IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

FACTUM OF THE INTERVENER
CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

(Regarding the constitutionality of s.63(1) of the *Judges Act*)

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I. OVERVIEW

1. The Canadian Superior Courts Judges Association (hereinafter "Association") is a voluntary organization of 1055 Superior Court Judges across Canada: over 90% of eligible judges are members. As part of its objects the Association is concerned with the provisions of the *Judges Act* and procedures pertaining to complaints, investigation and inquiries involving the conduct of judges.

2. The Association intervenes before this Inquiry Committee to challenge the ability of the Minister of Justice of Canada (hereinafter "Minister"), and the Attorneys General to mandate that the Canadian Judicial Council convene an Inquiry Committee under Section 63(1) of the *Judges Act*.

3. The Canadian Judicial Council (hereinafter "Council") and previous Inquiry Committees have proceeded on the assumption that the *Judges Act* provides two avenues into the process to remove judges. First, s.63(1) mandates an Inquiry Committee if requested by the Minister or Attorneys General (hereinafter referred to collectively as the "Executive"). Second, s.63(2) applies to all other complaints or allegations which are dealt with under a multi-tiered screening process.

4. The correctness and constitutionality of this reading of s.63(1) is being challenged for the first time before this Inquiry Committee. In the absence of binding authority on s.63(1), this matter is therefore one of first instance and first principles.

5. The Canadian Superior Courts Judges Association submits that the Minister or Attorneys General do not have the authority to mandate an Inquiry Committee because the *Judges Act* does not require it and the Constitution does not allow it. To preserve judicial independence all requests, complaints and allegations, including those made by the Executive, should be subject to the multi-tiered screening process established under the Council's Complaints Procedures.[1]

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[1] *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges*, approved by the Canadian Judicial Council September 27, 2002 and effective January 1, 2003.

II. SECTION 63(1) OF THE *JUDGES ACT*

1. *History of Enactment*

6. This provision first came into effect in 1971 when the federal government enacted Bill C-243, an *Act to Amend the Judges Act and the Financial Administration Act*.[2] This legislation created the Canadian Judicial Council.

7. Before this Act, it was recognized that there were serious deficiencies in the process of removing judges from office under s.99 of the *Constitution Act, 1867*[3], which immediately prior to this Act occurred through the *Inquiries Act*[3a]. The Council was established to respect and reinforce judicial independence. When the Minister of Justice, the Honourable John N. Turner introduced Bill C-243 he stated: "The purpose of the Canadian Judicial Commission is to ensure that the separation of powers as between the executive and the judiciary is properly maintained".[4]

8. The 1971 Act was intended to establish an independent Council and to bestow upon it the powers necessary to perform its new functions. Its objects expressly included "the making of the inquiries and the investigation of any complaint or allegation" described in what is now s.63.[5] An independent Council would establish its own procedures; the *Judges Act* gave Council the power to establish by-laws "respecting the conduct of the inquiries and investigations"[6] and provided that "subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct".[7]

9. The independence of the judiciary was secured by establishing a process for the removal of judges built on self regulation and peer review. Albert Bouchon, the

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2 *An Act to Amend the Judges Act and the Financial Administration Act* 19-20 Elizabeth II, assented to 6th October, 1971 at s.31(2)(c).
3 1996-97 *Annual Report* of the Canadian Judicial Council, p.13.
3a *The Inquiries Act*, R.S.C. 1952 c. 154
4 *Hansard*, , May 3, 1971 at p.533.
5 *An Act to Amend the Judges Act and the Financial Administration Act* 19-20 Elizabeth II, assented to 6th October, 1971 at s.31(2)(c).
6 *Ibid.* s 31(5)(c).
7 Now s.61(2).

Parliamentary Secretary to the Minister of Justice said when amendments to the *Judges Act* and *Financial Administration Act* were read for the second time:[8]

> Consistent with its underlying concept, the Canadian Judicial Council will have the power to carry out investigations of any complaint made regarding the conduct of members of the bench.
>
> In addition to the right to initiate an investigation on its own, the council may also be directed by the Minister of Justice to commence an inquiry as to whether a federally appointed Judge should be removed from office. The Governor in Council now has this power under the *Inquiries Act*, but the enabling powers confirmed by the bill are restricted and made appropriate to inquiries respecting the judiciary.
>
> Because the independence of the judiciary is an integral part of the Canadian democratic process, it is important that the judiciary become, to some extent, a self disciplining body. The executive or legislative branches of government should not ordinarily intervene in the management or control of the judiciary. To do so might result in an abuse of the executive power of government and would diminish the respect and independence now held by the bench, and destroy the delicate balance of powers that Canadian democracy had enjoyed since Confederation.

10. Two major events since the enactment of s.63 have a bearing on its proper interpretation and application: the *Constitution Act, 1867*, with entrenchment of constitutionally protected rights in the *Canadian Charter of Rights and Freedoms* and the formulation by Council of by-laws and policies in relation to:[9]

(a) the *Canadian Judicial Council Inquiries and Investigations By-Laws*, in effect January 1, 2003 (hereinafter the *Inquiries and Investigations By-Laws*)

(b) *Procedures for Dealing with Complaints Made to the Canadian Judicial Council about Federally Appointed Judges*, in effect January 1, 2003 (hereinafter the "Complaints Procedures")

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8 *Hansard*, June 14, 1971 at p.6665.

9 In the Council's view, likely as a result of its interpretation of s.61(3)(c) of the *Judges Act*, discussed later in this factum, it was required to split the pre-existing complaints by-laws into informal procedures and formal by-laws: 2002-03 *Annual Report*.

2. *Interpretation of "Inquiry" by the Canadian Judicial Council in its By-Laws and Policies*

11. Although the meanings of "inquiry" and "investigation" in s.63 have not been judicially considered, the Canadian Judicial Council has interpreted ss.63(1) and (2) of the *Act* to authorize two separate avenues for establishing an Inquiry Committee: a request by the Minister or Attorney General under s.63(1) automatically triggers an Inquiry Committee (a public and formal hearing) whereas any other complaint is handled under s.63(2), and is reviewed prior to the Inquiry Committee stage in accordance with the Complaints Procedures.

