgrove, Tab 3***

CJC Press release dated April 27, 2004, ***Motion Record of Justice Cosgrove, Tab 3, Exhibit C***

9. On April 29, 2004, the Chief Justice of the Superior Court of Ontario requested that Justice Cosgrove not preside over any matter until the inquiry was resolved. Justice Cosgrove acceded to this request.

Affidavit of Justice Cosgrove, paragraph 19, ***Motion Record of Justice Cosgrove, Tab 3***

The *Judges Act* and the Canadian Judicial Committee

10. The amendments to the *Judges Act* in 1971 which created the CJC established a scheme by which the judiciary would to some extent become a self-disciplining body, insulated from interference by the executive or legislative branches of government, but subject to Parliament's overriding supremacy on matters of removal. The scheme also ensured that, in the ordinary course, the Attorney General of Canada and Parliament would have the benefit of the advice and perspective of the judiciary should there be an address be made to both houses of Parliament.

Hansard, House of Commons Debates, April 28, 1971 (First Reading), at 5301, ***AGC's Authorities, Tab 1***

> *Hansard, House of Commons Debates,* June 14, 1971, (Second Reading), at 6664-6666, 6670, ***AGC's Authorities, Tab 2***
>
> Evidence and Proceedings from the Standing Committee on Justice and Legal Affairs, No.27, June 22, 1971, 27:25, 27-26, ***AGC's Authorities, Tab 3***
>
> *Hansard, House of Commons Debates,* September 24, 1971 (Third Reading), at 8170, ***AGC's Authorities, Tab 4***

11. As Mr. Turner, Minister of Justice at the time stated, the legislation was carefully constructed to balance the need for accountability and judicial independence while recognizing the responsibility of the Attorney General to Parliament under section 99 of the *Constitution Act*, 1867. The following passages of his speech to the House are instructive:

> *I have been searching for some time for a way in which allegations and complaints against the bench can be dealt with in such a manner that one will not bring the bench unduly into ridicule and contempt and yet will not deprive the judiciary of that independence which under the British parliamentary system it is entitled to and which, I believe, has been one of the strongest points of the British, Canadian and Commonwealth systems.*
>
> *I discussed the terms of the bill, not as a bill but as terms of reference, with all the ten Attorneys General of the provinces in Halifax on July 13, 14 and 15, 1970, a year or so ago. They agreed with me that the best way of obtaining discipline within the judiciary, of ensuring that judges were pulling their weight, of analysing whether judges had become handicapped by age, infirmity or conflict of interest was to leave it with the judiciary, and that it was not up to the executive and the Attorneys General to impose their will on the judiciary.*
>
> *... Where is the ultimate control? If the commission, on referral of an allegation by the Minister of Justice, by a provincial Attorney General or by an ordinary citizen, feel that as a result of their inquiry a report should be made to the Minister of Justice, they do that. Then the matter is in the hands of the Attorney General of Canada, subject to his responsibility to Parliament. If the Canadian judicial council were to fail to act, if the situation were of such gravity that Parliament were concerned, then the power of inquiry under the Inquiries Act and the Judges Act would still be retained. The Attorney General still has the duty and the power to refer that matter to an inquiry conducted by a judge or members of*

the bar, and the ultimate responsibility in serious cases still remains with him for report to Parliament and to the people.

Primarily for the reason of the independence of a system whereby the judiciary is immune from pressure, either from public opinion, short-term public opinion—although I have argued that it should respond to the movement of society and I have spoken openly, even before the Supreme Court, of a creative judiciary responding to social direction – free from the pressures of the Attorneys General, free from the pressures of a legislature, in fact free from every type of public pressure, I decided to achieve the type of discipline I wanted by entrusting it to the Canadian Judicial Council made up of the chief justices of the country, of course subject always to the overriding authority of Parliament.

Speech of Mr. Turner, Minister of Justice, Hansard, House of Commons Debates, September 24, 1971, (Third Reading) at p.8170, ***AGC's Authorities, Tab 4***

12. The legislative intent of the referral power in the *Judges Act* was to provide a mechanism to ensure judicial independence and accountability in a manner consistent with the statutory and constitutional duties of the Attorney General. Parliament was equally aware that the executive should not engage in the daily management of the judiciary:

In addition to the right to initiate an investigation on its own, the Council may also be directed by the Minister of Justice to commence an inquiry as to whether a federally appointed judge should be removed from office. ....

Because the independence of the judiciary is an integral part of the Canadian democratic process, it is important that the judiciary become, to some extent, a self-disciplining body. The executive or legislative branches of government should not ordinarily intervene in the management or control of the judiciary. To do so might result in an abuse of the executive power of government and would diminish the respect and independence now held by the bench, and destroy the delicate balance of powers that Canadian democracy has enjoyed since Confederation.

Speech of Mr. Bechard (Parliamentary Secretary to Minister of Justice), , Hansard, House of Commons Debates, June 14, 1971, (Second Reading), p.6666, ***AGC's Authorities, Tab 2***

The Inquiry and Investigation Processes

13. Inquiries and investigations under section 63 of the *Judges Act* may be established in one of two ways:

> *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).*
>
> *(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.* [emphasis added]

Judges Act, R.S.C. 1985, c.J-1, as am., section 63(1), (2), ***Authorities of the Independent Counsel ("IC Authorities"), Tab 41***

14. Parliament conferred considerable autonomy and discretion on the CJC to establish the procedures by which it would conduct investigations and inquiries. The authority of the CJC to make by-laws governing the complaint process is set out in section 61 of the *Judges Act*.

Judges Act, R.S.C. 1985, c. J-1, as am., s.60, 61(3), ***IC Authorities, Tab 41***

15. The CJC has, in consequence, adopted a series of by-laws (collectively "*CJC By-laws and Policies*"). The By-laws provide for a comprehensive complaints process and govern the conduct of investigations and inquiry proceedings, including the public or private nature of the process.

Canadian Judicial Council Inquiries and Investigation By-Laws, SOR/2002-371, Inquiries and Investigations By-laws, (Approved by the CJC September 27, 2002, Effective July 1, 2003, ("CJC 2003 By-Laws"), s.6(1), ***AGC's Authorities, Tab 6***

Procedures for dealing with complaints to the Canadian Judicial Council about federally appointed judges, ("Complaints Procedures"), Complaints Procedures Approved September 27, 2002, Effective January 1, 2003, ***AGC's Authorities, Tab 12***

Operating Procedures of the CJC, September 27, 2002, Operating Procedures, ***AGC's Authorities, Tab 7***

See also: Canadian Judicial Council, Annual Report, 2002-2003, Terms of Reference of the Judicial Conduct Committee, Canadian Judicial Council, at 10, ***AGC's Authorities, Tab 10***

The investigation process under section 63(2)

16. The CJC complaint process consists of four stages. As a matter of practice, the CJC follows this procedure where a complaint is made against a judge by a member of the public, a member of the judiciary or an Attorney General that does not invoke his or her right under section 63(1) to request an inquiry and report of the Council.

Complaints Procedures, sections 2.2, 3-10, ***AGC's Authorities, Tab 12***

Canadian Judicial Council, Annual Report, 2002-2003, at 12, ***AGC's Authorities, Tab 10***

17. Neither the *Judges Act* nor the *CJC By-Laws and Policies* direct that the fact of a complaint having been filed or the disposition of that complaint is to be kept confidential. Although the practice of the CJC with respect to most complaints filed by individuals has been not to conduct investigations in public or issue news releases or decisions, there have been instances where the disposition of a panel's conclusions have been released to the media.

