IN THE MATTER OF:

CANADIAN JUDICIAL COUNCIL
Inquiry of Justice Paul Cosgrove

FACTUM OF THE INTERVENER,

ATTORNEY GENERAL OF ONTARIO
(Regarding the constitutionality of s. 63(1) of the *Judges Act*)

November 29, 2004

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PART I – OVERVIEW

1. Mr. Justice Paul Cosgrove ["the moving party"] seeks a declaration that *Judges Act* R.S.C. 1985, c. J-1, s. 63(1) is unconstitutional and of no force and effect, and a declaration that the Inquiry Committee has no jurisdiction to proceed with the inquiry. The Attorney General of Ontario intervenes to support the constitutional validity of *Judges Act* s. 63(1).

2. *Judges Act* s. 63(1) gives the federal Minister of Justice and the Attorneys General of the provinces the ability to set into motion a process of inquiry designed to affirm public confidence in the administration of justice. It represents one of many statutory recognitions of the historic, constitutional role of the Attorney General as a guardian of the public interest and the supervisor of the administration of justice. It does not give an Attorney General the power to sanction or "temporarily sideline" a judge. Nor does it deprive a judge of the ability to resume active duties after an inquiry, or allow an Attorney General to be a "judge in his own cause." The only effect of *Judges Act* s. 63(1) is to allow an Attorney General to begin a judicial process of investigation "marked by an active search for the truth."

Judges Act **R.S.C. 1985, c. J-1, s. 63(1)**

Ruffo v. Conseil de la magistrature **[1995] 4 S.C.R. 267 at para. 72**

PART II – FACTS

I. Facts relating to this inquiry

3. In August 1995, Julia Yvonne Elliott was charged with second-degree murder and interfering with a dead body in connection with the killing and dismemberment of a resident of Kemptville, Ontario. Following a preliminary inquiry and orders to stand trial on both counts, pre-trial applications commenced before Mr. Justice Cosgrove in the Ontario Superior Court of Justice in Brockville, Ontario, in September 1997.

4. Over the next two years, Mr. Justice Cosgrove permitted defence counsel, in the context of various applications brought pursuant to the Canadian Charter of Rights and Freedoms ["Charter"], to advance serious allegations of deliberate wrongdoing against the many Crown counsel and police officers who took part in the investigation and prosecution of the case.

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

R. v. Elliot **[1999] O.J. No. 3265 (SCJ)**

6. Mr. Justice Cosgrove found that eleven Crown counsel and senior members of the Ministry of the Attorney General of Ontario and at least fifteen named police officers

from three different police forces, in addition to unnamed OPP and RCMP officers, federal Immigration officers, and officials from the Ministry of the Solicitor General of Ontario and the Centre for Forensic Sciences had committed over 150 violations of the accused's Charter rights. Many of the violations involved the alleged fabrication of evidence, perjury, deliberate destruction and non-disclosure of evidence, witness tampering, making false or misleading submissions to the court, and various other forms of wilful and grave misconduct.

R. v. Elliot **[1999] O.J. No. 3265 (SCJ)**

7. By Notice of Appeal dated September 7, 1999, the Crown appealed to the Court of Appeal for Ontario against the stay of proceedings and the order for costs. The appeal was argued during the week of September 15, 2003. On December 4, 2003, the Court of Appeal allowed the appeal, set aside the order of Mr. Justice Cosgrove staying the proceedings, set aside the costs order, and ordered a new trial.

R. v. Elliott **(2003), 181 C.C.C. (3d) 118 (Ont. C.A.)**

8. The Ontario Court of Appeal described Mr. Justice Cosgrove's rulings against the Crown and his findings of Charter breaches as "unwarranted" (para. 113), "unfounded" (para. 113), "ill advised" (para. 122), "unfair to the person whose conduct was impugned" (para. 123), "completely without foundation" (para. 125), "peculiar" (para. 133), "erroneous" (para. 136), "troubling" (para. 138), "factually incorrect" (para. 150), and "not borne out by the evidence" (para. 160). The Ontario Court of Appeal also found (at paras. 123-24) that Mr. Justice Cosgrove's findings of Charter breaches typically shared the following common elements:

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

R. v. Elliott **(2003), 181 C.C.C. (3d) 118 (Ont. C.A.)**

9. The Court of Appeal further held that Mr. Justice Cosgrove's use of the Charter to "remedy" frivolous and baseless claims brought the Charter and the administration of justice into disrepute. The Court of Appeal found it "troubling" that Mr. Justice Cosgrove built immaterial matter into Charter violations, and found without any reasonable basis that the court had been deliberately misled.

R. v. Elliott **(2003), 181 C.C.C. (3d) 118 (Ont. C.A.) at para. 129 and 141**

10. The Court of Appeal found that it did not need to decide whether Mr. Justice Cosgrove's failure to put to a halt the defence counsel's "deplorable" litigation strategy "stemmed from a misunderstanding of the basic principles that govern the Charter and its application or from his bias toward the Crown or both."

R. v. Elliott **(2003), 181 C.C.C. (3d) 118 (Ont. C.A.) at para. 180**

11. Although noting that "abuse of the contempt power was not a matter that gave rise to any erroneous findings of Charter violations", the Court of Appeal expressed its concern about the manner in which Mr. Justice Cosgrove used his contempt powers. The Court of Appeal found that "the trial judge may have misunderstood the purpose of the contempt power" and concluded that a "reasonable observer might be concerned that the trial judge appeared to be biased against the police and their counsel."

R. v. Elliott **(2003), 181 C.C.C. (3d) 118 (Ont. C.A.) at paras. 142-44**

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

Affidavit of The Honourable Paul J. Cosgrove sworn October 14, 2004 ["Cosgrove Affidavit"], Motion Record of the moving party dated October 18, 2004 ["Motion Record"], Tab 3, Exhibit 'A'

13. Following the expiry of the period within which the accused could have sought leave to appeal, the Attorney General of Ontario wrote a letter to the Chair of the Canadian Judicial Council ["CJC"], received on April 23, 2004, requesting that an inquiry be commenced, pursuant to *Judges Act* s. 63(1), to investigate the conduct of Mr. Justice Cosgrove in the matter of *Regina v. Julia Yvonne Elliott*.

Cosgrove Affidavit, Motion Record, Tab 3, Exhibit 'A'

14. On April 27, 2004, the CJC issued a press release announcing that it would conduct an inquiry into the conduct of Mr. Justice Cosgrove.

Cosgrove Affidavit, Motion Record, Tab 3, para. 17 and Exhibit 'C'

15. On or about April 29, 2004, Chief Justice Heather Smith of the Ontario Superior Court indicated to Mr. Justice Cosgrove that he should not sit on any cases until the inquiry was resolved.

Cosgrove Affidavit, Motion Record, Tab 3, para. 19

II. Facts relating to *Judges Act* s. 63(1)

16. Between 1990-1991 and 2003-2004, a total of 2205 complaints against federally appointed judges were filed with the CJC.

Canadian Judicial Council Annual Report, 2003-2004

Canadian Judicial Council Annual Report, 1993-1994

17. During the same period, 5 inquiries by Inquiry Committees of the CJC were commenced, pursuant to *Judges Act* s. 63(1), at the request of a federal Minister of Justice or provincial Attorney General.

Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990

Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996

Decision of Flahiff Inquiry Committee, April 1999

Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002

Report of the Boilard Inquiry Committee to the Canadian Judicial Council, August 2003

18. Mr. Justice Bienvenue resigned following the report of the CJC to the federal Minister of Justice recommending his removal. Mr. Justice Flahiff resigned after the Inquiry Committee dismissed his constitutional argument that the Committee was without jurisdiction. The judges under inquiry in the Nova Scotia Judges, Flynn and Boilard matters resumed active judicial duties after their respective Inquiry Committees released reports that did not recommend their removal.

19. The present inquiry marks the first time an Attorney General of Ontario has requested an inquiry pursuant to *Judges Act* s. 63(1).

PART III – ISSUES AND LAW

20. This factum addresses two issues:

1) The constitutional role of a provincial Attorney General; and
2) the purpose and function of the inquiry provisions of the *Judges Act* and their relation to the constitutional protection of judicial independence.

Issue One: Role of the Attorney General

I. Constitutional role of the Attorney General in the administration of justice

21. *Judges Act* s. 63(1) gives the Attorney General of a province the power to request a judicial inquiry into the conduct of a judge. This power is one of many statutory recognitions of the historic, constitutional role of the Attorney General as a guardian of the public interest and the supervisor of the administration of justice. The context in which *Judges Act* s. 63(1) operates cannot be understood adequately without an appreciation of the role of the Attorney General in the Canadian legal system.

22. The office of the Attorney General has deep roots in the history of the common law. The office has its beginnings in thirteenth-century England where its medieval precursors, the King's Attorney and the King's Sergeant, exercised powers derived from the royal prerogative and were charged with the responsibility of maintaining the Sovereign's interests before the royal courts. Over the centuries the office of the English

Attorney General has evolved in various ways, but the Attorney General has always been the chief law officer of the Crown, the titular head of the legal profession, and the official guardian of the public interest. In Canada, the office of the provincial Attorney General is one with constitutional dimensions recognized in *Constitution Act, 1867* ss. 63, 134 and 135.

> ***Constitution Act, 1867* ss. 63, 135 and 135**
>
> ***Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 at para. 26**
>
> ***Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 (H.L.)**
>
> **J.Ll.J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 3**
>
> **P.C. Stenning, *Appearing for the Crown* (Cowansville: Brown Legal Publications, 1986) at 14-16**

23. The many constitutional responsibilities of the office of the Attorney General are now commonly and consistently expressed, throughout the country, in various statutes. In Ontario, the principal statutory recognition of the responsibilities of the Attorney General is set out in *Ministry of the Attorney General Act* R.S.O. 1990, c. M.17, s. 5, which codifies the historical common law position of the Attorney General.

> ***Ministry of the Attorney General Act* R.S.O. 1990, c. M.17, 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.

Compare:

***Attorney General Act,* R.S.B.C. 1996, c. 22, s. 2**

***Government Organization Act,* S.A. 1994, c. G-8.5, sched. 9, s. 2**

***Department of Justice Act,* S.S. 1983, c. D-18.2, ss. 9-10**

***Department of Justice Act,* C.C.S.M., c. J-35, ss. 2-2.1**

***An Act Respecting The Ministère De La Justice,* R.S.Q., c. M-19, ss. 3-5**

***Public Service Act,* R.S.N.S. 1989, c. 376, s. 29**

24. In the exercise of his or her constitutional duties, the Attorney General is responsible to the Legislature. The Supreme Court of Canada, provincial appellate courts and academic commentators have all noted that, in the independent exercise of his or her quasi-judicial discretion, the Attorney General is not subject to judicial review but is publicly accountable to the Legislature.

***R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) at 12-16**

***Re Hoem et al. v. Law Society of British Columbia* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.) at 255-256**

D. Vanek, "Prosecutorial Discretion" (1987-88), 30 Crim. L.Q. 219

D.C. Morgan, "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 Crim. L.Q. 15 at 18-19:

> Along with the exalted status of his office come high expectations as to the Attorney-General's performance of his functions. A large measure of constitutional trust is reposed within him, and he bears a heavy obligation to conduct himself with dignity and fairness. In many situations, he is described as acting either judicially or quasi-judicially. When exercising his "grave" discretion in prosecutorial matters, he must take into account not only the position of the individual, but what the public interest demands. In doing so, he must stand alone, acting independently of political or other external influences. He is to be neither instructed or restrained, save by his final accountability to Parliament.

25. While the quasi-judicial role of the Attorney General in initiating or terminating criminal proceedings has been subject to much comment, it is not the Attorney General's only exercise of his or her constitutional function. The Attorney General also acts as a guardian of the public interest in the civil courts. For example, the Attorney General is responsible for enforcing and vindicating public rights, including claims for public nuisance, by bringing civil injunction proceedings. Similarly, the Attorney General may, as protector of the public interest, obtain an injunction where the law as contained in a public statute is being flouted.

British Columbia v. Canadian Forest Products Ltd. **[2004] S.C.J. No. 33 at para. 67**

Ontario (Attorney General) v. Grabarchuk **(1976), 11 O.R. (2d) 607 (Div. Ct.), followed in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 125 D.L.R. (4th) 1 (Ont. C.A.)**

Ontario (Attorney General) v. Ontario Teachers' Federation **(1997), 36 O.R. (3d) 367 (Gen. Div.)**

26. The Attorney General occupies a unique position in Canadian law. While both an elected member of the Legislature and a member of the Executive, he or she is also the Chief Law Officer of the Crown, with an independent responsibility to sustain and defend the Constitution and the rule of law. This unique position imposes a duty on the Attorney

General to consider, objectively and independently of partisan considerations, what actions must be taken to uphold the rule of law.

> **The Hon. Ian G. Scott, "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39 U.T.L.J. 109 at 122:**
>
> It is understood in our province that the attorney general is first and foremost the chief law officer of the Crown, and that the powers and duties of that office take precedence over any others that may derive from his additional role as minister of justice and member of Cabinet.
>
> **The Hon. J.C. McRuer, *Royal Commission Inquiry Into Civil Rights*, Report No. 1, vol. 2, c. 62 (Toronto: Queen's Printer, 1968) at 945:**
>
> The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways.
>
> **The Hon. R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 7:**
>
> Attorneys General are above all servants of the law, responsible for protecting and enhancing the fair and impartial administration of justice, for safeguarding civil rights, and maintaining the rule of law.
>
> **The Hon. Ian G. Scott, "The Role of the Attorney General and the Charter of Rights" (1986-87) 29 Crim. L.Q. 187 at 193:**
>
> In advising on questions of constitutionality, the Attorney General must give paramount consideration to the obligation to ensure that government action complies with the law, in this case the supreme law of Canada. The giving of constitutional advice must be carried out with the same independence and detached objectivity with which the Attorney General approaches questions of prosecution policy.

27. It is from this independent responsibility to uphold the rule of law that the Attorney General's role as supervisor of the administration of justice arises. The Attorney General of Ontario is charged with ensuring that the administration of public affairs is in accordance with the law, and with supervising all matters connected with the administration of justice in the province and all matters connected with judicial offices.

To further this duty, the Attorney General may assert a purely public interest in maintaining the respect of public officials and bodies for the statutory and constitutional limits of their authority. He or she is also responsible for all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary. Additionally, the Attorney General serves as the guardian of the public interest in all matters having to do with the legal profession.