12. The Complaints Procedures outline a multi-stage screening process leading from a complaint to the convening of an Inquiry Committee:

(a) The Executive Director receives a complaint and opens a file, but may decline to open a file if the complaint is "clearly irrational or an obvious abuse of the complaints process" (s.2.2)

(b) The Chairperson of the Judicial Conduct Committee reviews the complaint and may close the file if:

(i) The complaint is "trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration" (s.3.5(a)(i); or

(ii) the complaint is outside the Council's jurisdiction "because it does not involve conduct" (s.3.5(a)(ii)).

(c) The Chairperson then may seek input from the judge and his or her chief justice, and upon review of their responses may close the file if:

(i) the complaint is "without merit or does not warrant further consideration" (s.5.1(a)(i)) or

(ii) the judge acknowledges inappropriate conduct and no further action is necessary (s.5.1(a)(ii)).

(d) The Chairperson may then decide to ask independent counsel to investigate further and prepare a report. Upon review of this report, the Chairperson may close the file if:

(i) the complaint is "without merit or does not warrant further consideration" (s.8(a)) or

(ii) the judge acknowledges inappropriate conduct and no further action is necessary (s.8(a)).

(e) The complaint may also be dealt with at the Chairperson stage by providing a written assessment of conduct to the judge, and recommending counselling or other remedial measures (ss.5.2, 5.3, 8.1(b)).

(f) The file, if not closed by the Chairperson, is forwarded to a Panel, which will close the file if "the matter is not serious enough to warrant removal" of the judge (s.9.6(b)).

(g) Otherwise, the Panel makes a recommendation to the Council that the matter "may be serious enough to warrant removal" (s.9.6(d)).

(h) The Council then reviews the Panel's report and closes the file if "the matter is not serious enough to warrant removal" (s.10.4(a)).

(i) If the "matter may be serious enough to warrant removal" an Inquiry Committee is designated to hold a formal hearing (s.10.4(b)).

13. The *Inquiries and Investigations By-Laws* set out a procedure for the Inquiry Committee, which is a formal, public hearing.[10]

14. The Council has framed its by-laws and policies to reflect its assumption that s.63(1) requires an Inquiry Committee. However, the by-laws are subordinate legislation and cannot alter the meaning of statutory provisions. Where an Act of Parliament and by-laws conflict, the Act will prevail.[11]

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10 S.7. They refer to the Inquiry Committee process as an "inquiry or investigation".

11 *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S C R. 3.

15. By-laws are not interpretive aids to the legislation under which they are enacted: especially to the extent they are premised on a misunderstanding of the statute's wording and purpose.

16. The Complaints Procedures are, however, relevant to the constitutional requirement of a process for removal of judges that respects judicial independence.

3. *Interpretation of "Inquiry" by the Canadian Judicial Council in its Writings*

17. The Council submits an Annual Report outlining its activities under s.63 each year. The word "inquiry" has been defined by the Council as meaning the Inquiry Committee process. For example, the Council stated in the following excerpt from the 2002-03 *Annual Report*: [12]

> The Council must undertake a formal inquiry into a judge's conduct if requested to do so by the Minister of Justice of Canada or a provincial attorney general, under subsection 63(1) of the *Judges Act*.[13]

18. In this expression of s.63(1), the Council inserts the word "formal" after the term "inquiry".

19. In a letter to an individual making a complaint, the Council stated about s.63(1) "when a 'request' is made under this provision by a Provincial Attorney General or the Minister of Justice of Canada, a council must establish an Inquiry Committee".[14]

20. Various Inquiry Committees have made statements to the effect that "under subsection 63(1) of the *Judges Act*, a request for an inquiry by the Minister of Justice and Attorney General of Quebec is mandatory. Consequently, the council must hold an inquiry in this matter."[15]

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12 The Annual Reports have repeated words to this effect each year an Annual report has been issued (1987-2004)

13 p.11.

14 Letter from Jeannie Thomas to Mr. Patrick Cowan, dated November 4, 2002 in the *Boilard* matter.

15 Decision of Flynn Inquiry Committee, December 12, 2002 the Attorney General of Quebec.

21. The Association disputes this reading of s.63(1) on the basis that:

(a) under the *Judges Act* the Minister or Attorney General's power is restricted to mandating the Council to "commence an inquiry". That is different from the power to convene an Inquiry Committee, a power reserved exclusively by statute to the Council in s.63(3); and

(b) to allow the Executive to order the Council to proceed directly to an Inquiry Committee is an unnecessary and unjustified interference with constitutionally protected rights.

III. SECTION 63(1) OF THE *JUDGES ACT* DOES NOT GIVE THE POWER TO THE MINISTER OR ATTORNEYS GENERAL TO MANDATE AN INQUIRY COMMITTEE

22. The Association submits that the plain reading of s.63(1) simply requires the Council to "commence an inquiry" when it receives a request from the Executive. This is different from convening a formal "Inquiry Committee", which is one modality of an inquiry, and which is also the subject of separate treatment under s.63(3). Section 63(3) gives a specific and express power to the Council to establish an Inquiry Committee, a power which is notably not given to the Executive.

23. When ss.63(1), (2) and (3) are read together and read properly the Executive may compel the Council to engage in a fact-finding inquiry which may or may not lead to an Inquiry Committee but they cannot compel the Council to establish an Inquiry Committee. In the absence of a statutory requirement, the decision of the Council to convene an Inquiry Committee would be made according to the Council's Complaints Procedure.

1. *Legislation*

24. Part II of the *Judges Act*, "Canadian Judicial Council", establishes the Council and grants to it the statutory powers necessary to fulfill its objects and powers as defined by s.60.

> 60. (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.
>
> (2) In furtherance of its objects, the Council may
> (a) establish conferences of chief justices and associate chief justices;
> (b) establish seminars for the continuing education of judges;
> (c) make the inquiries and the investigation of complaints or allegations described in section 63; and
> (d) make the inquiries described in section 69.
>
> [emphasis added]

25. Relevant statutory powers include the power to make by-laws "respecting the conduct of inquiries and investigations" under s.61(3)(c); the power to investigate under s.63(2); and the powers of a superior court under s.63(4).

26. Sections 63(1) to 63(3) read:

> 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.
>
> [emphasis added]

27. The words "inquiry" and "investigation" are not defined in the *Judges Act*. In ss.63(4), 63(5), 64, and 65, the phrase "inquiry or investigation" is used, but ss.63(1) and 69 use only the word "inquiry", s.63(2) uses only the word "investigation" and s.63(3) uses "Inquiry Committee".