E. Ratushny, *Speaking as Judges,* (1999-2000) 11 N.J.C.L. 293 at 364-366, ***AGC's Authorities, Tab 42***

Canadian Judicial Council, Annual Report, 2002-2003, at 22-23, ***AGC's Authorities, Tab 10***

A Place Apart: Judicial Independence and Accountability in Canada, A Report prepared for the Council by Martin L. Friedland, ("Friedland Report") at 96, ***IC Authorities, Tab 41***

18. Since 1971, only five complaints filed under the CJC complaint process have been referred to a formal inquiry.

Canadian Judicial Council, Annual Report, 2002-2003, at 13-14, ***AGC's Authorities, Tab 10***

19. Most complaint files initiated through the CJC complaint process are closed by the Chairman of the Judicial Conduct Committee at the first stage.

> *Decision of the Gratton Inquiry Committee re Constitutional Questions with respect to the jurisdiction of the Canadian Judicial Council and the Inquiry Committee (PDF, 2131 Kb) ("Gratton Inquiry Report"), at 11,* ***IC Authorities, Tab 25***

20. For example, in 2003-2004, 138 new complaints were filed with the CJC. The largest single source of complaints was in cases of divorce and child custody. During this time period, only three cases warranted further review.

> *CJC Annual Report,* 2003-2004, at 11, ***AGC's Authorities, Tab 11***

The inquiry process under subsection 63(1)

21. The power of the Attorneys General to refer a complaint to an inquiry under section 63(1) has been exercised sparingly. Only seven requests for inquiry have been made by Attorneys General pursuant to section 63(1) since 1971: three by the Attorney General of Quebec,[1] one by the Attorney General of Nova Scotia and four by the Attorney General of Canada. The request in this case is the first to be made by an Attorney General for Ontario.

> *Friedland Report*, at 96, ***IC Authorities, Tab 25***
>
> See: "Chart of Inquiries requested pursuant to ss.63(1) of the Judges Act", ***Appendix A to AGC's Factum***

22. Under the *Judges Act*, provincial Attorneys General cannot require that an Inquiry be held in public. Subject only to the Minister of Justice's power under s. 63(6) to require a public inquiry, section 63(5) vests the discretion to determine whether a hearing should be held in public or in private in the CJC:

> *63(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of,*

---

[1] In the case of the inquiry into the conduct of Justice Bienvenue the request for inquiry was made by both the Quebec Attorney General and the Minister of Justice.

an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

(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.

Judges Act, R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27; 2002, c. 8, s. 63(5)(6), ***IC Authorities, Tab 41***

23. The CJC 2002 By-laws provide that proceedings of Inquiry Committees 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.

CJC 2003 By-Laws, s.6(1), ***AGC's Authorities, Tab 6***

24. The practice of the CJC has been to conduct inquiry proceedings in public, particularly in cases where the matter has already "received wide public attention".

Friedland Report, at 96, ***IC Authorities, Tab 41***

CJC Annual Report 2002-2003, at 24-25, ***AGC's Authorities, Tab 10***

II. POINTS IN ISSUE

25. The Attorney General states that this Inquiry Committee must determine the following issues:

(a) Whether the ability of an Attorney General under section 63(1) of the *Judges Act* to request the Canadian Judicial Council to strike an Inquiry Committee to review the conduct of a judge compromises the constitutional principle of judicial independence;

(b) Whether the power in section 63(1) violates section 2(b) of the *Charter of Rights and Freedoms*; and

(c) The jurisdiction of an Inquiry Committee to grant the relief sought.

26. In the Attorney General's submission the challenge to section 63(1) must fail for the following reasons:

(a) Sections 63(1) of the *Judges Act*, (and section 6(1) of the CJC 2002 *By-Laws*) do not interfere with judicial independence because:

(i) a public inquiry may be the only means by which the independence of individual judges and the judiciary as a whole is assured;

(ii) the power of the Attorney General to request an inquiry is exercised by the Attorney General in the public interest; and

(iii) there is no "chilling effect"; and, in any event,

(iv) section 63(1) of the *Judges Act* does not confer on provincial Attorneys General the power to require that an inquiry be conducted in public. That power is reserved to the Attorney General of Canada or the CJC.

(b) Section 2(b) of the *Charter* is not engaged on the facts of this case, but if engaged, the balance struck by s. 63(1) in favour of the public's interest in an independent and accountable judiciary outweigh the interference with the expressive freedom of an individual judge; and

(c) the Inquiry Committee may answer the constitutional questions as stated, but cannot grant a formal declaration of invalidity.

III. SUBMISSIONS

A. SECTION 63(1) IS VALID LEGISLATION

The public nature of an inquiry reinforces judicial independence

27. The public nature of an inquiry into judicial conduct reinforces judicial independence as it enhances public trust and confidence in the administration of justice.

28. The constitutional guarantee of judicial independence of superior court judges is expressed in section 99 of the *Constitution Act, 1867*. The guarantee is also recognized as an unwritten constitutional principle, is given expression as a legal right in section 11(d) of the *Charter*, and is a fundamental element of the separation of powers.

> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paragraphs 63-65, 82-85, ***IC Authorities, Tab 15***

29. The "essential conditions of judicial independence" - security of tenure, financial security and institutional independence - were confirmed by the Supreme Court in *Valente*. Security of tenure requires that a judge be removable "only for cause related to the capacity to perform judicial functions" and that a judicial inquiry is a prerequisite to determine cause.

> *R.* v. *Valente,* [1985] 2 S.C.R. 673, 697, 708-709, ***IC Authorities, Tab 20***

30. Judges have security of tenure when they are free from interference by the executive in a discretionary or arbitrary manner. This is achieved when "a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status."

> *... the essence of judicial independence for superior court judges is complete freedom from arbitrary interference by both the executive and the legislature. Neither the executive nor the legislature can interfere with the financial security of superior court judges. That*

> *security is crucial to the very existence and preservation of judicial independence as we know it.*

R. v. *Beauregard,* [1986] 2 S.C.R. 56, paragraph 34, per Dickson J., ***IC Authorities, Tab 2***

Mackin v. *New Brunswick (Minister of Finance),* [2002] 1 S.C.R. 405, at paragraph 38, per Gonthier J., ***AGC's Authorities, Tab 24***

R. v. Valente, supra, paragraph 30, ***IC Authorities, Tab 20***

31. However, the principle of judicial independence is meaningless unless it is interpreted in a manner that promotes the core values of "...a strong and independent judiciary capable of upholding the rule of law and our constitutional order, and public confidence in the administration of justice."

Moreau-Bérubé v. *New Brunswick (Judicial Council),* [2002] 1 S.C.R. 249, at paragraph 46, ***AGC's Authorities, Tab 25***

R. v. Beauregard, supra, at paragraphs 2-24, ***IC Authorities, Tab 2***

R. v. Valente, supra, at paragraph 22, ***IC Authorities, Tab 20***

Lippe v. *Charest,* [1991] 2 S.C.R. 113 *at 140-141,* per Lamer J., dissenting, ***AGC's Authorities, Tab 23***

32. These core values depend both on public perception of the judiciary's institutional and adjudicative independence, as well as the existence of a transparent and impartial mechanism to ensure accountability for conduct which undermines judicial independence.

Ell v. *Alberta,* [2003] 1 S.C.R. 857 at paragraphs 3, 20 per Major J, ***AGC's Authorities, Tab 21***

33. If the principle of judicial independence is not interpreted in light of the public interest it is meant to serve, there is a danger that it "will wind up hurting rather than enhancing public confidence in the courts".