> ***Ministry of the Attorney General Act*** **R.S.O. 1990, c. M.17, s. 5(b), (c), (i)**
>
> ***Courts of Justice Act*** **R.S.O. 1990, c. C.43, s. 71**
>
> ***Judicial Review Procedure Act*** **R.S.O. 1990, c. J.1, s. 9(4)**
>
> ***Courts of Justice Act*** **R.S.O. 1990, c. C.43, s. 109**
>
> ***Sutcliffe v. Ontario (Minister of the Environment)*** **(2004), 69 O.R. (3d) 257 (C.A.) at para. 24**
>
> ***Finlay v. Canada (Minister of Finance),*** **[1986] 2 S.C.R. 607 at para. 32**
>
> ***Law Society Act*** **R.S.O. 1990, c. L.8, s. 13(1)**

28. The Attorney General's function pursuant to *Judges Act* s. 63(1) is entirely consistent with the constitutional responsibility of the Attorney General for supervising the administration of justice. While an Attorney General himself or herself has no power to sanction, suspend or remove a judge, an Attorney General does have the ability to initiate a process of judicial investigation in cases where the Attorney General is concerned that the public interest requires such an inquiry. In coming to the conclusion that such an inquiry is necessary, an Attorney General is exercising his or her quasi-judicial discretion as guardian of the public interest. Such discretion is necessary to fulfil the Attorney General's general responsibility for the efficient and proper functioning of

the court system. The Attorney General bears responsibility for the administration of justice as a whole, and not for the outcome of a particular case. In this respect, it should be noted that the Attorney General who requested the present inquiry is not the same individual who held that office during the trial of *R. v. Julia Yvonne Elliott*.

> ***Proulx v. Quebec (Attorney General)*** **[2001] 3 S.C.R. 9 at para. 81 per L'Heureux-Dubé J. (dissenting but not on this point):**
>
> The Attorney General and the Attorney General's prosecutors are the guardians of the public interest, and assume a general responsibility for the efficient and proper functioning of the criminal justice system. Their role is not limited to that of private counsel who is responsible for an individual case.
>
> ***Mackin v. New Brunswick (Judicial Council)*** **(1987), 44 D.L.R. (4th) 730 at 743 (N.B.C.A.) per Ryan J.A. (dissenting but not on this point):**
>
> The Attorney General is the guardian of the public interest. He, above all ministers, is charged with responsibility for the administration of justice. It is his duty to concern himself with matters of a public nature because the people of this province have a continuing interest in seeing that laws are obeyed; and that all officers of the law, within the different levels of the justice system, do not abrogate their responsibilities or defy the tenets of their appointment or position. In matters related purely to the administration of justice, the Attorney General, because of the strength of his office, is an appropriate person to bring his concerns about the conduct of any provincial court judge, before the Judicial Council. It then becomes the duty of the Judicial Council, following the procedures set forth in the Provincial Court Act, to deal with the validity of the concerns expressed by the Attorney General if they are received under s. 6.2(1) as a complaint. If the Attorney General is in error, he is answerable to the legislature for his conduct. Until and unless any such error is referred to the legislature, it is the duty of the Attorney General to inform himself of the facts and to make the ultimate decision, on his own initiative, whether to complain or advise the Judicial Council of what he perceives to be legitimate matters of concern within the administration of justice in the Province. This he has done, using the vehicle established by government, the Judicial Council, as the action unit to investigate and address these concerns.

29. The Attorney General of a province is not in the same position as a private litigant, who does not bear general responsibility for the administration of justice and whose interests may be restricted to the outcome of a particular case. While it is both necessary and desirable that complaints against judges made by private citizens should be

subject to internal screening by the CJC, because the vast majority of them are unmeritorious, the same is not true of the concerns raised by Attorneys General. A decision by an Attorney General to request an inquiry under *Judges Act* s. 63(1) is an exercise of his or her constitutional responsibility as guardian of the public interest and, absent any indication of impropriety or bad faith, should not be readily frustrated.

30. While the provincial Attorneys General are the most frequent litigants in the courts of the provinces, they represent a vanishingly small proportion of complainants to the CJC. Between 1990 and 2003, more than two thousand complaints against superior court judges were filed with the CJC by private litigants, counsel or other judges. By contrast, provincial Attorneys General made only four requests for an inquiry pursuant to *Judges Act* s. 63(1) in the same period. This record contradicts any suggestion that provincial Attorneys General have used, or are reasonably perceived to use, inquiries under the *Judges Act* for political purposes, or as a way to "avenge" themselves against judges who have made rulings adverse to their interests. On the contrary, the record suggests that provincial Attorneys General are extremely reluctant to request inquiries under *Judges Act* s. 63(1), doing so only where there is a most serious issue of public confidence at stake.

Canadian Judicial Council Annual Report, 2003-2004

Canadian Judicial Council Annual Report, 1993-1994

Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990

Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996

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Report of the Boilard Inquiry Committee to the Canadian Judicial Council, August 2003

31. The record of requests by Attorneys General pursuant to *Judges Act* s. 63(1) demonstrates that the administration of justice requires the intervention of an Attorney General, in those rare and exceptional cases where a judge's conduct brings into serious question the public confidence in the judiciary.

II. History of requests by Attorneys General pursuant to *Judges Act* s. 63(1)

32. The moving party has mischaracterized the history of requests for inquiry under *Judges Act* s. 63(1), and in so doing reveals a fundamental misunderstanding of the role of the Attorney General in the review of judicial conduct. Contrary to the moving party's implication, the function of the Attorney General in requesting an inquiry into a judge's conduct is not to secure that judge's removal. Accordingly, the Attorney General's record of participation should not be assessed by reference to the mere number of recommendations for removal obtained. Rather, it is the role of an Attorney General under *Judges Act* s. 63(1) to set into motion a process of inquiry designed to affirm public confidence in the administration of justice. Such a role excludes any notion of prosecution or *lis inter partes*, and precludes assessment by way of simply counting the number of judges removed.

Moving party's factum paras. 70-72

Ruffo v. Conseil de la magistrature **[1995] 4 S.C.R. 267 at para. 73**

33. A review of the history of requests pursuant to *Judges Act* s. 63(1) reveals that, in the case of every public inquiry, the judicial conduct at issue raised a serious issue potentially capable of bringing into question the public's confidence in the administration of justice. In every such case, the public was well served by a full, fair, open and impartial inquiry by the CJC or its committees into the judicial conduct at issue. This is particularly true in those cases where the CJC found that removal was not warranted, for in those cases the public, and the judges in question, had the benefit of a reasoned recommendation against removal, made on the basis of evidence and argument advanced in an open forum. Significantly, in no case did the CJC find that a request under *Judges Act* s. 63(1) was without merit or made with any improper purpose.

> ***Interim Ruling Re complaints respecting the Honourable Justice Kerry P. Evans,*** **July 2002 at para. 6 per Charron J.A. (as she then was):**
>
> If in the end result the Council's findings are favourable to Justice Evans, it is our view that the transparency of the process will go much further in restoring the public's confidence in him than any private hearing shrouded in secrecy. The fundamental importance of open judicial hearings has been emphasized repeatedly. Just recently, the Supreme Court of Canada, in *Vancouver Sun (Re)*, 2004 SCC 43, reiterated that the "open court principle" is a "hallmark of a democratic society and applies to all judicial proceedings". The following excerpt is particularly relevant to the issue raised on this motion (at para. 25):
>
> > Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": [reference omitted]. 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 principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

34. Moreover, the history of public inquiries commenced by a request under *Judges Act* s. 63(1) reveals that, in every case where an inquiry committee recommended that

removal was not warranted, the judge or judges under inquiry resumed their duties. This record flatly contradicts the unsubstantiated opinion put forward by the moving party's affiant that it would be "difficult, if not impossible for a judge to resume active duties with any degree of effectiveness after a public inquiry into his or her conduct."