2. *Interpretation of "Inquiry"*

28. The modern approach to statutory interpretation was expressed by Elmer Driedger[16] as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

29. This approach was declared by the Supreme Court of Canada to be the proper one in *Re Rizzo and Rizzo Shoes Ltd.*[17] by Iacobucci J., where he stated:

> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

30. In that case, although the wording in a particular section of the statute did not seem to be ambiguous, it had to be looked at in the context of the entire Act and the consequences of adopting one interpretation over another.

31. The Council's interpretation of "inquiry" to mean a formal hearing is not supported by the overall context of the *Judges Act* or the plain and ordinary meaning of the word. The more contextual and reasonable interpretation defines "inquiry" as a process of examination, consideration, fact-gathering, and truth-seeking: in short a review. When the term "inquiry" appears in Part II it is therefore intended to refer to the process to be undertaken by the Council to review whether the Executive's concerns have merit.

32. The word "inquiry" is defined in *Webster's Third New International Dictionary*, unabridged[17a]:

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16 As cited in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Ottawa: Butterworths, 2002) at 1.

17 [1998] 1 S.C.R. 27, at 41.

17a (U.S.A.: Merriam-Webster Incorporated, 1993)

17b (England: Oxford University Press, 2002)

> 1: the act or an instance of seeking truth, information, or knowledge about something: examination into facts or principles : RESEARCH, INVESTIGATION ...2: the act or instance of asking for information : a request for information : QUERY, QUESTION ...

33. "Inquiry" is defined in *Shorter Oxford English Dictionary*, 5th ed.[17b]:

> 1 Investigation, examination
>
> 2 An investigation, an examination, *esp.* an official one: *spec.* (in full *public inquiry*) a judicial investigation, held under the auspices of a Government department, into a matter of public concern
>
> 3 The putting of a question, asking, interrogation
>
> 4 A question, a query

34. Under the word, "inquire," the *Shorter Oxford English Dictionary* notes that "recent UK usage tends to distinguish *enquire* = ask, *inquire* = make investigation; the distinction is not made in North America".

35. The meaning of "inquiry" in a particular statute depends upon the purpose of the legislation and the context in which it is used. In some cases, it has been held that "inquiry" means a public hearing.[18]

36. Nothing in the context of the *Judges Act* mandates that a s.63(1) "inquiry" must be a formal hearing. Indeed the very wording of s.63(3) points against it. The *Judges Act* does not prescribe the stage at which the "inquiry" begins. While an "inquiry" can result in and lead to an Inquiry Committee, the *Judges Act* does not state that the "inquiry" must begin with or is the same as the Inquiry Committee.

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[18] For example, *Starr* v. *Houlden* (1990), 71 O.R. (2d) 161 (Ont. C.A.) (appeal allowed at [1990] 1 S.C.R. 1366 on the basis of a division of powers argument), where it was held that an inquiry under the Ontario *Public Inquiries Act* did not include a pre-hearing private investigation stage as this would deprive the hearing of its public character. Also see *Cape Breton Development Corp.* v. *Nova Scotia (Workers' Compensation Board)* (1995), 8 C.C.E.L. (2d) 157 (C.A.) where it was held at paras. 43-45 that "there can be no doubt that an inquiry can be a seeking and gathering of information" but that "inquiry" in the context of workers' claims for industrial hearing loss required an oral hearing, given the purpose of the inquiry at issue and a section that stated an inquiry "shall be held ... at the earliest convenient date"

37. Four other provisions in Part II of the *Judges Act* support a reading of s.63(1) that the request by the Executive mandates a review by Council, rather than requiring a formal Inquiry Committee.

38. First, s.63(3) expressly provides that the Council *may* designate members to constitute an Inquiry Committee "for the purpose of conducting an inquiry or investigation".

39. While "inquiry" and "investigation" are to be read as broad terms that extend to the range of activities covered in a review, the phrase "Inquiry Committee" is different, specific, directed at a particular stage in that review process, and the subject of its own particular subsection.

40. As stated in *Sullivan and Driedger on the Construction of Statutes*:

> It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings.[19]

41. As well, "every word in a statute is presumed to make sense and have a specific role to play in advancing the legislative purpose".[20]

42. The "Inquiry Committee" is a separate concept from an "inquiry". The "Inquiry Committee" is to be made up of specific members, whereas an "inquiry" is general and commenced by the Council as a whole. The Inquiry Committee has a specific role to play in advancing the legislative process as an "inquiry" may lead to an "Inquiry Committee". Section 63(3) contemplates that an Inquiry Committee is but one way the Council may proceed "for the purpose of conducting an inquiry or investigation".

43. Section 63(3) provides expressly that the ability to convene an Inquiry Committee rests with the Council, not the Executive. No statutory power to convene an Inquiry Committee is given to the Executive. This is consistent with establishing the Council as an essentially self-regulating body.

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19 (Ontario: Butterworths Canada Ltd , 2002) at 162

20 *Ibid.* at 158.

44. Second, s.63(7) demonstrates that not every "inquiry" involves a hearing.

> 63(7) A judge in respect of whom an inquiry or investigation under this section is to be made shall be given reasonable notice of the subject matter of the inquiry or investigation and of the time and place of any hearing thereof ...
>
> [emphasis added]

45. If the word "inquiry" was the same as an "Inquiry Committee" a hearing would always take place. The use of the term "any hearing thereof" suggests that there may be an inquiry or investigation that does not include a hearing: a position consistent with the Complaints Procedures.

46. Third, s.60(2)(c), which outlines the objects and powers of the Council, states that the Council can "make the inquiries" necessary. A formal hearing heard by the Inquiry Committee is not "made," it is held, conducted or convened. In contrast, this section is both plural (inquiries) and active: to "make the inquiries" means to ask, research, examine and review.

47. Further, confining the meaning of "inquiry" and "investigation" to conducting an Inquiry Committee would limit the powers provided to the Council under s.60(2)(c) to that purpose, when the Council has exercised broad powers to screen and dismiss complaints without taking them to the Inquiry Committee.

48. A more reasonable interpretation of "inquiry" (and "investigation") is to define those words more generally as review, the process of considering complaints from intake until resolution. Subsection 60(2)(c) would then support a consistent interpretation, whereby the Council is given the power to take the steps necessary to determine if a complaint is justified.

49. Fourth, s.64 speaks of "a judge in respect of whom an inquiry or investigation under s.63 is to be *made*", again suggesting a fact-finding process rather than a formal hearing.