Ell v. Alberta, supra, paragraph 29, per Major J., ***AGC's Authorities, Tab 21***

Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, at paragraph 116, per Binnie J., dissenting, ***AGC's Authorities, Tab 24***

34. There are circumstances where the actions of individual judges may threaten public confidence in the integrity of the institution as a whole. As in *Moreau-Bérubé*, the harm caused to the integrity of the judicial function may not be curable by the appeal process alone:

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

Moreau-Bérubé, supra, at paragraph.59, see also paragraphs. 46, 58, ***AGC's Authorities, Tab 25***

35. The *CJC By-Laws and Policies* and the practices of the CJC consistently recognize the importance of safeguarding public confidence in the judicial system as a whole to our system of government.

> *Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore,*

> *strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.*
>
> *Canadian Judicial Council, Ethical Principles for Judges, (1998)* at 14, ***AGC's Authorities, Tab 14***

36. The object and purpose of judicial independence is not to protect judges as individual office holders but to ensure the impartiality of their decision-making thereby promoting the public interest and respect for the rule of law:

> *..[I]ndependence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves.*
>
> *This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged." (emphasis added)*
>
> *Gratton v. Canada (Judicial Council),* [1994] 2 F.C. 769 (F.C.T.D.), paragraph 17, per Strayer J., ***IC Authorities, Tab 5***

37. It is in the context of the inter-relationship or inter-dependency between judicial independence and public confidence in its impartiality that s. 63(1) finds its origins and its justification. Public confidence in an independent judiciary is not simply the responsibility of judges; rather it is a public interest of the highest order that the Attorney General has a duty to preserve. If the Attorney General could not request an inquiry, and the CJC were to decline to do so, then there would be no mechanism, short of a joint address, by which the Attorney General could ensure the public that its confidence in the judiciary was well placed. In the result, the sound public policy of ensuring public confidence through transparent assessment of judges by judges would be eroded.

Vriend v. Alberta (A.G.), [1998] 1 S.C.R. 493 at paragraphs 129-143, ***AGC's Authorities, Tab 34***

38. Inquiries do not threaten judicial independence or weaken public confidence in judges and the judiciary as an institution. Rather, a public inquiry of judges by judges reinforces judicial independence. It is only through an open transparent process that public confidence in the integrity of the judiciary may be maintained. A private confidential process does nothing to reassure the public that justice has been served.

39. It is only by a fair and public hearing that public confidence in a particular judge and hence the administration of justice generally may be restored. In notorious cases, if a complaint is dealt with through a private review, it is unlikely that the public would again have confidence in a judge whose conduct has been the subject of extensive public debate. In this way transparency assists the particular judge especially if a complaint is categorically dismissed. More importantly though, the use of *in camera* proceedings in high profile cases, may damage both the public's confidence in the Council's review process and in the integrity of the judiciary as a whole.

The Attorney General exercises the discretion in the public interest

40. Section 63(1) and the discretion it confers upon Attorneys General cannot be viewed divorced from the broader constitutional structure of the Westminster system of government. The Attorneys General have an important role to play within our constitutional framework which includes the responsibility to maintain public confidence in the integrity of the judiciary.

41. The Attorney General has historically, and by statute, been recognized as the guardian and protector of the public interest. The Minister of Justice and the Attorney General of Canada is by virtue of s. 4 and 5(a) of the *Department of Justice Act*, charged with over-arching duties and responsibilities.

> *"4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall*

...

> *(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;*
>
> *5. The Attorney General of Canada*
>
> *(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage..."*
>
> *Department of Justice Act,* R.S.C. 1985, c.J-2, as am., ss.4, 5, ***AGC's Authorities, Tab 8***
>
> *See also: Ministry of the Attorney General Act,* R.S.O. 1990, c.M.17, as am, s.5, ***AGC's Authorities, Tab 9***

42. The antecedence and uniqueness of the Attorney Generals' duties and special role in Cabinet was recognized by Chief Justice McRuer:

> *[...] [T]he Attorney General must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen's Attorney, he occupies an office of judicial attributes and in that office is responsible to the Government. He must decide when to prosecute, and when to discontinue a prosecution. In making such decisions, he is not under the jurisdiction of the Cabinet, nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney and not as a member of the Government of the day.*
>
> *Report of the Royal Commission of Inquiry in Civil Rights 1968, (the "McRuer Report").* ***AGC's Authorities, Tab 43***

43. As Chief Law Officer of the Crown, the Attorney General's responsibilities include law making and both civil and criminal enforcement. Attorneys General are also charged with defending the judiciary, often responding to political or media criticism of unpopular decisions, and have the power to bring actions for contempt where appropriate.

> Huscroft, Grant, *The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?* (1995) 5 N.J.C.L. 126 at 130, ***AGC's Authorities, Tab 41***

Edwards, John, *The Attorney General, Politics and the Public Interest, (London: Sweet and Maxwell, 1984) at 360,* ***AGC's Authorities, Tab 38***

Edwards, J.Ll.J., *The Attorney General and the Charter of Rights,* in Sharpe, Robert J. *Charter Litigation,* (Toronto: Butterworths, 1987), pp. 45-51, ***AGC's Authorities, Tab 40***

44. In addition to his prosecutorial functions, the Attorney General may take over or stay private prosecutions where it is in the public interest to do so. While normally defending the constitutionality of legislation, he may also concede a violation. In light of these roles, by convention, the Attorney General is independent of both Cabinet and the legislature when he exercises his powers in the public interest.

R. v. Campbell, [1999] 1 S.C.R. 565, ***AGC's Authorities, Tab 26***

Huscroft, Grant, *supra,* at 128-129, ***AGC's Authorities, Tab 41***

Edwards, John, *The Law Officers of the Crown,* (London: Sweet and Maxwell, 1964) at 215 , ***AGC's Authorities, Tab 39***

45. In exercising the referral power, the Attorney General does not act as a member of Cabinet, but is instead acting in his role as guardian of the public interest. It is in recognition of the responsibility of the Attorney General to sustain an independent judiciary. The request for an inquiry does not interfere with the judicial function as it merely triggers an inquiry process that might otherwise be engaged by private citizens' complaints.

Gouriet v. *Union of Post Office Workers,* [1977] 3 All ER 70 (H.L.) at 119, ***AGC's Authorities, Tab 22***

46. The decision by an Attorney General to request an inquiry is not entered into lightly. The Attorney General is accountable to Parliament or the Legislature. The suggestion that the exercise of discretion under s.63(1) could be used for political or improper purpose is inimical to the office of Attorney General. As Ian Scott reflected, "the Attorney General's assessment of a public interest must absolutely exclude any consideration of the political implications of a particular decision".