> **Affidavit of The Honourable James Chadwick Q.C. sworn October 12, 2004 ["Chadwick Affidavit"], Motion Record, Tab 4, at para. 4**

1. The Nova Scotia Judges inquiry (1990)

35. On February 9, 1990, the Attorney General of Nova Scotia requested an inquiry, pursuant to *Judges Act* s. 63(1), into the conduct of three Nova Scotia Court of Appeal judges (the Honourable Gordon L.S. Hart, the Honourable Malachi C. Jones, and the Honourable Angus L. Macdonald). This request was the first exercise by a provincial Attorney General of the *Judges Act* s. 63(1) power, and the first public inquiry commenced by *Judges Act* s. 63(1) (the federal Minister of Justice had previously requested two inquiries under *Judges Act* s. 63(1), in 1977 and in 1983, neither of which was held in public).

> **Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990**
>
> **M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 97**

36. The judges under inquiry had served on a panel of the Court of Appeal that heard a Reference in 1983 on the murder conviction of Donald Marshall, Jr. While the Court of Appeal directed that Marshall's conviction be quashed as not supported by the evidence, it added in obiter six paragraphs that were critical of Mr. Marshall, and stated that his own conduct contributed in large measure to his wrongful conviction. Subsequent to the

Reference, a Royal Commission on the Marshall Prosecution was struck, and the Commission made several findings that were sharply critical of the conduct of the judges hearing the Reference. In response to these findings, the Attorney General of Nova Scotia requested an inquiry by the CJC.

37. Public hearings of the Inquiry Committee commenced in Halifax on June 4, 1990 – seven years after the Reference. The judges under inquiry continued to serve during the intervening period.

38. On August 27, 1990, the Inquiry Committee released its report. The majority of the Committee reported its "strong disapproval of some of the language used by the Reference Court in its comments about Mr. Marshall." It found that the obiter remarks were "inappropriately harsh" and created the "strong impression that it was not responsive to the injustice of an innocent person spending more than ten years in jail." Ultimately, however, the majority concluded that the comments did not meet the high threshold for conduct warranting removal, that is, conduct "so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office."

> **Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990 at 27 and 32-35**

39. While the majority of the Committee did not recommend removal, they were clearly aware of the seriousness of the issue before them. There is no suggestion in their Report that the Attorney General's request for an inquiry was unmeritorious or

inappropriate, or that the issue should have been dealt with behind closed doors. On the contrary, the majority expressly recognised the importance for the public confidence in the administration of justice, of a public judicial reproach of the impugned conduct:

> **Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990 at 36:**
>
> 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.

40. Notwithstanding the public inquiry into their conduct, and the public criticism of their judicial comments by the Royal Commission and by the majority of the Inquiry Committee, the judges under inquiry resumed their judicial duties.

2. The Bienvenue inquiry (1996)

41. On December 11, 1995, the Attorney General of Quebec requested an inquiry, pursuant to s. 63(1), into the conduct of Mr. Justice Jean Bienvenue in the *R. v. Tracy Théberge* murder trial. On December 12, 1995, the federal Minister of Justice added his own request for a public inquiry. At issue were remarks made by Mr. Justice Bienvenue to jurors and court staff during the course of the murder trial, and to the accused herself during sentencing, that were perceived as inappropriate, demeaning and offensive.

42. Public hearings were held in March and April of 1996. On June 25, 1996, the Inquiry Committee rendered its report. The majority of the Inquiry Committee expressed disapproval of the judge's "inappropriate and humiliating" comments, and of the subsequent "aggravating lack of sensitivity to the communities and individuals offended by his remarks and conduct." The majority found that the judge's conduct had

undermined the public confidence in the judicial system, and recommended the judge's removal. The Inquiry Committee's report was considered by the CJC, which in turn produced a majority and minority report. The majority Council Report concurred with the recommendation of removal. Mr. Justice Bienvenue subsequently resigned.

> **Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996**
>
> **Report of the Canadian Judicial Council to the Minister of Justice under ss. 63(1) of the Judges Act concerning the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge, October 1996**

3. The Flahiff inquiry (1999)

43. On January 25, 1999, the federal Minister of Justice requested a public inquiry into the conduct of Mr. Justice Robert Flahiff. The judge under inquiry had been convicted of offences under the Narcotics Control Act and the Criminal Code. The judge brought a number of preliminary constitutional motions challenging the constitutionality of the inquiry proceedings. On April 9, 1999, the Inquiry Committee dismissed all of the preliminary motions. On April 13, 1999, the judge under inquiry resigned, with the result that the Inquiry Committee did not consider the merits and did not release a report.

> **Decision of Flahiff Inquiry Committee re Preliminary Motions by Judge, April 1999**

4. The Flynn inquiry (2002)

44. On March 28, 2002, the Attorney General of Quebec requested an inquiry, pursuant to s. 63(1), into the conduct of Mr. Justice Bernard Flynn. At issue were remarks made by the judge to a journalist, which were reported in a newspaper on February 23, 2002, in which the judge expressed opinions about the legality of a sale of properties from a municipality to a group of individuals that included the judge's wife.

Subsequent to the judge's comments, the legality of the sale became an issue before the Quebec Superior Court. A public hearing of the Inquiry Committee was held on October 28, 2002.

45. On December 12, 2002, the Inquiry Committee released its report. The Inquiry Committee found the judge's comments "inappropriate and unacceptable", and that they were "liable to undermine public confidence in the judiciary and adversely affect the perception of impartiality." Accordingly, the Committee found that the judge had failed in the due execution of his office in regard to the duty to act in a reserved manner. However, in all the circumstances the Committee concluded that the test for removal was not met, and thus did not recommend removal.

> **Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002**

46. As with the Nova Scotia Judges inquiry, while the Committee did not ultimately recommend removal, there is no suggestion in the Flynn Report that the Attorney General's request for an inquiry was unmeritorious or inappropriate, or that the judge's conduct did not raise a serious issue of public confidence. Nor is there any suggestion in the Report that the proceedings should have been held in private.

47. Mr. Justice Flynn continues to serve on the Quebec Superior Court today.

5. The Boilard inquiry (2003)

48. On October 28, 2002, the Attorney General of Quebec requested an inquiry, pursuant to s. 63(1), into the conduct of Mr. Justice Jean-Guy Boilard. Mr. Justice Boilard recused himself from a "Hell's Angels mega-trial" after receiving a strongly-

worded letter from the CJC criticizing him for his conduct in a related trial. At the time of Mr. Justice Boilard's recusal, 113 witnesses had been heard and 1,114 exhibits entered in the record. Another judge was appointed to replace Mr. Justice Boilard but subsequently declared a mistrial.

49. In a report dated August 5, 2003, the Inquiry Committee concluded that Mr. Justice Boilard's recusal was "improper" and lacked concern "for the due administration of justice and the image of detachment and calm which the judiciary should project to the public" and for those reasons the judge "failed in the due execution of his office." However, the Inquiry Committee did not recommend his removal from office, noting the judge's twenty-six-year judicial career, his contribution to the development and application of the criminal law in Quebec and in Canada, and his involvement in the training of judges.