50. If s.63(1) is read in this manner it is not deprived of meaning. It operates to give a special power to the Executive to compel the commencement of an inquiry. At

the time s.63(1) was enacted the Council had not yet enacted by-laws or complaints procedures and it could not be known that Council would elect, as it has, to act upon all complaints received.

51. Section 63(1) was intended to secure to the Executive the ability to force Council to consider the Executive's concerns about judicial conduct. To give the Executive the power to force Council to find and consider the facts was thought necessary to protect the public interest in judicial integrity. This need is met as long as the Executive's request is considered and a review is commenced. There is no need for, or basis upon which, the Executive can legitimately claim to dictate how that inquiry should proceed and what it must look like, especially in light of constitutionally entrenched principles of judicial independence and the existing standards in the Complaint Procedures.

52. The interpretation of s.63(1) advanced by this intervener is consistent with policy concerns and constitutional considerations. It is well established that statutes must be read in conformity with the Constitution. The interpretation that protects constitutionally enshrined rights and principles is to be preferred.[21]

53. To respect judicial independence, the Executive and Council must establish objective conditions and guarantees that respect the separation of powers and safeguard the reputations of members of the judiciary against the negative publicity generated by unsubstantiated complaints. As stated by the Council on pp.12-13 of its 2001-02 *Annual Report*,

> The complaints process inevitably risks exposing judges to unjust accusations and unwarranted public questioning of their character. This is particularly so when a complaint that was made public by the complainant is later found to be baseless, and the finding is not given the same public prominence as the original accusation. Judges are not in a position to refute such accusations publicly, or act independently to protect themselves from what they see as damage to their reputations. ... A judge whose conduct is in question must be assured that the matter will be resolved as promptly and fairly as possible.

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[21] *R. v. Rube*, [1992] 3 S.C.R. 159 at 160.

> If a complainant has made his or her complaint public, in closing the file the Council will generally issue a news release or have a statement available in the event of media inquiries. As a protection for both the complainant and the judge, the Council will not make the fact of a complaint or its disposition public on its own initiative.

54. Once the Inquiry Committee process is commenced, the hearing is presumed to be public unless it is demonstrated that it should be private.[22] Under the Act the Minister may require the Inquiry Committee to be public.

55. The Association addresses the constitutionality of s.63(1) in a separate section and argues that the power to mandate an Inquiry Committee by the Executive, especially when the government is a frequent litigator, creates an apparent threat to judicial independence. For all of the reasons presented in that section, s.63(1) should be read in the manner proposed so that it complies with s.11(d) and the principles of judicial independence.

56. The interpretation of "inquiry" adopted by Council results in inefficiencies and unnecessary expenditures of the Council's resources. Where the complainant is an Attorney General who is (as in this case) the litigant involved in the trial at issue, there is a serious possibility that the Council will not have jurisdiction to hear the complaint. As stated in the 2003-04 *Annual Report* of the Council:

> When dealing with complaints, the Canadian Judicial Council is concerned with the *conduct* and not the *decisions* of federally appointed judges. Decisions that may be wrong in law can be appealed to higher courts.[23]
>
> When a file is closed without seeking comment or conducting further investigation, typically the complainant is seeking directly or indirectly to have the judge's decision altered or reversed. Complainants frequently ask for a new trial or hearing, or for compensation as a result of an allegedly incorrect or "unlawful" decision.

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22 *Inquiries and Investigations By-Laws*, s.6.

23 p.10.

> The Council has no power to deal with these requests. The files are closed with a letter to the complainant, in most cases advising that the appropriate recourse, if any, is to appeal the decisions.[24]

57. To convene an Inquiry Committee to deal with a complaint about a decision of a judge, as opposed to the conduct of a judge, is an unnecessary misuse of the Council's time and resources.

58. The Council, by giving s.63(1) complaints a special status the statute does not require, has removed its discretion to screen out baseless complaints, to the detriment of individual judges and the judiciary as a whole.

59. The Inquiry Committee into Mr. Justice Jean-Guy Boilard of the Superior Court of Quebec (the "Boilard Inquiry") illustrates the problems that arise if s.63(1) requires the Council to convene an Inquiry Committee. In that case an individual made a complaint under s.63(2). The Chairman of the Council's Conduct Committee turned his mind to the relevant considerations and decided that as the complaint concerned judicial decision-making, it could not proceed. The safeguards under the Complaints Procedure were applied and the matter did not even reach the panel stage, let alone an Inquiry Committee. When a substantially similar complaint was made by the Attorney General of Quebec, the Council considered itself bound to establish a full and public Inquiry Committee.[25]

60. The Council ultimately rejected the recommendations of the Inquiry Committee that heard the Boilard Inquiry. The Council found that the Attorney General, in its request under s.63(1), did not allege misconduct, but simply "was expressing disagreement with, or at least concern about, the rationale for the decision itself".[26]

61. Independent counsel recommended to the Inquiry Committee that the Attorney General's complaint should be dismissed on a preliminary basis, prior to a full hearing, because the request did not arise in relation to judicial conduct. This

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24 p.13.

25 *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 19, 2003, p.1

26 *Ibid.*, p.2.

recommendation was not accepted by the Inquiry Committee. The Council, upon reviewing the Inquiry Committee's report, agreed with the recommendation and held:

> In the view of the Council, the decision by Mr. Justice Boilard to recuse himself was made by him in his capacity as a judge sitting in a judicial proceeding and is a "discretionary judicial decision". When acting in the course of judicial duties, a judge is presumed, unless the contrary is demonstrated, to have acted in good faith and with due and proper consideration of the issues before him or her.[27]

62. The Council then pronounced that in similar circumstances, the Inquiry Committee should decline to deal with the matter further "on the basis that the nature of the request for the inquiry and the essential evidence is so lacking in proof of misconduct that there is no reason to continue the inquiry".[28]

63. Rather than authorizing the Inquiry Committee to dismiss a complaint made by the Executive at that late and public stage, it is preferable from both a policy and constitutional perspective to allow such an "inquiry" to be screened out at the preliminary stages according to the Complaints Procedures. The reading of s.63(1) proposed by this intervener better serves this purpose.