Scott, Ian, *The Role of the Attorney General and the Charter,* (1986-1987) 29 Crim. L.Q. 187 at 190, ***AGC's Authorities, Tab 44***

Speech by the Hon. R. Basford, Minister of Justice, Hansard, House of Commons Debates, 17 August, 1978, at 18437-38, ***AGC's Authorities, Tab 5***

47. The nature and scope of the inquiry to be held is not mandated by statute. In the *Boilard* case, the Council adopted the submissions of Independent Counsel that the Inquiry Committee ought to have refused to consider whether the judge should be removed for any of the reasons set out in section 65 of the *Act*. The complaint related solely to the exercise of Justice Boilard's judicial function and the complaint by the Attorney General contained no allegation of bad faith or abuse of office. The Council explained their preferred approach to such cases in the following terms

> *Where the Minister of Justice or an Attorney General of a province questions a judicial decision and requests an inquiry under s.63(1) of the Act, but makes no allegation of bad faith or abuse of office and where, on its face the judicial decision itself discloses no indication of bad faith or abuse of office, then, the Council would be justified in considering, or an Inquiry Committee appointed under s.63 should consider, as a preliminary matter, whether there is anything to rebut the presumptions of good faith and due consideration of the issues. Although the circumstances may vary from case to case, if there is nothing of that nature, the Council or an Inquiry Committee should, as a general rule, decline to deal with the matter further on the basis that the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry.*

Report of the Canadian Judicial Council to the Minister of Justice of Canada concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec, December 19, 2003, ***IC Authorities, Tab 3***

48. When viewed through the broader lens of the Constitution as a whole, the failings in the argument become readily apparent. The Attorney General has an unquestioned right to refer the question of removal to Parliament. It remains unclear why the exercise of a discretion to refer the same question to the CJC is, or even could be unconstitutional.

Conclusion

49. In sum, the inquiry process is an effective mechanism to determine judicial capacity prior to a joint resolution of Parliament. The presumption, although not a constitutional requirement, that the Minister of Justice will only proceed to Parliament armed with a report of the Council, together with the safeguards inherent to the CJC process, further protects judicial independence.

R. v. Valente, supra, at para. 30, ***IC Authorities, Tab 20***

50. Section 63(1) provides a balance between the discharge of the responsibilities of Attorneys General to maintain public confidence in the administration of justice and the independence of the judiciary. Where the subject matter of a complaint is already notorious, public confidence in individual judges and in the institution as a whole may demand that the complaint be conducted and be seen to be conducted through a fair and open process, thus ensuring that the purposes and objects of judicial independence are upheld.

No chilling effect

51. Public criticism of judicial decisions and judicial conduct occurs to varying degrees on a daily basis in Canada. Unlike other public figures however, judges are not expected to explain or justify their decisions, beyond their reasons for judgment. Judges more than others, are under a duty not to permit their decision-making to be subject to pressure or influence exerted through the media. Such scrutiny underlies the constitutional imperative of independence.

52. The argument advanced in support of the constitutional challenge is that the publicity surrounding the request for an inquiry causes a 'chilling effect' on Justice

Cosgrove individually and the judiciary as a whole. For several reasons, this argument fails, whether by reason of law, policy or the evidence before this Committee.

53. This argument discounts the extent of protection that the Constitution provides. Second, it presumes a lack of resiliency in the judiciary, and a lack of commitment to their oath of office and so does a disservice to the judiciary as a whole. Third, the affidavit evidence in support of the chilling effect is not persuasive. As a federally appointed judge since 1984, Justice Cosgrove is familiar with the laws of Canada, and so would have been aware of the ability of an Attorney General to request an inquiry under the *Judges Act* at the time of the pre-trial applications and stay motions brought before him in the *Elliott* matter and in other cases in which he ruled against the Crown.

> *Carey v. A.G. Ontario,* [1986] 2 S.C.R. 637, at paragraph 48, ***AGC's Authorities, Tab 18***

54. In any event, it is not the power to request an inquiry under s.63(1) of the *Judges Act* which causes the alleged chilling effect, but rather the public nature of the inquiry and the attendant publicity. It is the Attorney General's submission that even if the public nature of the inquiry eroded a judge's capacity to sit, damage to an individual judge is outweighed by the broader objectives of the inquiry process. Moreover, the remedy proposed to prevent this "chilling effect" is to require that complaints made by an Attorney General be subject to the same "confidential" screening process as other complaints. This process neither ensures confidentiality, nor does it have any qualitative advantages over the inquiry process.

> ***Factum of Justice Cosgrove,*** at paragraphs 80- 97

55. Implicit in this argument is that the identity of the complainant and the judge is confidential during the CJC complaints process. There is nothing to prevent either a private complainant or an Attorney General from discussing or publicizing a complaint made through either process in the media. The presumption in the argument of confidentiality under the CJC complaints process is unwarranted.

56. Indeed, the redesign of the scheme enacted by Parliament proposed by Justice Cosgrove is in direct opposition to the clear statements by the Supreme Court as to the relationship between open courts to public confidence in the judiciary. In *Vancouver Sun,* the Supreme Court reviewed the importance of the open court principle, noting that it is a "hallmark of a democratic society and applies to all judicial proceedings":

> *Public access to courts guarantees the integrity of judicial processes by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law. Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, at para.22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principle component of the legitimacy of the judicial process and why the parties and the public abide by the decisions of the courts.*
>
> *... "[t]he press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: Edmonton Journal, supra, at pp. 1339-40. Consequently the open court principle, to put it mildly, is not to be lightly interfered with.*

Vancouver Sun v. *Canada (Attorney General),* 2004 SCC 43 at paragraphs 25, 26, ***AGC's Authorities, Tab 33***

Sierra Club of Canada v. *Canada (Minister of Finance),* [2002] 2 S.C.R. 522 at paragraph 36, ***AGC's Authorities, Tab 30***

57. The Council's discretion to determine whether proceedings ought to be held in public or private reflects Parliament's choice to place decisions as to the process and procedure of investigations and inquiries in the hands of the judiciary. The very choice of judges as the investigative body suggests that such hearings should contain "as many of the guarantees and indicia the come from judicial involvement as is compatible with the task at hand." Justice Cosgrove could, if he wished, apply to the Inquiry Committee to hear the matter in private.

Vancouver Sun, supra, at paragraph 38, ***AGC's Authorities, Tab 33***

58. As well, where a Committee struck under the *CJC complaints process* determines that a complaint made by an Attorney General warrants an inquiry, under section 63(5), the CJC will make a determination whether the inquiry ought to be held in public and may issue a news release indicating that an inquiry hearing will be conducted. In this scenario, the damage to the public confidence in a particular judge where the Attorney General has asked for an Inquiry, as opposed to where a panel of judges has determined an Inquiry is warranted, if any, is equivalent.

59. The practice of the CJC has been to issue a press release announcing the Panel's disposition of a complaint where the matter has already come to the public's attention. This is consistent with the acknowledgement made by Friedland, who while advocating confidentiality, recognizes that "there are of course cases where the issue is already public and it is in the judge's interest to make the result known".

> *Friedland Report*, at 134, ***IC Authorities, Tab 25***
>
> E. Ratushny, *Speaking as Judges*, (1999-2000) 11 N.J.C.L. 293 at 364, ***AGC's Authorities, Tab 421***

The motion is misconceived

60. The constitutional challenge to the legislation in this case is based on the flawed assumption that the Attorney General of Ontario has the ability to require that an inquiry be held in public. However a careful examination of the *Judges Act* indicates that the power to hold an inquiry in public or private does not derive from section 63(1), rather is vested in the Attorney General of Canada. As noted, the CJC has, under its constituent legislation, the authority to craft process and procedure appropriate to the circumstances before it.[2]

61. The Attorney General of Ontario has no authority to direct that the inquiry be public. The Minister of Justice and Attorney General of Canada did not request that the Inquiry be conducted in public pursuant to his power to do so under section 63(6) of the

Judges Act. CJC practice and bylaws provide that inquiries shall be public unless it is in the public interest or necessary for the "administration of justice that all or any part of it be conducted in private".

> *Judges Act,* R.S.C. 1985, c.J-1, as amended, section 63(6), ***IC Authorities, Tab 41***
>
> *CJC 2003 By-Laws,* ***AGC's Authorities, Tab 6***

62. The decisions to announce the inquiry and to hold the inquiry in public were the result of the legitimate and lawful exercise of the discretion by the CJC.

