IN THE MATTER OF:

CANADIAN JUDICIAL COUNCIL

INQUIRY OF JUSTICE PAUL COSGROVE

FACTUM OF THE INTERVENER
CRIMINAL LAWYERS' ASSOCIATION
and CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS

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THE INTERVENER

1. The Intervener, the Criminal Lawyers' Association (Ontario) ("CLA"), is a non-profit organization founded in 1971 and currently comprising approximately 900 criminal defence lawyers practising in the Province of Ontario, as well as members from across Canada. The objects of the CLA are to educate, promote and represent the membership on issues relating to criminal and constitutional law. To that end, the CLA presents a variety of continuing legal education programs, and publishes "For The

Defence", a nationally circulated newsletter highlighting current developments in criminal and constitutional law.

2. The CLA is routinely consulted by both Houses of Parliament and their committees, and invited to make submissions on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Attorney General of Ontario often consults the CLA on matters concerning provincial legislation, courts management and the Ontario Legal Aid Plan, as well as various other concerns that involve the administration of justice in the province.

3. The CLA has been granted standing to make submissions as an intervener in several appeal cases before the Court of Appeal for Ontario. These cases include:

R. v. Felderhof (2003), 180 C.C.C. (3d) 498 (*re: notice requirements for allegations of misconduct*)

R. v. J.P. (2003), 177 C.C.C. (3d) 522 (*re: marijuana legislation*)

R. v. Leduc (2003), 176 C.C.C. (3d) 321 (*re: appropriate notice of an allegation of Crown misconduct*)

R. v. B.(E.) (2002), 162 C.C.C. (3d) 451 (*re: cross-examination of complainant on diary at preliminary hearing*)

R. v. Hall (2000), 147 C.C.C. (3d) 279 (*re: constitutionality of section 515(10)(c) of the Criminal Code*)

Horsefield v. Ontario (Registrar of Motor Vehicles), [1999] O.J. No. 967 (*re: constitutionality of administrative driver's licence suspensions*)

R. v. McCallen, [1999] O.J. No. 202 (*re: right to counsel of choice*)

R. v. Glasner, [1994] O.J. No. 1892 (*re: contempt of court*)

R. v. Kopyto, [1987] O.J. No. 117 (*re: freedom of expression and contempt of court*)

4. The CLA has also been granted leave to intervene in the Supreme Court of Canada in a number of cases. These include:

R. v. Mann, [2004] S.C.J. No. 49 (*re: investigative detention*)

R. v. Ling, [2002] 3 S.C.R. 814 (*re: tax audits and criminal proceedings*)

R. v. Jarvis, [2002] 3 S.C.R. 757 (*re: tax audits and criminal proceedings*)

R. v. Hall, [2002] 3 S.C.R. 309 (*re: constitutionality of section 515(10)(c) of the Criminal Code*)

R. v. Shearing, [2002] 3 S.C.R. 33 (*re: cross-examination on diary entries*)

R. v. Brown, [2002] 2 S.C.R. 185 (*re: solicitor-client privilege*)

R. v. 974649 Ontario Inc., [2001] 3 S.C.R. 575 (*re: costs in provincial offences court*)

R. v. Find, [2001] 1 S.C.R. 863 (*re: challenge for cause*)

R. v. McClure, [2001] 1 S.C.R. 445 (*re: solicitor-client privilege*)

R. v. Pan, [2001] 2 S.C.R. 344 (*re: jury secrecy*)

R. v. Sharpe, [2001] 1 S.C.R. 45 (*re: child pornography legislation*)

R. v. Biniaris, [2000] 1 S.C.R. 381 (*re: unreasonable verdicts and standard of review*)

R. v. Oickle, [2000] 2 S.C.R. 3 (*re: voluntariness*)

R. v. Williams, [1998] 1 S.C.R. 1128 (*re: challenge for cause*)

R. v. Mills, [1999] 3 S.C.R. 668 (*re: third party records*)

R. v. Stillman, [1997] 1 S.C.R. 607 (*re: admissibility of evidence*)

R. v. Burns and Rafay, [2001] 1 S.C.R. 283 (*re: extradition*)

L.L.A. v. A.B., [1995] 4 S.C.R. 536 (*re: production of medical records*)

R. v. Morales, [1992] 3 S.C.R. 711 (*re: judicial interim release*)

R. v. Pearson, [1992] 3 S.C.R. 665 (*re: presumption of innocence and bail*)

5. The Canadian Council of Criminal Defence Lawyers ("CCCDL") was formed in November of 1992 to represent defence counsel and to offer a national voice and perspective on criminal justice issues. Its membership includes defence lawyers from coast to coast. The CCCDL has intervened in the Supreme Court of Canada in *R. v. Mills*, [1999] 3 S.C.R. 668. As well, the Council has been invited by the federal government to consult on major pieces of criminal legislation and is often asked by the media to comment on current issues.