> **Report of the Boilard Inquiry Committee to the Canadian Judicial Council, August 2003**

50. The CJC subsequently held an open session on December 6, 2003 to consider the Inquiry Committee's report and hear submissions from the judge under inquiry. The CJC released its report to the federal Minister of Justice, pursuant to *Judges Act* s. 65(1), on December 19, 2003. The Council agreed with the Inquiry Committee's decision not to recommend removal, but found that, as there was no allegation or indication of bad faith or abuse of office in the record before the Inquiry Committee, there was no basis to say that Mr. Justice Boilard had failed in the due execution of his office.

> **Report of the Canadian Judicial Council to the Minister of Justice of Canada under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec, December 2003**

51. Mr. Justice Boilard continues to serve on the Quebec Superior Court today.

III. Conclusions on role of Attorney General under *Judges Act* s. 63(1)

52. Where, as in the present matter, the conduct of a judge raises a serious question of public confidence, it is the obligation of an Attorney General, as guardian of the public interest and supervisor of the administration of justice in a province, to take such steps as are required to restore public confidence. *Judges Act* s. 63(1) recognizes that obligation by permitting an Attorney General to commence a judicial fact-finding process. The resulting process balances the public interest and the principle of judicial independence in a manner that is fair to the judge under inquiry.

53. *Judges Act* s. 63(1) is an important recognition of the role of the Attorney General, but the power it grants is a very limited one. It does not give an Attorney General the power to sanction, suspend or reprimand a judge. It does not give the Attorney General of a province the power to order a public inquiry. It does not affect the responsibility of the judiciary with respect to the assignment of judges to cases. It does not constitute the Attorney General as a "prosecutor" in a legal proceeding against the judge. The only power granted by *Judges Act* s. 63(1) is the ability to set in motion a fair, judicial process of inquiry designed to affirm public confidence in the judiciary. Such a process supports, rather than undermines, the important constitutional principle of judicial independence.

Issue Two: Purpose and function of inquiries under the *Judges Act*

I. Inquiry is a search for truth that enhances judicial independence

54. *Judges Act* ss. 63-71 establishes a statutory process of investigation that supplements the constitutional protection of judicial independence provided by *Constitution Act, 1867* s. 99(1). The inquiry process established by the *Judges Act* acts as a judicial pre-screening mechanism for Parliament. It allows Parliament to have the benefit of a factual inquiry, conducted in a process that is fair to the judge, into judicial conduct that could potentially lead to removal proceedings in Parliament.

> **Decision of the Gratton Inquiry Committee, February 1994 at 17:**
>
> Parliament has established statutory machinery for the systematic processing of complaints. There is a "screening" function which eliminates allegations which are not serious. If removal might be warranted, [*Constitution Act, 1867*] section 99(1) becomes operative and Parliament acts without any restriction imposed upon it by the steps taken under the *Judges Act*.

55. It is the purpose and function of the CJC (or an Inquiry Committee thereof) under *Judges Act* ss. 63-65 to investigate facts concerning a judge's conduct, and to report to the Minister of Justice the conclusions of its investigation. The CJC and its committees do not adjudicate disputes or render legally enforceable decisions. Proceedings before the CJC or its committees do not resemble litigation in an adversarial proceeding, but (like those of provincial judicial councils) are rather "intended to be the expression of purely investigative functions marked by an active search for the truth."

> **Report of the Bienvenue Inquiry Committee, June 1996 at 6-7**
>
> **Decision of the Gratton Inquiry Committee, February 1994 at 22**

Ruffo v. Conseil de la magistrature **[1995] 4 S.C.R. 267 at para. 72-73:**

> As I noted earlier, the Comité's mandate is to ensure compliance with judicial ethics; its role in this respect is clearly one of public order. For this purpose, it must inquire into the facts to decide whether the Code of Ethics has been breached and recommend the measures that are best able to remedy the situation. Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.
>
> In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself, on which the CJA confers a pre-eminent role in establishing rules of procedure, researching the facts and calling witnesses. Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

56. The CJC may recommend whether the conduct of the judge under inquiry merits removal, but may also denounce unacceptable conduct that falls short of meriting removal. In so doing, the CJC meets the need recognized by La Forest J. in *MacKeigan v. Hickman* for "credible complaint procedures to ensure continued public confidence in the administration of justice." The mandate of the CJC or an Inquiry Committee thereof is the remedial one of ensuring compliance with judicial ethics in order to preserve the integrity of the judiciary. This mandate does not have the effect of undermining judicial independence, for the concepts of judicial independence and ethics are interdependent.

MacKeigan v. Hickman, **[1989] 2 S.C.R. 796 at para. 20**

Ruffo v. Conseil de la magistrature, **[1995] 4 S.C.R. 267 at para. 68**

Report of the Bienvenue Inquiry Committee, June 1996 at 56-57

57. Judicial independence requires public confidence in the judiciary. In fact, it is precisely in order to affirm public confidence in the administration of justice that judicial independence is protected. In *R. v. Valente*, the Supreme Court of Canada held that:

> ***R. v. Valente*, [1985] 2 S.C.R. 673 at 689:**
>
> Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation.

58. Similarly, in *MacKeigan v. Hickman*, Cory J. (in dissent) noted that "The aim and goal of all aspects of judicial independence is to preserve and foster public confidence in the administration of justice. Without public confidence the courts cannot effectively fulfil their role in society."

> ***MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at para. 100**
>
> ***P.E.I. Reference re: Remuneration of Provincial Court Judges*, [1997] 3 S.C.R. 3 at para. 10**
>
> **Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990 at 26:**
>
> Public confidence in the independent and impartial administration of justice is, in effect, the first proposition in the syllogism which has as its second proposition the need for independent and impartial judges, and as its conclusion the independence of the judiciary.
>
> **Decision of the Gratton Inquiry Committee, February 1994 at 34-35**

59. Previous Inquiry Committees have recognized the importance of public confidence in the judiciary and its close connection to the principle of judicial independence. In determining whether to recommend removal, Inquiry Committees have adopted the test first formulated in the Nova Scotia Judges Inquiry: is the judicial conduct alleged so manifestly and profoundly destructive of the concept of the

impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of exercising the judicial office?

> **Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990 at 27**
>
> **Decision of the Gratton Inquiry Committee, February 1994 at 36**
>
> **Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996 at 61**
>
> **Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002 at 43-44**

60. Where, as in the present case, judicial conduct raises a serious question of public confidence, investigation by an Inquiry Committee is necessary to affirm public confidence. Both the public and the judge under inquiry are well served by an investigative process that searches for truth in a manner procedurally fair to the judge, and makes a reasoned recommendation (either for or against removal) on the basis of evidence and argument advanced in an open forum.

61. A request under *Judges Act* s. 63(1) simply sets this process in motion. A request for an inquiry is not a sanction. The Attorney General making the request is not a prosecutor bringing legal proceedings against a judge. Nor does *Judges Act* s. 63(1) give an Attorney General the ability to impair a judge's security of tenure, which is protected by *Constitution Act, 1867* s. 99(1).

II. Constitutional protection of judicial independence

62. The only procedure for the removal of a superior court judge under the Canadian Constitution is by act of the Governor-General on address of both Houses of Parliament.

Since the independence of the judiciary depends to a significant extent on security of tenure, it is appropriate that the removal of a judge be a major undertaking, bringing the Parliamentarians who must accomplish it under close scrutiny. The requirement of a double address of Parliament protects the independence of the judiciary because of the "solemn, cumbersome and publicly visible nature of the process." As a result, superior court judges in Canada enjoy "what is generally regarded as the highest degree of security of tenure" afforded by Canadian law. Nothing in the *Judges Act* alters this protection.