63. In *Charter* cases, it has been determined that there must be a causal connection between the impugned legislation or state action and the violation of a particular right. As occurred in *Blencoe*, the alleged interference in this case is not clearly linked to the request for inquiry itself. Nor can it reasonably be said that it resulted from the publicity surrounding the Attorney General's request, as it is just as likely to have resulted from the media attention surrounding the statements made by the Court of Appeal in December 2003. In short, the harm to public confidence in the impartiality of Justice Cosgrove if any, was done before the announcement was made and is not causally linked to the exercise of the power under s.63(1) or the announcement of the inquiry. Indeed, this is confirmed by Justice Chadwick's own affidavit.

> *Blencoe v. British Columbia (Human Rights Commission*), [2000] 2 S.C.R. 307, ***AGC's Authorities, Tab 17***

B. NO INDEPENDENT FREEDOM OF EXPRESSION

64. The power to request an inquiry under section 63(1) does not violate Justice Cosgrove's individual right to expression because:

- Judicial conduct or speech is not expression under section 2(b) of the *Charter*;

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[2] *Judges Act*, s.61(3)(c) The Council may enact bylaws respecting the conduct of inquiries and investigations described in section 63.

- the request for an inquiry does not limit expression;
- the public's right to an open process outweighs any deleterious effects to judicial independence, hence s. 2(b) is not infringed and
- In the alternative, if section 2(b) is infringed, the infringement is a justifiable limit in a free and democratic society within section 1 of the *Charter*.

Judicial conduct or speech is not expression under section 2(b) of the Charter

65. Judicial expression, which takes the form of written or oral findings, rulings and decisions, is expression which enjoys the highest constitutional protection. It is not, however, protected expression within the meaning of section 2(b) of the *Charter*. The fundamental values which underlie judicial independence and freedom of expression are singular and unique. To overlay the two principles results in inherent contradiction and confusion which undermines their respective content.

> *Moreau-Bérubé, supra,* paragraph 59, ***AGC's Authorities, Tab 25***

66. The protections which attach to judicial expression are entirely encompassed by the constitutional guarantees of judicial independence. 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. Indeed, the Supreme Court has held that the *Charter* applies to constrain both branches.

> *B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214, ***AGC's Authorities, Tab 15***

> Speech of The Honourable Brian Dickson, Chief Justice of Canada, August 21, 1985, *The Rule of Law, Judicial Independence and the Separation of Powers,* ***AGC's Authorities, Tab 37***

67. The judiciary's role as 'foremost defenders of individual freedoms and human rights and guardians of the values" of the constitution is fundamental to the functioning of our constitutional system. Any consequence or restraint on judicial expression should be assessed solely in the context of the independence that guarantees freedom of judicial decision making.

> *The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them...*

Therrien (Re), [2001] 2 S.C.R. 3, at paragraphs 108-111, ***AGC's Authorities, Tab 32***

68. Any attempt to define the scope of judicial expression through the prism of individual rights is counter-intuitive to the very premise on which independence is based. For example, where judges have spoken out publicly on political issues, the CJC has determined this to be inconsistent with judicial independence and to violate the separation of powers. By contrast s. 2(b) serves to ensure freedom of political expression by individuals 'which is essential to the working of a parliamentary democracy.' Save for the 'pursuit of truth', the objectives of s. 2(b) are not the same as those encompassed by judicial independence. The two values stand separate and apart.

Ruffo v. Quebec, [1995] 4 S.C.R. 267, ***IC Authorities, Tab 18***

Therrien (Re), [2001] 2 S.C.R. 3, at para. 111, ***AGC's Authorities, Tab 32***

Switzman v. Elbling, [1957] S.C.R. 285 at 369 per Abbott J., ***AGC's Authorities, Tab 31***

See for example: *Council Report and Inquiry Committee Reports into the conduct of Justice Berger (1982),* ***AGC's Authorities, Tab 16***

69. The dichotomy between both the objectives and substantive content of judicial independence and freedom of expression is best reflected in an examination of judicial expression which raised questions as to judicial conduct or impartiality. *Berger, Ruffo,*

Moreau-Bérubé and *Bienvenue,* are all examples of questionable judicial speech which would be unquestionably protected expression under s. 2(b) but for the nature of the office held by the individuals.

70. Justice William Esson, in a diagnostic of the limits of judicial expression, concludes that while the contours of permitted discourse are undefined, it is nonetheless clear that there are necessarily narrow constraints on judicial expression.

> The Honourable Justice William A. Esson, *The Judiciary and Freedom of Expression,* (1985) 23 U.W.Ont.L.Rev. 159 at 162, ***IC Authorities, Tab 24***

71. Stripped to its essence, the argument advanced on behalf of Justice Cosgrove, under the rubric of "freedom of expression" is that a judge has a continued right to work and express himself as a judge. Freedom of expression, even if it applied to a judge, *qua* judge, does not confer a right to work nor is it without limitation or boundaries.

72. As noted earlier, the investigation and inquiry process put in place by the *Judges Act* carefully limits the nature and scope of the interference with judicial expression. The constitutional protection of judicial expression which is inherent to judicial independence is granted not to secure the individual judge's right to political expression or personal fulfillment, or the preservation of his or her reputation, but aims at building a judicial system that is impartial and independent and worthy of public confidence and respect. The appropriate limits to judicial expression are best determined within the context of the purpose of the guarantee: to preserve and protect judicial independence.

In any event, an Inquiry is not a "limit" on expression

73. The request for an inquiry by an Attorney General under s. 63(1) is neither a sanction nor a threat of sanction: it does nothing more than trigger the CJC review process. As the provincial Attorneys General cannot require it be held in public, it seems unlikely that the ability of a part, whether an Attorney General or an individual citizen, to trigger a CJC inquiry will directly or indirectly have the effect of limiting judicial speech.

74. Even if one accepts the presumption, reflected in section 6(1) of the CJC regulations, that the request *effectively* triggers a 'public' inquiry, it is still the case that the request alone does not limit expression. Short of removal by Parliament, a judge's security of tenure is protected and his expression *qua* judge, is not subject to censure. In most cases that proceed to inquiry, the judge will continue to sit and hear cases until the inquiry and Council report are completed. This decision is generally that of the Chief Justice of the court on which the particular judge sits, as part of her responsibilities for the assignment of court dockets, and not that of an Attorney General.

75. Only actual removal would infringe the right. In *Ruffo c. Gobeil*, a provincial court judge challenged the Chief Justice's direction that she refrain from public commentary concerning the mandate of the juvenile division of the court and related issues. She argued that such directives violated her rights under section 2(b) of the *Charter*.

> *Ruffo c. Gobeil,* 1989 CarswellQue 1392, paragraphs 23-25, ***AGC's Authorities, Tab 29***

76. The court dismissed this claim on the basis that the directive, which was not made pursuant to the provincial judicial discipline legislation then in place, was not legally binding on the judge, and therefore did not constitute a violation. Similarly, here, Justice Cosgrove has voluntarily removed himself from active duties at the request of his Chief Justice. Unless and until there is a Parliamentary address to remove him as a judge, no actor within our constitutional structure, be it the Attorney General, the executive or other members of the judiciary, can legally place restrictions on his expressive rights as a judge.