6. The CCCDL joins the CLA in these submissions as an intervener on the issue of the constitutionality of section 63(1) of the *Judges Act*, which gives the Attorneys General the power to direct inquiries by the Canadian Judicial Council without the pre-screening of complaints that applies in all other cases.

OVERVIEW OF POSITION

7. The Criminal Lawyers' Association and Canadian Council of Criminal Defence Lawyers have an interest in matters relating to the administration of justice in the criminal courts. The CLA and CCCDL intervene on this motion for declaration of invalidity, to express the views of the criminal defence bar regarding the importance of protecting the independence of the judiciary, as well as the appearance of independence, particularly in matters of criminal law.

8. This particular case exemplifies the dangers threatened by an Attorney General's exercise of the power to direct an inquiry under section 63(1). The intervener fully supports and agrees with the submissions of Justice Cosgrove. The intervener submits that the provision must be found to be unconstitutional because in every criminal case the Attorney General acts as the prosecuting litigant and therefore section 63(1) threatens the appearance of judicial independence in every criminal case.

JUDICIAL INDEPENDENCE

9. The independence of the judiciary is a fundamental foundational principle in the Canadian justice system and in the criminal justice system in particular.

10. Judicial independence requires not only that the judiciary be independent of the legislative and executive branches of government, but that the public perceive that the judiciary is independent and free from interference by the other branches of government. The importance of protecting the perception of independence was recognized by the Supreme Court in *Mackin v. New Brunswick*:

> … not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

Mackin v. New Brunswick (2002), 209 D.L.R. (4th) 564 (S.C.C.) at 585

11. In all cases, judicial independence is constitutionally mandated under the preamble to the *Constitution Act, 1867*. In criminal cases, the constitutional protection of an impartial tribunal is expressly found in section 11(d) of the *Charter*.

12. The criminal justice process compels those brought before the courts to defend against allegations brought against them by the government. It is the Crown counsel of the office of the Attorney General who prosecute. With the weight and resources of the government behind the prosecution, the imbalance of the parties before the court is enormous. In this context, the independence of the judge from the government, and the Attorney General in particular, is especially significant. It is the independence of the judiciary that provides assurance to an accused that justice will be done, that the rights of the accused will be protected, that accused will receive a fair hearing in which the government is held to its burden of proof, and that his defence will be heard with open ears and assessed on the merits of the case without bias. Without an independent judiciary, an accused person has no protection against the power of the prosecution.

13. Security of tenure has been recognized as the first of the essential conditions of judicial independence.

Valente v. The Queen, [1985] 2 S.C.R. 673 at 694

14. Constitutional protection of judicial independence requires the existence in fact of security of tenure, and maintenance of the perception that it exists.

Mackin v. New Brunswick, *supra*, at 586

15. In this case, the appearances of security of tenure have been damaged. As a result of the Attorney General's direct indictment, Justice Cosgrove has been effectively removed from his position on an interim basis by his being removed from sitting on any cases while the inquiry is pending. The intervener submits that security of tenure is violated not just when a permanent removal takes place, but equally by a temporary or limited removal, or a day-to-day removal of indefinite duration. In other words, the consequential effect of temporarily removing a judge from judicial duties is as invidious and must be precluded equally with a permanent threat. Doctrinally this is related to the impropriety of day-to-day judicial tenure under the control of the Attorney General.

Valente v The Queen, *supra,* at 702-704
see also R. v. Magee, [1988] A.J. No. 61 (Q.B.)
R. v. Baylis, [1986] S.J. No. 303 (Q.B.)

16. Likewise, the consequential effect of temporarily removing a judge from judicial duties can even be viewed as related to the prohibition against judge shopping. In *R. v. Regan,* conduct of the Crown and police in

seeking to avoid bringing matters before a particular judge was strongly criticized:

> The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system.

R. v. Regan, [2002] 1 S.C.R. 297 at 330-331

17. Any ability by the Crown to unilaterally "remove" a judge from judicial duties (even through consequential effect), either permanently or temporarily, runs afoul of the basic constitutional principle of judicial independence. How can the appearance of independence possibly be maintained when an accused person, facing the imbalance of resources in the weight of the prosecution against him and protected only by the Constitution and the rule of law, is faced with the fact that the interpreter of the law and guardian of the Constitution – the trial judge – may be subjected to an inquiry for removal from office if the Attorney General, his prosecutor, is dissatisfied with the judge's ruling? The facts of this case demonstrate the danger. In this case, the Attorney General made no complaint of age or infirmity, did not direct an inquiry because of any out-of-court conduct of the judge, or because of abdication or abandonment of duties. Here, the Attorney General, the Crown's prosecutor, directed

the inquiry on the basis of complaint simply against the trial judge's rulings and findings made in the course of the criminal trial. As a result, the Attorney General has been able to unilaterally "remove" Justice Cosgrove as a judge. The fact that this "removal" is not automatically permanent is irrelevant to the constitutional violation.