64. It might be argued that the word "inquiry", because it is used alone in s.63(1), while the word "investigation" is used alone in s.63(2), must mean something different than "investigation". On its face s.63(2) gives the Council the power to investigate: it provides a statutory grant of authority to a new body, much like s.63(4), which may or may not be invoked in any given case. The Council has not drawn a distinction between the two words and implementing the *Judges Act* does not require such a distinction. Use of two separate words may allow the Council to devise two separate procedures if it deems appropriate, but using two different words does not make an "inquiry" mandatory under s.63(1).

65. Section 63(4), which gives the Council or the Inquiry Committee powers to summon witnesses and documents, is not inconsistent with this proposed

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27 *Ibid.*, p.3.
28 *Ibid.*, p.3.

reading. First, s.63(4) provides powers to be used by Council or an Inquiry Committee as needed. Second, the Inquiry Committee can make an inquiry, without an inquiry being the same thing as an Inquiry Committee.

IV. IF SECTION 63(1) MANDATES AN INQUIRY COMMITTEE IT IS UNCONSITITUTIONAL

1. *Section 63(1) Infringes Judicial Independence*

A. The Source, Role, Purpose And Requirements Of Judicial Independence

66. The Supreme Court of Canada has stated on many occasions that judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law.[29] Judicial independence is accepted as "one of the pillars upon which our constitutional democracy rests",[30] and as a principle that exists at the highest level of the legal hierarchy.[31]

67. The fundamental purposes of judicial independence are to promote public confidence in the integrity of the justice system and to ensure the proper separation of power between the judiciary, the executive and the legislature.[32] The courts are, in the words of Chief Justice Dickson, the "protector of the Constitution and the fundamental values embodied in it". To carry out this sacrosanct function the judiciary requires a corresponding measure of

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29 *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 (hereinafter "Beauregard") at p. 70.

30 A.G. Alberta [2003] 1 S.C.R. 857 [hereinafter *Ell*] at para.19. The *Ell* case can be distinguished on it facts. Alberta sought to enhance the values behind the principle of judicial independence by increasing educational and experiential requirements for justices of the peace. The Supreme Court said it was influenced by the fact that Alberta was implementing the recommendations of the Judicial Council, Alberta sought to encourage public confidence in the judiciary and improve the quality of justice in the province, the proposed changes were amply demonstrated to have great merit and to respond to a pressing need,(39) each change was clearly designed to improve the independence and qualifications of Alberta's justices of the peace.(41), the changes removed conflicts of interest; the change was made by legislation and did not involve executive action and the Court believed Alberta was acting in good faith. A reasonable and informed person would perceive the amendments to strengthen the qualifications and independence of Alberta's justices of the peace, and that changes to the office are necessary to serve the public good by advancing the underlying principles of judicial independence.(53)

31 *Mackin*, *supra*, para.38.

32 *Valente* v. *The Queen*, [1985] 2 S.C.R. 673 [hereinafter *Valente*] at p.689; *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3 [hereinafter *Therrien*] at pp.47, 50, 74-76, paras. 60, 68, 108-112 [AA Vol. I, Tab 29 (para.68); *Mackin* v. *New Brunswick (Minister of Finance)*, 2002 SCC 13 [hereinafter *Mackin*] at para.34

independence. Such independence is vested in the individual arbiters and the institution itself, both of which must be immune from any manner of intrusion from executive and legislative branches.[33]

68. Section 11(d) of the Charter contains an express guarantee of judicial independence and is proof of the existence of a general principle of judicial independence.

69. In the *P.E.I. Reference*, the Supreme Court held that judicial independence is also an unwritten constitutional principle recognized and affirmed by the preamble to the *Constitution Act*, 1867.[34] The preamble articulates the political theory which the Act embodies and expresses its underlying logic and organizing principles.[35] The preamble is given effect under s.52(2), extends judicial independence to all courts, and can be used to fill gaps in the express terms of the constitutional text.[36]

70. A court or tribunal must be reasonably perceived as independent, as well as impartial. As the goal of judicial independence is the maintenance of public confidence in the impartiality of the judiciary, there must be both the reality and reasonable perception of independence. Certain objective conditions and guarantees are necessary to ensure a reasonable perception of judicial independence.[37]

71. Given that judicial independence is a right of the public, it is the perception of a reasonable and informed person which governs whether there has been an infringement. In *Mackin*, the Supreme Court summarized the general test for judicial independence in this way:

> The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status ... Emphasis is

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33 *Beaugregard* at 70 and 73; and *Valente* at 685.
34 Para 83 and 109.
35 Para 95 and 104.
36 *Ibid.*
37 *P.E.I. Reference*, supra at pp 79-80, para 113.

> placed on the existence of an independent status, because 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.[38]

72. Judicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge, and the latter to the independence of the court in which the judge is a member. Each dimension depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by the executive.

73. In *Beauregard*, the Supreme Court, in discussing the concept that judicial independence involves both individual and institutional relationships, stated:

> The rationale for this two-pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it - rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.[39]

74. The three core characteristics of judicial independence are security of tenure, financial security, and administrative independence.

75. The heart of security of tenure is protection against removal from office other than for cause. "Cause" has a specific meaning: it is tied to the capacity to

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38 para. 38.

39 p.70.

perform judicial functions and requires an independent review at which the individual affected is given a full opportunity to be heard.[40]

76. In *Valente,* the Supreme Court stated that security of tenure is the first of the essential conditions of judicial independence. LeDain, J. said:

> ...Security of tenure, because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for the purpose of s.11(d) of the *Charter*.[41]

77. The essential conditions of security of tenure are:

> The essence of security of tenure for purposes of s.11(d) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.[42]

78. In *Valente,* the Supreme Court made it clear that the s.11(d) guarantee is premised on the existence of a set of objective conditions or guarantees which are necessary to ensure the reasonable perception of independence. Perceptions are to be judged against the standard of a reasonable and right-minded person, applying themselves to the question and obtaining thereon the required information. In essence, the test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude.

79. The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s.99 of the *Constitution Act, 1867*. In *Ell* the Supreme Court commented that "this level of tenure reflects the historical and modern position of superior courts

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40 Valente, supra, p.698; *R.* v. *Genereux*, [1992] 1 S.C.R. 259, at pp.285-286; *P.E.I. Reference, supra*, pp.80-81, para.115; *Therrien*, *supra*, pp.49-51, paras.66-68.