77. In sum, the assertion that there is a chilling effect on Justice Cosgrove and other judges who hear cases in which the Attorney General participates does not meet the objective standard required to establish a limit on expression. The evidence filed as to the alleged chilling effect does a disservice to the integrity and resolve of Canada's judiciary. The decisions and conduct of judges are constantly subject to public scrutiny

through the media and other outlets. Superior court judges are expected to, and consistently perform their judicial functions without concern for public approval, in accordance with their oath of office.

The balancing of rights in this case dictates the need for a public inquiry

78. If Justice Cosgrove or other members of the judiciary have s.2(b) rights, *qua* judges, the substantive content of that 2(b) right remains to be defined. Here, assuming a 2(b) right is available, its content is circumscribed by the public right to access and scrutiny of the investigation and inquiry process. The substantive content is defined both by the content of other *Charter* rights, and by the context. The public's interest in an open review process has also been recognized as deserving protection under section 2(b):

> *The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:*
>
>> *The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.*
>
> *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522, paragraph 36, ***AGC's Authorities, Tab 30***

79. A determination by the CJC that it will not release information concerning an investigation or inquiry restricts the public's expressive freedom. The balancing of the alleged s. 2(b) right with those of the public must be undertaken within a framework which 'utilizes overarching *Charter* principles'. Those principles include the

requirement that judicial independence and freedom of expression be assessed in light of their underlying purposes. Where two rights appear to conflict, the proper approach is to determine how best to define each right and not to ask how they may be justifiably limited.

> *Sierra Club, supra,* at paragraph 38, ***AGC's Authorities, Tab 30***
>
> *R. v. Mills,* [1999] 3 S.C.R. 668 at paragraph 68, per McLachlin and Iacobucci JJ., ***AGC's Authorities, Tab 27***
>
> *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 S.C.R. 835 at 877, ***AGC's Authorities, Tab 19***

80. The Supreme Court has developed the balancing test in *Dagenais* 'to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the Oakes test.' This balancing can incorporate not only the rights protected under the *Charter* but can include other values and interests.

> *Vancouver Sun v. Canada (Attorney General),* 2004 SCC 43 at paragraphs 28, 31, ***AGC's Authorities, Tab 33***

81. By analogy to *Dagenais*, limits on the publication of information concerning investigations or inquiries ought to be imposed only where (i) it is necessary to prevent a real and substantial risk of harm to the independence and impartiality of the judiciary; and (ii) the salutary effects of the confidential nature of the investigation or inquiry outweigh the deleterious effects to the free expression of the public. The application of these two tests in this context weigh heavily in favour of a limitation on the freedom of expression when advanced by a judge in this context.

> *Sierra Club, supra,* paragraphs 37-40, ***AGC's Authorities, Tab 30***
>
> *Dagenais v. Canadian Broadcasting Corp., supra,* at 839, ***AGC's Authorities, Tab 19***
>
> *Vancouver Sun, supra,* at paragraph 29, ***AGC's Authorities, Tab 33***

i) ***Confidential proceedings pose a threat to judicial independence***

82. It is a core precept of an independent judiciary that there will be no interference with judicial discretion and decision-making. The need for public confidence in the institution as a whole, however, necessarily mandates accountability and restorative mechanisms.

> *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.*
>
> *Moreau-Bérubé, supra,* at paragraph 59, ***AGC's Authorities, Tab 25***

83. As submitted above, the independence of the judiciary as an institution is threatened where the public has lost confidence in the impartiality of a particular judge, or if where the review process to determine whether the judge is impartial and independent is not a transparent one. As recognized by the Committee in the Marshall Inquiry:

> *...we are deeply conscious that criticism can itself undermine public confidence in the judiciary, but on balance conclude in this case that that confidence would more severely be impaired by our failure to criticize inappropriate conduct than it would by our failure to acknowledge it.*
>
> *Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council (PDF, 2162 Kb)* ("Marshall Inquiry Report") at 36, ***AGC's Authorities, Tab 28***

84. Jeremy Bentham recognized the importance of the common law's commitment to openness of court proceedings, "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Publicity is the very soul

of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.

> Jeremy Bentham, *Rationale of Judicial Evidence vol.1* (London: Hunt and Clarke, 1827) at 524, ***AGC's Authorities, Tab 35***
>
> *The Works of Jeremy Bentham,* Published under the Superintendence of his Executor, John Bowring, vol. 9 (NY: Russell & Russell, 1962) at 493, ***AGC's Authorities, Tab 36***

ii) The salutary effects on the judiciary's individual right to expression do not outweigh the deleterious effects to judicial independence and the public's right to an open process

85. The effect of having a confidential inquiry process in notorious cases will normally leave the public disillusioned as to the integrity of the judiciary insofar as there is no resolution or response to concerns about a judge's conduct or competence.

86. As a consequence, litigants appearing before a judge whose conduct has been seriously questioned may not have confidence in his or her impartiality. Practically, this may result in more appeals, allegations of bias and recusal motions, thus disrupting the efficient functioning of the court. The harm to individuals may include liberty interests through unnecessarily prolonged detention, and cause personal and financial harm through delays and increased legal expenses.

87. Litigants and the general public who are aware of the circumstances of cases involving allegations of misconduct may lose confidence in the impartiality of other judges and the effectiveness of the judicial system if the concerns regarding those judges are not adequately addressed in a public forum. The damage to public confidence in the impartiality of the judiciary as a whole is difficult to assess but may result in diminished

trust in judicial decision-making, less respect for court orders and judgments and the law generally.

88. The presumption that a confidential process will protect a judge's reputation in a case which has not been subject to media attention may in the normal course outweigh the deleterious effects on the public's right to an open hearing and may further the independence of the judiciary as a whole.

89. In notorious cases however, where damage to a judge's reputation as a result of media attention may have already occurred, the salutary effects of a confidential process are limited, and outweighed by the public's need to see that judges are impartial, independent and accountable to other judges.

90. In conclusion, the protection of an individual judge's ability to speak freely cannot take precedence over the protection of the independence of the judiciary as an institution. By providing a flexible and open process which accords procedural fairness, the ability of the CJC to determine whether an inquiry ought to be held in public, best advances the rights of both judges and the public.

Any restraint on expression is necessary to protect the independence and impartiality of the judiciary and is justified by section 1 of the Charter

91. The purpose of the impugned provision and the legislation as a whole is pressing and substantial. In particular, the investigation and inquiry process under s.63 of the *Judges Act* serves to maintain respect for and adherence to the rule of law. Our constitutional structure demands that there be a mechanism for the Attorney General to trigger the Council's inquiry function, in pursuit of the administration of justice. The CJC complaints process is insufficient.

92. The power to refer a matter to inquiry is rationally connected to the Attorney General's responsibility to act in the public interest. When such a request is made, he or

she is acting independently of the executive and legislature to ensure public confidence in the integrity of the judicial branch is maintained.

93. It is only through the inquiry process that a report of the full Council is provided to the Minister of Justice. This Report provides the minister with a clear record of the CJC's conclusions. If this method of obtaining a report were eliminated or restricted, public confidence in the Minister's ability to ensure judicial accountability and to regulate the administration of justice would be impaired.

94. The means chosen to achieve judicial accountability under the impugned provision of the *Judges Act* are proportional to the potential negative effect on an individual judge, who is subject to an investigation or inquiry.

C. THE INQUIRY COMMITTEE LACKS JURISDICTION TO GRANT A FORMAL DECLARATION OF INVALIDITY

95. The Attorney General accepts that this Committee may determine the constitutionality of legislation in relation to a specific factual foundation that is before it. However, should this Committee find that judicial independence is violated or that Justice Cosgrove's individual right to expression under section 2(b) of the *Charter* is breached by the operation of the legislation, the Attorney General states that the Committee cannot grant a general declaration of invalidity.