18. It is noteworthy that this complaint was not made during the course of the trial, nor following the 1999 judgment during the four years it took the Crown to bring the appeal to hearing. If the issue were the non-judicial conduct of the Judge, as opposed to his rulings in the case, the outcome of the appeal would be irrelevant. To the contrary, in this case the Attorney General waited for the expiration of the time for filing a leave to appeal to the Supreme Court. The timing of the complaint supports the appearance that the Attorney General's complaint is with the unfavourable litigation result, as opposed to extra-judicial conduct.

see Motion Record of The Honourable Justice Paul Cosgrove, Tab 3, Affidavit of Justice Cosgrove, exhibit A – complaint, appendix History of Proceedings

19. A core principle of judicial independence is the liberty of a judge to hear and decide cases without fear of external reproach. The Supreme Court in *Moreau-Berubé v. New Brunswick (Judicial Council)* commented on the need to protect against fear of external reproach:

> ¶ 56 One half of the "two-pronged" modern articulation of

> judicial independence (the other prong being institutional independence), without which there can be no public confidence in the justice system, rests on the individual independence of each and every judge. Within this, the core principle is the liberty of the judge to hear and decide cases without fear of external reproach. The majority of this Court stated in Beauregard, supra, at p. 69:
>
> > Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [Also see Valente, supra, per Le Dain J., at p. 685.]
>
> The Canadian Judicial Council echoed this principle in the Marshall Report, supra, asserting that "[j]udicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal" (p. 24). Thus, the Council's inquiry panel noted, while criticizing the comments of the Nova Scotia Court of Appeal that "[w]e 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" (p. 36).
>
> ¶ 57 While acting in a judicial capacity, judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen.

Moreau-Berubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249

20. When the Attorney General demonstrates, as it has in this case, that the outcome of litigation may lead to a directed inquiry concerning removal, the appearances of judicial independence are eroded. A reasonable

person could not consider that a court enjoys the necessary independent status to decide an accused's claims of prosecutorial abuse of process, as an example, where the trial judge may be thrown into the removal process should he err in favour of the accused.

JUSTIFICATION and SECTION 1

21. It is respectfully submitted that a constitutional violation of judicial independence can never be justified and that section 1 of the *Charter* has no application given the constitutional status of the protection in the preamble to the *Constitution Act 1867*.

22. Judicial independence functions as a prerequisite for giving effect to a litigant's rights including the rights guaranteed in the *Charter.* To justify legislative interference with the independence of the judiciary in any way, the government bears a more demanding onus than the standard application of section 1 of the *Charter.*

Mackin v. New Brunswick, *supra*, at 595

23. The factum of the independent counsel (at paragraphs 57-58 and 62) attempts to justify the Attorney General's power to direct an inquiry with mention that an inquiry is not determinative of removal, and that procedural protections are provided to prevent unmeritorious complaints

from resulting in removal. In effect, the suggestion is that inquiries directed by the Attorney General will not affect security of tenure because of the other procedural safeguards that exist. But this reverses the burden of justification. It is for the government to meet the demanding onus of justification for the granting of power to the Attorney General to direct an inquiry while inquiry into other complaints is within the autonomous discretion of the council.

24. In paragraphs 54 and 55 of his factum, the independent counsel mischaracterizes the nature of the constitutional challenge. The challenge to section 63(1) takes the position that it is inconsistent with judicial independence to give the power to indict a judge directly to Attorney General, who is an institutional litigator. The power is unjustified and unnecessary. Nothing else need be affected by any constitutional decision. The residual discretion of Parliament and the Governor in Council need not be affected. Section 63(1) is inconsistent with constitutionally required judicial independence and ought to be declared to that extent of no force or effect.

25. If section 63(1) is struck down as unconstitutional, the remainder would not become “constitutionalized” as the independent counsel suggests, nor would any power, right or duty of the House of Commons, the Senate or the Governor in Council necessarily be effected. There is no reason

why the House of Commons, the Senate or the Governor in Council could not demand an inquiry before the judicial council. The independent counsel's argument equates the Attorney General with Parliament. Parliament may enact legislation for the procedure of directing inquiries. This particular legislation, however, giving the power to direct inquiries to the Attorney General, a litigant, is not constitutionally permissible.

ORDER REQUESTED

26. It is respectfully submitted that this Inquiry Committee should declare section 63(1) of the *Judges Act* unconstitutional and of no force or effect.

27. The Intervener requests leave to make oral submissions at the hearing of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 29th day of November, 2004.

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Alan D. Gold
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SCHEDULE A

TABLE OF AUTHORITIES

1) *Mackin v. New Brunswick* (2002) 209 D.L.R. (4th) 564 (S.C.C.)

2) *Valente v. The Queen*, [1985] 2 S.C.R. 673

3) *R. v. Magee*, [1988] A.J. No. 61 (Q.B.)

4) *R. v. Baylis*, [1986] S.J. No. 303 (Q.B.)

5) *R. v. Regan*, [2002] 1 S.C.R. 297

6) *Moreau-Berubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249