41 Valente, supra, p.694.

42 *Valente, supra* at p.698.

as the core of Canada's judicial structure and as the central guardians of the rule of law".[43]

B. The Unique and Important Role Played by Bodies that Receive Complaints Against Judges

80. The Supreme Court has recognized that bodies that receive complaints about judges serve an important and unique function.[44]

81. In *Moreau-Bérubé* v. *New Brunswick (Judicial Council)* the Supreme Court considered the status and relationship between the report of an Inquiry Panel and the Judicial Council established for provincial court judges under the relevant *Provincial Court Act*. At issue were comments made by the judge about residents of the Acadian Peninsula while presiding over a sentence hearing. The Inquiry Panel found misconduct but did not recommend removal. The Council, which was required to make a decision based on the findings contained in the Panel's report, recommended removal. The case turned on the applicable standard of review and the Court decided that a high degree of deference should be afforded to decisions of the Judicial Council.

82. While this decision, and others concerning disciplinary process for provincial court judges, do not address the proper interpretation or constitutionality of s.63 of the *Judges Act*, the Supreme Court provides guidance on the nature of the judicial role, the goals and consequences of disciplinary proceedings, the distinction between judicial conduct and judicial reasoning and the constitutional requirement of an independent judiciary.

83. In relation to the role of the judge, the reasonable person understands that:

> From the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.
>
> The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their

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43 *Ell, supra* at para.31.

44 *Moreau-Bérubé* v. *New Brunswick(Judicial Council)*, [2001] 1 S.C.R. 249; *Re Therrien*

> oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them...[45]

84. The acknowledged tension between judicial accountability and judicial independence means that the process for removing judges has two goals which may conflict. First, the Council contributes to public confidence in the judiciary when it reviews conduct of judges that may threaten judicial integrity. Second, the constitutional imperative of judicial independence must be respected and this includes: "security of tenure and the freedom to speak and deliver judgement free from external pressures and influences of any kind".[46]

85. The Inquiry Committee is called upon to balance the ethical process and the principles of judicial independence. In *Therrien* the Supreme Court considered whether a government is bound by the findings and recommendation of a judicial body concerning the removal of a Provincial Court Judge.[47] It said "the Committee of Inquiry is responsible for preserving the integrity of the whole of the Judiciary" and recognized that "the constitutional considerations that apply when a Judge is reprimanded are not as significant as when his or her appointment may be revoked by the executive". It addressed the issue in this way: "We must consider whether the judicial function is genuinely secure against any discretionary interference by the executive or other appointing authority, as required by *Valente*".[48] The Court said the Canadian Constitution protects the security of tenure of members of the judiciary by ensuring that they are protected against any arbitrary interference by the executive and noted that a review of the actions of the Judge, in his or her capacity as a Judge, involved a high risk of interference by the executive in the performance of his or her judicial functions and raises questions about the independence of the judiciary.[49]

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45 *Moreau-Bérubé* at para 59

46 *Moreau-Bérubé, supra* at para 46; see also *R.* v. *Lippé,* [1991] 2 S.C.R. 114; *Beauregard* v. *Canada*, [1986] 2 S.C.R. 56

47 *Therrien*, *supra* at para 72.

48 (No. 2) p.698.

49 *Ibid.*, at para. 149.

86. The constitutional requirement of judicial independence attaches to each and every stage of the process employed to recommend the removal of judges: the Inquiry Committee as well as the commencement of an inquiry. The start of the process leading to an Inquiry Committee and potentially beyond is of crucial constitutional significance as it may affect the effectiveness of an individual judge and public confidence in the judicial system.

C. Section 63(1) Offends the Constitutional Guarantees of Judicial Independence

87. If s.63(1) is read as conferring the power on the Minister and Attorneys General to direct that an Inquiry Committee be established by request alone then the individual and institutional dimensions of security of tenure guaranteed under s.11(d) and the preamble are infringed.

88. Removal of a judge and the threat of removal go to the core of security of tenure. Section 63(1) offends s.11(d) and the guarantee of judicial independence because it allows the executive to interfere with a judge's security of tenure in a discretionary and arbitrary manner. On its face, the objective conditions and guarantees of judicial independence are lacking. In purpose and effect it creates a reasonable perception that the tenure of judges is not genuinely secured. A reasonable person, fully informed of the relevant context, could only conclude that the public's right to an independent judiciary is unnecessarily and unjustifiably impaired. Section 63(1) lacks the objective legal guarantees that would confirm the necessary independent status and openly communicate the independence of the courts to the public.

i. Section 63(1) Confers a Special, Powerful and Absolute Discretion

89. Section 63(1) confers a special, powerful and absolute discretion on the Minister and Attorneys General, which is unavailable to all others who may have concerns with judicial conduct. This wide discretion is extended further in the case of the Minister, who may also determine if the Inquiry Committee will be public (s.63(6)) and may designate members to sit on the Committee(s.63(3)).

90. The Council determined that a multi-staged review and screening process best respected the need to ensure judicial independence. The underlying purpose of a staged process is to provide safeguards against claims that would not lead to the removal of the judge.

91. Under the Complaints Procedures there are multiple opportunities to determine if an Inquiry Committee is warranted and multiple opportunities to obtain full information on which to make that determination. By the time a matter is the subject of an Inquiry Committee it has gone through numerous levels of screening and it has been determined that the allegation or complaint relates to judicial conduct, is not trivial or vexatious, is not clearly irrational or an obvious abuse of process, is not made for an improper purpose, is not manifestly without substance, warrants further consideration, has merit, and is serious enough to warrant removal.

92. The judge has been given the opportunity to respond and explain his or her behaviour. There is also the opportunity for the judge to acknowledge that his or her conduct was inappropriate and the Chairperson may be of the view that no further measures should be taken. There is a process of peer review and a series of inquiries, including the possibility of hiring counsel to investigate and prepare a report, that escalate in terms of the information required and the procedural protections afforded.