[7] Martin Friedland, "A Place Apart: Judicial Independence and Accountability in Canada" (Ottawa: Canadian Judicial Council, 1995) at 97 refers to 1978 inquiry requested by the Minister of Justice. However, it is not clear whether it was a formal request under ss. 63(1) or a request to consider the matter under ss.63(2) of the *Judges Act*. In this case, a judge was heard arranging an appointment with a prostitute and then seen entering her apartment. The judge resigned within a month of receiving the Minister of Justice's letter.

96. An administrative tribunal may determine constitutional issues where it is explicitly or implicitly empowered by its enabling statute to determine questions of law. The power to make a formal declaration however, does not extend to inferior courts or administrative tribunals.

> *Nova Scotia (Workers' Compensation Board) v. Martin,* [2003] 2 S.C.R. 504, at paragraph 31, ***IC Authorities, Tab 12***
>
> *Douglas/Kwantlen Faculty Association v. Douglas College,* [1990] 3 S.C.R. 579, at 594, 599-600, ***AGC's Authorities, Tab 20***

97. An Inquiry Committee struck under section 63(3) is not a superior court pursuant to section 96 of the *Constitution Act, 1867.* Although section 63(4) of the *Judges Act* grants it certain powers as a superior court: those powers do not confer on it the status of a superior court for purposes of section 52(1).

98. In *Gratton*, the Inquiry Committee considered the jurisdiction of the Committee and made the following findings:

> *We do not agree that section 63(4) of the Judges Act has the effect of making this Inquiry Committee a superior court. While it may be "deemed" to be a superior court for any or for all three of the purposes suggested, an inquiry committee does not have the essential characteristics of a superior court. Parliament did not say that an inquiry committee is a court. The langue of "deeming" suggest that Parliament is using a legal "fiction" in order to provide the committee with certain powers or characteristics. But this does not transform an inquiry committee into a court.*
>
> *... An inquiry committee does not adjudicate disputes between parties. It does not render a legally enforceable decision. It merely carries out an investigation. Nor does it have the jurisdiction of a superior court. An inquiry committee is authorized to deal with only the specific matter which is referred to it. In all of these circumstances, this Inquiry Committee is not a superior court and this second ground of constitutional challenge must fail.*
>
> *Gratton Inquiry Decision, supra,* ***IC Authorities, Tab 5***
>
> See also: *Decision of the Inquiry Committee established by the Canadian Judicial Council to conduct a public inquiry into Justice Robert Flahiff, April 9, 1999,* (preliminary motions), pp.4-5, ***IC Authorities, Tab 4***

99. Since the introduction of the *Charter*, no Inquiry Committee established under section 63(3) has granted a formal declaration of invalidity.

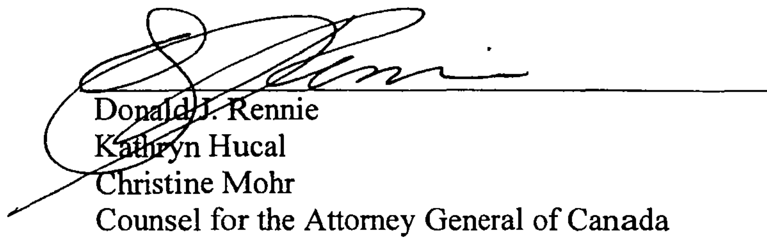
100. In the present case, should a violation of the legislation be established, the proper relief is to decline jurisdiction and direct the CJC to process the complaint filed by the Attorney General of Ontario by way of the public complaints process.

101. In the event this Committee finds that the CJC's exercise of discretion in announcing an inquiry and that it be held in public was in error, the only remedy available is to make an order that the inquiry be conducted in private.

IV. ORDER SOUGHT

102. The Attorney General asks that the motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, at Ottawa this 29th day of November, 2004.



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APPENDIX A

Inquiries requested pursuant to ss. 63(1) of the Judges Act

Since the establishment of the Canadian Judicial Council and the enactment of ss.63(1) of the Judges Act, a total of 7 inquiries have been directed by the federal Minister of Justice or provincial Attorney's General. The details of these inquiries are set out in the table below.

DATE	REQUESTED BY	NATURE OF CASE	HEARING	OUTCOME
1977[7]	Minister of Justice	According to an obtained police report, a superior court judge had admitted using the services of a company which provided private, strip-tease performances.	Private	Removal from office not recommended.
1983[8]	Minister of Justice	A superior court judge's behaviour on the bench was arbitrary and autocratic and had shown questionable judgement in statements to police on being given a speeding ticket and in subsequent hearings.	Private	Judge resigned before the Inquiry Committee commenced its work.
1990[9] Marshall Affair	AG of Nova Scotia	The conduct of the five judges who had heard	Private	Two of the five judges resigned before the Inquiry

[8] *Ibid.*

[9] *Ibid.* at 102-104.

DATE	REQUESTED BY	NATURE OF CASE	HEARING	OUTCOME
		the Donald Marshall Jr. wrongful conviction reference into was at issue.		commenced. The unanimous recommendation was that the remaining judges not be removed from the bench.
1995[10]	Minister of Justice and AG of Québec	During a trial of a woman who allegedly murdered her husband, Justice Bienvenue of the Québec Superior Court made a number of comments which offended Jews and women.	Public	Council recommended that the judge be removed from office. He resigned before any address to Parliament.
January 1999[11]	Minister of Justice	Justice Robert Flahiff of the Québec S.C. had been convicted by a provincial court of criminal charges of money laundering prior to his appointment to the bench.	N/A	At the commencement of the Inquiry Committee hearing, counsel for the judge announced that Justice Flahiff had submitted his letter of resignation.
February 2002[12]	Attorney General of Québec	Comments attributed to Justice Bernard Flynn of the Québec S.C. in	Public	Council did not recommend removal

[10] *Canadian Judicial Council-Annual Report 1995-96* (Ottawa: Canadian Judicial Council, 1996) at 30, **online: Canada Judicial Council http://www.cjc-ccm.gc.ca (date accessed: November 5, 2004).**
[11] *Canadian Judicial Council-Annual Report 1998-1999* (Ottawa: Canadian Judicial Council, 1999) at 21,22.
[12] *Canadian Judicial Council-Annual Report 2002-03* (Ottawa: Canadian Judicial Council, 2003) at 24, **online: Canada Judicial Council http://www.cjc-ccm.gc.ca (date accessed: November 5, 2004).**

DATE	REQUESTED BY	NATURE OF CASE	HEARING	OUTCOME
		the newspaper, Le Devoir in Feb'02 were at issue. The judge was quoted defending the sale of municipal assets of L'île Dorval to local residents (of which one included his wife)		
October 2002[13]	Attorney General of Québec	At issue was whether Justice Jean-Guy Boilard's decision to recuse himself from the mega-trial he was conducting in July 2002 constituted misconduct	Public	Council did not recommend removal.

[13] *Ibid.* at 24, 25.