***Constitution Act, 1867,* s. 99(1)**

***R. v. Valente,* [1985] 2 S.C.R. 673 at 695-98**

***Judges Act,* s. 71**

63. The inquiry provisions of the *Judges Act* create a statutory process of investigation that supplements the constitutional protection afforded by *Constitution Act, 1867* s. 99(1). While the process assists Parliament in discharging its duty under the Constitution, by creating a factual record in a manner that is fair to the judge under inquiry, the process is not itself required by the Constitution. The text of *Constitution Act, 1867* s. 99(1) makes no mention of any judicial role in the removal of judges. Nor has the Supreme Court of Canada ever held that a judicial determination of incapacity is a pre-requisite to removal pursuant to *Constitution Act, 1867* s. 99(1).

Constitution Act, 1867 s. 99(1)

M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 77

64. The authorities relied on by the moving party do not stand for the proposition that the Constitution requires a series of judicial hearings and pre-hearings before a judge may be removed by double address of Parliament. *Valente* and *Re Therrien* concern constitutional limits on the power of the Executive to remove provincial court judges. In neither case did the Supreme Court of Canada suggest that a judicial role was required in the removal of superior court judges by Parliament.

***R. v. Valente*, [1985] 2 S.C.R. 673 at 696-98**

***Re Therrien*, [2001] 2 S.C.R. 3 at para. 72-78**

65. In *Valente*, the Supreme Court of Canada held that provincial court judges do not enjoy "the highest degree of security of tenure in the constitutional guarantee of s. 99 of the Constitution Act, 1867 that they shall hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons." The Court held that while "it may be desirable" that provincial court judges should be removable only by the legislature, it was not "reasonable to require this as essential for security of tenure for purposes of s. 11(d) of the Charter." *Valente* confirms that provincial court judges enjoy <u>less</u> security of tenure than that afforded to superior court judges by *Constitution Act, 1867* s. 99, in that the Executive may remove them for cause, provided that a finding of cause is subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard.

***R. v. Valente*, [1985] 2 S.C.R. 673 at 695-98**

66. In *Re Therrien*, the issue was whether the preamble of the *Constitution Act, 1867* afforded greater protection to the security of tenure of provincial court judges than that afforded by Charter s. 11(d). The Supreme Court answered that question in the negative, holding that the constitutional protection of judicial security of tenure found in both the preamble and Charter s. 11(d) did not require "the higher degree of constitutional guarantee modelled on the *Act of Settlement* of 1701 (12 & 13 Will. 3, c. 2) and set out in s. 99 of the *Constitution Act, 1867*." The lower degree of security of tenure guaranteed by the preamble and the Charter was satisfied by legislation that allowed the Executive to remove provincial court judges.

***Re Therrien*, [2001] 2 S.C.R. 3 at paras. 60-71**

67. The Supreme Court of Canada went on to note that "every Canadian province has taken the necessary measures to ensure that provincial court judges are secure against any discretionary interference by the Executive, in that the Executive remains bound by the finding of a judicial inquiry body exonerating a judge." *Re Therrien* does not support the moving party's position that there is a constitutional requirement of judicial inquiry before removal proceedings by Parliament.

***Re Therrien*, [2001] 2 S.C.R. 3 at paras. 72-78**

68. The issue of whether the Constitution requires a judicial investigation and recommendation prior to removal proceedings by Parliament does not arise in the present case. The *Judges Act* provides for a process of judicial investigation of incapacity, which is being followed in the present case. The question here is whether there is a constitutional requirement of an *in camera* judicial pre-screening of complaints before a

judicial investigation of incapacity. The Attorney General of Ontario submits that there is not. Such an approach finds no foundation in the decisions of the Supreme Court of Canada concerning security of tenure, does not respect the text of the Constitution, and would elevate, to constitutional significance, speculative apprehensions and hypothetical policy concerns about potential unmeritorious complaints.

> ***Gratton v. Canadian Judicial Council,* [1994] 2 F.C. 769 (T.D.) at para. 44:**
>
> The applicant raised certain essentially policy criticisms of the investigation process provided by the Judges Act, including the fact that in theory at least it exposes a judge to complaints by anyone including disgruntled litigants or those acting out of "malice or revenge." Such complaints may be taken up by the Canadian Judicial Council and publicly aired before an Inquiry Committee. Such hearings can be held in public or in private "unless the Minister requires that it be held in public." In theory at least the judge's reputation may be badly damaged by the mere holding of the inquiry no matter what its outcome. These are all important concerns as to how the system might operate, even though in fact the Council employs many safeguards. But at best such criticisms go to the wisdom of the particular provisions of the Judges Act and not to their constitutional validity.

69. A declaration that the inquiry provisions of the *Judges Act* are constitutionally infirm, because they offer insufficient protection for judicial independence, would amount to a declaration that *Constitution Act, 1867* s. 99(1) itself is deficient. It would constitutionalize a multi-layered system of *in camera* judicial pre-authorizations that is wholly foreign to the text of the Constitution.

III. The alleged adverse effects of *Judges Act* s. 63(1) are speculative or unrelated to scope of provision

70. The Attorney General of Ontario submits that each of the alleged adverse effects of *Judges Act* s. 63(1) on judicial independence are speculative or unrelated to the scope of that provision.

1. Publicity

71. The moving party submits that *Judges Act* s. 63(1) undermines the independence of the judiciary because of the "publicity surrounding the request of the Attorney General for an inquiry" and the fact that this publicity occurs without any prior judicial assessment of the merit or significance of the request. The Attorney General submits that *Judges Act* s. 63(1) has no such effect.

Moving party's factum at para. 56

72. The evidence is clear that the decision to issue a press release in this matter was made by the CJC, and not by the Attorney General of Ontario acting under the *Judges Act*. The moving party tacitly acknowledges this by referring, in an elliptical manner, only to the "public allegations of misconduct *associated* with an Attorney General's request", or the "publicity *surrounding the announcement* of this inquiry", or the "publicity *surrounding* the request of the Attorney General for an inquiry." In every case, the publicity complained of by the moving party is the result of actions taken by the CJC, not by the Attorney General.

Cosgrove affidavit, Motion Record Tab 3, para. 17 and Exhibit 'C'

Moving party's factum at paras. 20, 55-56 (emphasis added)

73. *Judges Act* s. 63(1) does not mandate the issue of press releases by the CJC or anyone else. If, as the moving party submits, judicial independence is undermined by such publicity, the appropriate remedy is to direct the CJC not to issue press releases until there has been an internal judicial screening of the merits of the request and an opportunity for the judge complained of to respond. It would be simply *non sequitor* to

invalidate the power of an Attorney General to make a request under *Judges Act* s. 63(1), in order to prevent the CJC from issuing press releases.

Cosgrove affidavit, Motion Record Tab 3, para. 17 and Exhibit 'C'

74. The *Judges Act* does not give the Attorney General of a province the ability to require a public hearing. *Judges Act* s. 63(6) allows the CJC to determine whether an inquiry commenced at the request of a provincial Attorney General should be held in private or in public. The decision to hold a public hearing in the present matter was made by the CJC, after review and consideration of the letter of request. The Attorney General of Ontario would submit that this decision was the correct one, in light of the very serious nature of the concerns identified in the letter of request and the findings of the Ontario Court of Appeal. Nevertheless, it was the CJC's decision to make, taking into account all of the circumstances. If, as the moving party submits, judicial independence requires judicial pre-screening of complaints before conducting public hearings, then it is submitted that this requirement was met in this case.