93. Before an Inquiry Committee is struck, the review is internal, as is appropriate with an essentially self regulating body. All stages of the process before the Inquiry Committee are not made public by Council because there are acute and accurate concerns with how public knowledge of a complaint may impact negatively on the effectiveness of an individual judge and the integrity of the judiciary as a whole. As stated in the 1997-98 *Annual Report* of the Council at pp.12-13:

> These requirements are closely related to the need for openness in the Council's complaints process. Professor Friedland proposed various alternatives for making the process more visible, including the preparation of case summaries for public view. He

> acknowledged, however, that enhancing the visibility of the process would require considerable care because an unfounded allegation of impropriety against a judge could have serious consequences in terms of his or her credibility. It would be unfair for the Council to publicize unfounded complaints that have not gone on to a hearing, he concluded. Summaries should avoid this unfairness.
>
> The Council accepted this recommendation and announced on May 8, 1997, that summaries of closed complaint files would be made available at the Council office in Ottawa, starting as of April 1997. The summaries provide a brief description of each complaint and its disposition. They do not include the names of the judges or complainants, the legal proceeding, court or province involved.
>
> If a complainant has made his or her complaint public, in closing the file the Council will generally issue a news release or have a statement available in the event of media inquiries. The Council will not make the fact of a complaint or its disposition public at its own initiative.

94. Section 63(1) allows the Minister and Attorneys General to insert their request far into the process and thereby circumvent the numerous safeguards established and required to protect judicial independence in removal proceedings. Their discretion allows them to directly indict to the Inquiry Committee stage. This discretion exists outside the carefully tailored system of checks and balances in the Council's multi-tiered complaints process, and effectively replaces peer review with executive fiat.

95. Although the discretion under s.63(1) has significant consequences, it is not constrained by any threshold requirements and remains absolute and unfettered. The Minister or Attorneys General get an Inquiry Committee merely because they ask, without regard to the facts, the nature of the judicial activity complained of, the information before them and what may otherwise be available, the reason they want one, whether any legal errors have been corrected on appeal, and the response of the judge or the assessment of his or her peers.

96. The statistics available concerning the number, origin and outcome of Inquiry Committees demonstrate the exceptional nature of the discretion conferred by s.63(1). The Canadian Judicial Council reports that since its inception in 1971

there have been six Inquiry Committees established under s.63(1) and six Inquiry Committees under s.63(2).[50]

97. The Council has received an average of 131 complaints per year since it began publishing annual reports in 1987/88, and in the last 10 years has received an average of 171 complaints per year[51]. The Council screened well over two thousand complaints to yield six cases of sufficient seriousness to merit an Inquiry Committee. The Minister and Attorneys General mandated the same number by request alone.

98. Any argument that s.63(1) is somehow reserved for the most serious cases is not supported by the facts. Since the Council was created in 1971 it has only recommended removal of a judge once, on September 20, 1996 in the case of Justice Jean Bienvenue, who resigned before the matter went before Parliament,[52] and this Inquiry was commenced under s.63(2).

99. Independent Counsel reports that on two occasions an Attorney General has chosen to make a complaint under s.63(2) rather than invoke s.63(1).[53] This gives rise to the following observations. First, the executive has two avenues open to it in determining how to proceed: meaning that not only is s.63(1) discretionary, it is optional. Second, the multi-staged complaints process works effectively and protects the public interest when the executive avails itself of this avenue. Third, the statute provides no principled basis on which to decide when a particular avenue should be selected. A Minister or Attorney General chooses s.63(1) and is free to choose s.63(1) knowing that it avoids the safeguards and protections of the screening process and embroils the individual judge directly in the public Inquiry Committee process.

100. Not only is this discretion special, powerful and absolute it is the same discretion which the Minister exercises in relation to civil servants under s.69 of the *Judges Act*. It states:

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50 Media announcement Ottawa 27th April, 2004 from the Canadian Judicial Council.
51 Annual Reports of the Canadian Judicial Council.
52 Inquiry Committee Report concerning Mr. Justice Jean Guy Boilard at p.49, para.110.
53 Para. 56 of the Factum of Independent Counsel

> 69. (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than
>
> (*a*) a judge of a superior court, or
>
> (*b*) a person to whom section 48 of the *Parliament of Canada Act* applies,
>
> should be removed from office for any of the reasons set out in paragraphs 65(2)(*a*) to (*d*)...

101. Treating the removal of a judge the same as the dismissal of a government employee creates the impression that judges are being treated the same as civil servants, contrary to the first condition of their independence, being security of tenure.

ii. Section 63(1) Allows Arbitrary Interference by the Executive

102. Section 63(1) also confers an arbitrary power on the executive to interfere with security of tenure. A reasonable person would perceive that the objective conditions required for judicial independence are absent because:

i. the Executive mandates the process for an independent judiciary

ii. the ability to mandate an Inquiry Committee is so much more than is necessary for the Executive to protect the public interest;

iii. there is no mechanism to screen out requests that do not concern judicial conduct;

iv. there is no mechanism to screen out requests which clearly fail to meet the test established for the removal of judges.

iii. The Executive Mandates the Process for an Independent Judiciary

103. The concept of peer review is important to judicial independence, and underlies the Supreme Court's observation in *Moreau-Bérubé* that in light of their functions, judicial discipline committees must be composed primarily of judges.[54] The Council must set its own procedure for a matter as integral to self-regulation and

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54 *Moreau-Bérubé, supra*, at para 47

independence as the removal of a judge from office. Such a power must include the ability to determine intake criteria and the routing of claims.

104. In *Therrien*, the Supreme Court cited the following quotation with approval:[55]

> if we take as our starting point the principle of judicial independence – and I emphasis the need for this starting point in our historical cultural and institutional context – I believe that it must be concluded that primary responsibility for the exercise of disciplinary authorities lies with Judge at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.

105. Interventions by the Executive into the disciplinary process of an essentially self-regulating branch of government strike at the core of independence and run counter to the stated objectives for establishing the Council. Section 63(1) allows the Executive to interfere by mandating how the Council will proceed and which matters will receive the attention of an Inquiry Committee. The ability to trigger the removal process at this level of review gives real disciplinary authority to the Executive. *Prima facie*, this power to compel and undermine the Council's ability to determine its own procedures and process and is at odds with judicial independence. Such interference with an impartial judiciary merits strict scrutiny.

iv. Mandated Inquiry Committees are not Required to Protect the Public Interest

106. The Association accepts that the Minister and Attorneys General may have a responsibility to act in the public interest and protect judicial integrity; the Minister also needs some access into the process which may lead to removal by the Governor General on address of the Senate and House of Commons.

107. However, that same public has a constitutionally entrenched right to an independent judiciary which is offended by the arbitrary interference allowed under s.63(1). The public does not need the protection of a mandated Inquiry Committee: the public interest is secured if the Minister or Attorneys General can require Council to undertake a fact finding and review process like the one established under the Complaints Process.