STATUTES

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s.96-101, R.S.C. 1985, App. II, No. 5	*Loi Constitutionnelle de 1867* (R.-U.), 30 & 31 Vict., c. 3, s.96-101, S.R.C. 1985, App. II, No. 5
Appointment of Judges	Nomination des juges
96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.	96. Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.
Selection of Judges in Ontario, etc.	Choix des juges dans Ontario, etc.
97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.	97. Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.
Selection of Judges in Quebec	Choix des juges dans Québec
98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.	98. Les juges des cours de Québec seront choisis parmi les membres du barreau de cette province.
Tenure of office of Judges	Durée des fonctions des juges
99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.	99. (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.
Termination at age 75	Cessation des fonctions à l'âge de 75 ans
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-	(2) Un juge d'une cour supérieure,

five years, or upon the coming into force of this section if at that time he has already attained that age. Salaries, etc., of Judges 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. General Court of Appeal, etc. 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge. Salaires, etc. des juges 100. Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada. Cour générale d'appel, etc. 101. Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.
***Canadian Charter of Rights and Freedoms,* ss 2(b), 11(d), Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11** 2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; 11. Any person charged with an offence	***Charte Canadienne des Droits et Libertés,* ss. 2(b), 11(d), Partie 1, Loi de 1982 sur le Canada, Annexe A c. 11, (R.-U)** 2. Chacun a les libertés fondamentales suivantes : b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; 11. Tout inculpé a le droit : d) d'être présumé innocent tant qu'il n'est

has the right (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal	pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
***Judges Act*, R.S.C. 1985, c.J-1, as amended, ss. 61(1)-(3), 63(1), (2), (5), (6).** Meetings of Council 61. (1) The Council shall meet at least once a year. 61(2) Work of Council (2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct. 61(3) By-laws (3) The Council may make by-laws (a) respecting the calling of meetings of the Council; (b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and (c) respecting the conduct of inquiries and investigations described in section 63. R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15. **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	***Loi sur le Juges*, Chapitre J-1, ss. 61(1)-(3), 63(1), (2), (5), (6).** Réunions du Conseil 61. (1) Le Conseil se réunit au moins une fois par an. 61(2) Travaux (2) Sous réserve des autres dispositions de la présente loi, le Conseil détermine la conduite de ses travaux. 61(3) Règlements administratifs (3) Le Conseil peut, par règlement administratif, régir : a) la convocation de ses réunions; b) le déroulement de ses réunions, la fixation du quorum, la constitution de comités, ainsi que la délégation de pouvoirs à ceux-ci; c) la procédure relative aux enquêtes visées à l'article 63. S.R., ch. J-1, art. 30; S.R., ch. 16(2e suppl.), art. 10; 1976-77, ch. 25, art. 15. **Enquêtes obligatoires** 63. (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux

(d). 63(2) Investigations (2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court. 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. 63(6) 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.	alinéas 65(2)a) à d). 63(2) Enquêtes facultatives (2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure. Protection des renseignements (5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci. 63(6) Publicité de l'enquête (6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à huis clos. L.R. (1985), ch. J-1, art. 63; 1992, ch. 51, art. 27; 2002, ch. 8, art. 106.
Canadian Judicial Council Inquiries and Investigation By-laws, SOR/2002-371, s. 6(1) **INQUIRY COMMITTEE PROCEEDINGS** 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.	***Reglement Administratif du conseil Canadien de la Magistrature sur les Enquetês, DORS/2002-371, s.6(1)*** **DÉROULEMENT DE L'ENQUÊTE** 6. (1) Le comité d'enquête tient l'audience en public, sauf si, sous réserve du paragraphe 63(6) de la Loi, il conclut que l'intérêt public et la bonne administration de la justice exigent le huis clos total ou partiel.

Department of Justice Act, R.S.C, c. J-2, as amended, s. 4 & 5.	*Loi sur le Ministère de la Justice, S.R.C., c.J-2, par am., s.4 & 5*
POWERS, DUTIES AND FUNCTIONS OF THE MINISTER	**POUVOIRS ET FONCTIONS DU MINISTRE**
4 Powers, duties and functions of Minister	4 Attributions
4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall	4. Le ministre est le conseiller juridique officiel du gouverneur général et le jurisconsulte du Conseil privé de Sa Majesté pour le Canada; en outre, il :
(a) see that the administration of public affairs is in accordance with law;	a) veille au respect de la loi dans l'administration des affaires publiques;
(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;	b) exerce son autorité sur tout ce qui touche à l'administration de la justice au Canada et ne relève pas de la compétence des gouvernements provinciaux;
(c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and	c) donne son avis sur les mesures législatives et les délibérations de chacune des législatures provinciales et, d'une manière générale, conseille la Couronne sur toutes les questions de droit qu'elle lui soumet;
(d) carry out such other duties as are assigned by the Governor in Council to the Minister.	d) remplit les autres fonctions que le gouverneur en conseil peut lui assigner.
R.S., c. J-2, s. 4.	S.R., ch. J-2, art. 4.
4.1(1) Examination of Bills and regulations	4.1(1) Examen de projets de loi et de règlements
4.1 (1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the	4.1 (1) Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la Loi sur les textes réglementaires ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la Charte canadienne des

Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity. 4.1(2) Exception (2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the Statutory Instruments Act to ensure that it was not inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms. R.S., 1985, c. 31 (1st Supp.), s. 93; 1992, c. 1, s. 144(F). **POWERS, DUTIES AND FUNCTIONS OF THE MINISTER** 5 Minister's powers, duties and functions 5. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to (a) natural resources; (b) explosives; and (c) technical surveys relating to any matter other than a matter to which the powers, duties and functions of the Minister of the Environment and the Minister of Fisheries and Oceans extend by law.	droits et libertés, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible. 4.1(2) Exception (2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la Loi sur les textes réglementaires et destiné à vérifier sa compatibilité avec les fins et les dispositions de la Charte canadienne des droits et libertés. L.R. (1985), ch. 31 (1er suppl.), art. 93; 1992, ch. 1, art. 144(F). **POUVOIRS ET FONCTIONS DU MINISTRE** 5 Attributions du ministre 5. Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés : a) aux ressources naturelles; b) aux explosifs; c) aux levés, dans les domaines qui ne relèvent pas de droit du ministre de l'Environnement ou du ministre des Pêches et des Océans.
MINISTRY OF THE ATTORNEY GENERAL ACT, R.S.O. 1990, Chap. M.17, Amended 2000, c. 26, Sch. A, s. 11; in force December 6, 2000 Functions -- s. 5	

5. The Attorney General, (a) is the Law Officer of the Executive Council; (b) shall see that the administration of public affairs is in accordance with the law; (c) shall superintend all matters connected with the administration of justice in Ontario; (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the Constitution Act, 1867 came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature; (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government; (f) shall advise the Government upon all matters of a legislative nature and superintend all Government measures of a legislative nature; (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies; (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature;	

(i) shall superintend all matters connected with judicial offices; (j) shall perform such other functions as are assigned to him or her by the Legislature or by the Lieutenant Governor in Council. R.S.O. 1980, c. 271, s. 5.	

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5. Speech by the Hon. R. Basford, Minister of Justice, Hansard, House of Commons Debates, 17 August, 1978

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16. *Report of the Canadian Judicial Council to the Minister of Justice of Canada concerning* Mr. Justice Jean-Guy Boilard *of the Superior Court of Quebec, December 19, 2003*

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File No.: 13356

JUSTICE PAUL COSGROVE and CANADIAN JUDICIAL COUNCIL

Independent Counsel

and

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THE ATTORNEY GENERAL OF ONTARIO

THE CANADIAN SUPERIOR COURT JUDGES ASSOCIATION

THE CRIMINAL LAWYERS ASSOCIATION

Interveners

CANADIAN JUDICIAL COUNCIL
INQUIRY OF JUSTICE PAUL COSGROVE

Proceeding Commenced at Toronto

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