2. "Sidelining" a judge

75. The moving party alleges that *Judges Act* s. 63(1) gives the Attorney General of a province the power to "temporarily sideline a judge by having him or her not sit on cases while the inquiry is undertaken" without any prior judicial assessment of the merit of the request. The Attorney General of Ontario submits that *Judges Act* s. 63(1) creates no such power.

Moving party's factum at para. 77

76. Decisions concerning the assignment of judges to particular cases are the unique province of the judiciary. Nothing in the *Judges Act* purports to alter that. It was Chief Justice Heather Smith who decided that Justice Cosgrove should refrain from active duties while the inquiry is pending. This decision was not mandated by *Judges Act* s. 63(1), but rather was an exercise of the Chief Justice's own discretion. There is no reason to believe that Chief Justice Smith would have made this decision if she was of the opinion that the request for an inquiry was frivolous or baseless.

Cosgrove affidavit, Motion Record Tab 3 at para. 19

3. Difficulty resuming active duties

77. The moving party submits that it may be very difficult for a judge to resume active duties after an inquiry into the judge's conduct, even in cases where the inquiry does not result in a recommendation of removal. There is no evidence to support this speculation.

Moving party's factum at para. 57

78. A review of the previous inquiries commenced by request pursuant to *Judges Act* s. 63(1) reveals that, in every case where the Inquiry Committee did not recommend removal, the judge or judges under inquiry resumed active duties.

Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990

Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002

Report of the Boilard Inquiry Committee to the Canadian Judicial Council, August 2003

79. It is submitted that a judge exonerated in the course of a public and open process is far more likely to retain public confidence than one exonerated in a secret *in camera* proceeding.

> ***Re complaints respecting the Honourable Justice Kerry P. Evans,*** **July 2002 at para. 6 per Charron J.A. (as she then was):**
>
> If in the end result the Council's findings are favourable to Justice Evans, it is our view that the transparency of the process will go much further in restoring the public's confidence in him than any private hearing shrouded in secrecy.

4. Chilling effect

80. The moving party submits that *Judges Act* s. 63(1) creates a "chilling effect" that inhibits judges from making findings against the Attorney General in court. The Attorney General submits that this allegation is without any factual foundation.

> **Moving party's factum at para. 78**

81. The moving party relies on the affidavits of Justice Cosgrove and Justice Chadwick as "direct evidence" of the existence of a chilling effect. The affidavits do not support this claim. Neither affidavit contains any factual evidence of the effect of *Judges Act* s. 63(1) in particular cases. Rather, the affidavits merely record the unsubstantiated opinion of the affiants. Moreover, to the extent that the affidavits rely on newspaper articles as exhibits, those exhibits are inadmissible.

> **Cosgrove affidavit, Motion Record, Tab 3, para. 26**
>
> **Chadwick affidavit, Motion Record, Tab 4, paras. 7-8**
>
> ***Alberta Public School Boards' Assn. v. Alberta (Attorney General)*** **[2000] 1 S.C.R. 44 at para. 14:**
>
> I held in the previous order that the two newspaper articles sought to be adduced by the PSBAA do not constitute "legislative fact". The two columns represent the opinion of two individuals writing in daily newspapers who may or may not have the underlying

> facts straight and whose opinion may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial. No basis has been made out by the applicants for admission of this material. It will therefore be rejected.

82. In order to advance a constitutional challenge, the challenger must provide a factual foundation for the claim. The Supreme Court of Canada has repeatedly emphasized the need for parties to provide a complete evidentiary basis to the court to assist it in its decision-making in constitutional cases. The mere allegation or speculation by an affiant of the existence of a chilling effect, unaccompanied by any facts, cannot provide this evidentiary basis.

***Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para 203**

***Nelles v. Ontario*, [1989] 2 S.C.R. 170 at paras. 51-52**

***McKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-62**

***Danson v. Ontario*, [1990] 2 S.C.R. 1086 at 1100-01**

5. "Judge in its own cause"

83. The moving party claims that the power of an Attorney General to request an inquiry "amounts to the Attorney General being a judge in its own cause." Far from making the Attorney General a judge in his or her own cause, the legislation does not even make the Attorney General a party to the hearing before the Inquiry Committee. Under the *Judges Act*, it is the responsibility of the CJC or an Inquiry Committee thereof, and not of an Attorney General, to conduct the inquiry proceedings, to summon witnesses and require them to give evidence under oath, to require production of such documents and evidence as it deems requisite to investigate the matter, and to report its conclusions.

Moving party's factum at para. 81

***Judges Act* ss. 63-65**

84. In *Ruffo*, the Supreme Court of Canada considered the power of the Chief Judge of the Court of Quebec to file a judicial conduct complaint with the Conseil de la magistrature, of which he was the Chairman. The Supreme Court held that there was no reasonable apprehension of institutional bias.

***Ruffo v. Conseil de la magistrature* [1995] 4 S.C.R. 267 at para. 73:**

> The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: as I noted earlier, the Comité's primary role is to search for the truth; this involves not a *lis inter partes* but a true inquiry in which the Comité, through its own research and that of the complainant and of the judge who is the subject of the complaint, finds out about the situation in order to determine the most appropriate recommendation based on the circumstances of the case before it.

85. The present case, where the "complainant" is not a member of the CJC, must give rise to even less of an apprehension of bias than the facts of *Ruffo*.

PART IV – ORDER REQUESTED

86. The Attorney General of Ontario respectfully requests that the motion be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 29, 2004

_____

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_____

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SCHEDULE ‘A’

Authorities

1. *Ruffo v. Conseil de la magistrature* [1995] 4 S.C.R. 267

2. *R. v. Elliot*, [1999] O.J. No. 3265 (SCJ)

3. *R. v. Elliot* (2003), 181 C.C.C. (3d) 118 (Ont. C.A.)

4. Report of the Nova Scotia Judges Inquiry Committee to the Canadian Judicial Council, August 1990

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SCHEDULE 'B'

Judges Act R.S.C. 1985, c. J-1

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.

(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.

(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.

(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.

(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.

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.

(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.

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

Constitution Act, 1867 (U.K.), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, Appl. II., No. 5

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:

63. The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General.

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.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks

thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

Ministry of the Attorney General Act, R.S.O. 1990, c. M.17

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.

Attorney General Act, R.S.B.C. 1996, c. 22

2. The Attorney General

(a) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council,

(b) must see that the administration of public affairs is in accordance with law,

(c) must superintend all matters connected with the administration of justice in British Columbia that are not within the jurisdiction of the government of Canada,

(d) must advise on the legislative acts and proceedings of the Legislature and generally advise the government on all matters of law referred to the Attorney General by the government,

(e) is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as those powers and duties are applicable to British Columbia, and also with the powers and duties which, by the laws of Canada and of British Columbia to be administered and carried into effect by the government of British Columbia, belong to the office of the Attorney General and Solicitor General,

(f) must advise the heads of the ministries of the government on all matters of law connected with the ministries,

(g) is charged with the settlement of all instruments issued under the Great Seal of British Columbia,

(h) [Repealed 1997-7-17.]

(i) has the regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature, and

(j) is charged generally with duties as may be assigned by law or by the Lieutenant Governor in Council to the Attorney General.

Government Organization Act, S.A. 1994, c. G-8.5, sched. 9

1. (1) The Minister is by virtue of the Minister's office Her Majesty's Attorney General in and for the Province of Alberta.

(2) The Deputy of the Minister is the Deputy Attorney General.

2. The Minister,

(a) is the official legal advisor of the Lieutenant Governor;
(b) shall ensure that public affairs are administered according to law;
(c) shall superintend all matters relating to the administration of justice in Alberta that are within the powers or jurisdiction of the Legislature or the Government;
(d) shall advise on legislative acts and proceedings of the Legislature and generally advise the Crown on matters of law referred to the Minister by the Crown;
(e) shall exercise the powers and is charged with the duties attached to the office of the Attorney General of England by law or usage insofar as those powers and duties are applicable to Alberta;
(f) shall advise the heads of the several departments of the Government on matters of law connected with them respectively;
(g) shall settle instruments issued under the Great Seal of the Province;
(h) shall regulate and conduct litigation for or against the Crown or a public department in respect of subjects within the authority or jurisdiction of the Legislature;
(i) is charged generally with any duties that may be at any time assigned to the Minister by law or by the Lieutenant Governor in Council;
(j) is responsible for the conduct of the following matters, the enumeration of which shall not be taken to restrict the general nature of any provision of this Schedule:

(i) the recommendation of the appointment of and the giving of advice to sheriffs, registrars, judicial officers, medical examiners, notaries public and commissioners for oaths;
(ii) the consideration of applications for bail and attendance on such applications;
(iii) the consideration and argument of appeals from convictions and acquittals of persons charged with indictable offences;
(iv) the hearing of applications for the granting of fiats regarding petitions of right, criminal information, indictments, actions to set aside Crown patents, actions to recover fines and penalties and other actions of a similar nature;
(v) the consideration of applications for the remission of fines and penalties;

(vi) the appointment of counsel for the conduct of criminal business;
(vii) the regulation of the work of official court reporters;
(viii) the supervision of the offices of the courts of law in Alberta;
(ix) the consideration of proposed legislation and other matters of a public nature;
(x) the drawing of special conveyances and instruments of a similar nature relating to the sale or purchase of property under any Act relating to public works or otherwise.

Department of Justice Act, S.S. 1983, c. D-18.2

9. The minister shall:

(a) be the legal member of the Executive Council;
(b) see that the administration of public affairs is in accordance with the law;
(c) have the superintendence of all matters connected with the administration of justice in Saskatchewan within the powers or jurisdiction of the Legislature or Government of Saskatchewan;
(d) advise upon the Legislative acts and proceedings of the Legislature of Saskatchewan and generally advise the Crown upon all matters of law referred to him by the Crown;
(e) advise the heads of the several departments of the government upon all matters of law connected with those departments;
(f) be charged generally with any other duties that may be assigned by law or by the Lieutenant Governor in Council to the minister.

10. The Attorney General:

(a) is the official legal adviser of the Lieutenant Governor;
(b) is entrusted with the powers and charged with the duties which belong to the Attorney General and Solicitor General of England, by law or usage, so far as those powers and duties are applicable to Saskatchewan, and also with the powers and duties which by the laws of Canada or of Saskatchewan belong or appertain to the Attorney General of Saskatchewan;
(c) shall regulate and conduct all litigation for or against the Crown or any department in respect of any subject within the authority or jurisdiction of the Legislature;
(d) is charged with the settlement and approval of all instruments issued under the seal of Saskatchewan;
(e) is charged generally with any other duties that may be assigned by law or by the Lieutenant Governor in Council to the Attorney General.

Department of Justice Act, C.C.S.M., c. J-35

2. The minister

(a) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council;
(b) shall see that the administration of public affairs is in accordance with law;
(c) shall superintend all matters connected with the administration of justice in the province that are not within the jurisdiction of the Government of Canada;
(d) shall advise on the legislative acts and proceedings of the Legislature, and generally advise the Crown on all matters of law referred to the minister by the Crown;
(e) shall advise the heads of the several departments of the government on all matters of law connected with those departments; and
(f) is charged, generally, with any duties that may be at any time assigned by law or by the Lieutenant Governor in Council to the minister.

2.1 The Attorney General

(a) is entrusted with the powers and charged with the duties that belong to the offices of the Attorney General and Solicitor General of England by law or usage, so far as those powers and duties are applicable to the province, and also with the powers and duties that, by the laws of Canada and of the province to be administered and carried into effect by the government of the province, belong to the office of the Attorney General and Solicitor General;
(b) shall regulate and conduct all litigation for or against the Crown or any department of the government in respect of any subjects within the authority or jurisdiction of the Legislature;
(c) is charged with the settlement of all instruments issued under the great seal; and
(d) is charged generally with any duties that may be assigned by law or by the Lieutenant Governor in Council to the Attorney General.

An Act Respecting The Ministère De La Justice, R.S.Q., c. M-19

3. The Minister of Justice:

(a) is the legal adviser of the Lieutenant-Governor and the legal member of the Conseil exécutif du Québec;
(b) sees that the administration of public affairs is in accordance with the law;
(c) exercises superintendence over all matters connected with the administration of justice in Québec except those assigned to the Minister of Public Security;
(d) advises the incumbent ministers of the several departments of the Gouvernement du Québec upon all matters of law concerning such departments;
(e) is in charge of the organization of the judicial system and of the inspection of the offices of the courts, and is in charge of the organization and inspection of the Personal and Movable Real Rights Registry Office;
(f) has superintendence over judicial officers and the Personal and Movable Real Rights Registrar;
(g) performs such other functions as are assigned to him by the Government, or as are not assigned to some other Government department.

Public Service Act, R.S.N.S. 1989, c. 376

29. (1) The functions, powers and duties of the Attorney General and Minister of Justice shall be the following:

(a) the Attorney General is the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;
(b) the Minister of Justice shall see that the administration of public affairs is in accordance with the law, and has the superintendence of all matters connected with the administration of justice in the Province not within the jurisdiction of the Dominion of Canada;
(c) the Attorney General shall advise the heads of the several departments upon all matters of law concerning such departments or arising in the administration thereof;
(d) the Attorney General has the settlement and approval of all instruments issued under the Great Seal;
(e) the Attorney General has the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the Government;
(f) the Attorney General has the functions and powers that belong to the office of the Attorney General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers that previous to the coming into force of the British North America Act, 1867 belonged to the office of Attorney General in the Province and that under the provisions of that Act are within the scope of the powers of the Government of the Province, including responsibility for affairs and matters relating to courts and prosecutions;
(g) the Attorney General and Minister of Justice has such other powers and shall discharge such other duties as are conferred and imposed upon the Attorney General or Minister of Justice by any Act of the Legislature of the Province, or by order in council made under the authority of any such Act.

Courts of Justice Act R.S.O. 1990, c. C.43

71. The Attorney General shall superintend all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary.

109. (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the Canadian Charter of Rights and Freedoms in relation to an act or omission of the Government of Canada or the Government of Ontario.

Judicial Review Procedure Act R.S.O. 1990, c. J.1

9. (4) Notice of an application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application.

Law Society Act R.S.O. 1990, c. L.8

13. (1) The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way, and for this purpose he or she may at any time require the production of any document or thing pertaining to the affairs of the Society.