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[55] Professor H. P. Glenn in his article "Indépendance et dē ontologie Judiciaries (1995), 55 R. du B. 295 at 308, at para 57 of *Therrien*

v. No mechanism to screen out requests that do not concern judicial conduct

108. A crucial distinction exists between judicial conduct for which a judge can be held accountable and judicial decision making to which is attached the liberty of the judge to hear and decide cases free of external reproach. This distinction has immense constitutional significance.

109. In cases where the judge is acting in a judicial capacity, it is clear that "Judges should not fear that they may have to answer for their ideas they have expressed or for the words they have chosen".[56] The Supreme Court has stated:

> The judge's right to refuse to answer to the Executive or Legislative branches of government or their appointees as to how and why the judge derived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. ... Judicial immunity is central to the concept of judicial independence.[57]

110. The difference between judicial conduct and judicial decision making is also reflected in the difference making a claim or taking an appeal.

111. The Supreme Court said the appeal process is:

> Designed to correct errors in the original decision and set the course for the proper development of legal principles, the judge whose decision is under review is not called to account for it. He or she is not asked to explain, endorse or repudiate the decision or the statement which is called into question by the appeal, and the result of the appeal process suffices to deliver justice to those aggrieved by the error made by the judge of first instance. In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal.[58]

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56 *Ibid*., at para 57.
57 *Ibid*., at para 57
58 *Moreau-Bérubé, supra*, at para 58

112. In *Moreau-Bérubé*, the Supreme Court quoted from p.129 of the Friedland report, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: 1985), addressing the tension between judicial accountability and independence:[59]

> ...accountability could have an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.

113. The Canadian Judicial Council has extensive experience with this distinction. Its Complaints Procedures are designed to separate claims into their appropriate categories and complaints are specifically screened by the Chairperson to ensure they relate to judicial conduct. Annual reports from the Council demonstrate that much of its activity under s.63(2) concerns matters properly dealt with through the normal appeal process.

114. In *Moreau-Bérubé*, Arbour J. said[60]:

> I wish to stress at this point that judicial councils as well as reviewing courts must remain acutely alive to the high level of protection that applies to comments made by judges in the conduct of court proceedings.

115. The fatal constitutional flaw of s.63(1) is that it contains no mechanism to ensure that the Minister and Attorneys General remain acutely alive to this high level of protection or that Inquiry Committees are not mandated to scrutinize judicial reasoning.

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59 *Ibid*, at para. 43.
60 At para. 54

vi. No mechanism to screen out cases which cannot meet the standard for removal

116. The Supreme Court has articulated the standard to be used in assessing whether a judge should be removed from office. In *Therrien,* Gonthier J. stated at para.147 that:

> Before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system would be undermined, rendering the judge incapable of performing the duties of his office.

117. This high standard is consistent with, and based in part on, the constitutional guarantee of a secure judicial tenure. It recognizes that s.63 is not a disciplinary process in the larger sense of the term, but is rather a specific process with only one sanction: the removal of a judge. Under the Complaints Procedure a matter will only come before an Inquiry Committee if there is a reasonable prospect that this standard can be met. By contrast, s.63(1) gives to the executive the power to mandate an Inquiry Committee for any type or seriousness of judicial behaviour, even actions that fall well short of being manifestly and totally contrary to the impartiality, integrity and independence of the judiciary.

vii. The assessment of a reasonable person

118. When the objective conditions and guarantees of s.11(d) and the preamble are lacking there is the reasonable perception that judicial independence is infringed. The absence of the objective conditions of security of tenure presented above creates a situation in which the Executive could use, or could appear to use, the Inquiry Committee process itself as a form of discipline against a particular judge and/ or to influence the judiciary. In light of these failings a reasonable person would conclude that on its face and in its effects s.63(1) offends the objective conditions of judicial independence, is a discretionary and arbitrary interference with security of judges by the executive, and is inconsistent with the reality and perception of judicial independence.

119. The special privilege s.63(1) bestows on the Executive offends the separation of powers and is not required in the public interest. There is no evidence to support the need for such an extraordinary power.

120. The reasonable person perceives that the unique ability to call a judge before an Inquiry Committee is a power of great significance. It may operate as a *de facto* suspension from judicial duties and an intermediate sanction, all without peer review.

121. The insinuation of incapacity necessarily associated with an Inquiry Committee, carries grave and known consequences. In Parliamentary debates on the subject of the *Judges Act*, as early as 1971 the inadequacies of public hearings gave rise to the following comment:[61]

> It did not matter whether Mr. Justice Landreville, as he was then, was guilty as alleged or not. The mere fact that he was suspected made him guilty in the eyes of the community; and even if he had not been guilty, and he was guilty, his usefulness as a Judge was over. No matter whether the allegations against the Judge are correct or not, the mere fact that they have been brought forward would make that Judge suspect in the eyes of the public. Unless these hearings were in camera old grievances involving, perhaps lawyers and clients contending they had been unsatisfactorily treated could be brought up, thus impairing the usefulness of that Judge. Such a Judge would be tried by the newspapers in advance of the hearing, and because of our shortcoming as human beings we would tend to pre-judge the man, so, his value as an impartial Judge would be over.

122. In *Ruffo v. Conseil de la magistrature*, Sopinka J., in dissent, held that a complaint made by a Chief Judge of the Provincial Court of Quebec against one of its judges raised a reasonable apprehension of bias. He held at para. 121[62]:

> The purpose of the preliminary examination is to ensure that the complaint is well-founded (s.267 *CJA*). It is thus a stage which acts as a screening device to eliminate frivolous or unjustified complaints that do not require further inquiry. Clearly, a disciplinary inquiry is a traumatic ordeal for a judge; the stage of the preliminary examination thus gives the judiciary important protection.

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61 Mr. Peters *Hansard*, *Common Debates*, June 14, 1971 at 6683.

62 [1995] 4 S.C.R. 267

123. Sopinka J. noted that the pre-inquiry remedial action that can be taken often, on its own has the effect of holding the judiciary accountable. He stated at para. 124 that "a reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be faced with a loss of confidence on the part of the public and litigants".

124. Experience shows that the mere announcement of an Inquiry Committee often leads judges to step down temporarily from their judicial duties, whether voluntarily or at the request of their chief justice. The announcement of an Inquiry Committee creates an apprehension of a lack of trust in the ability of a judge to fulfil his or her judicial functions.

125. When the objective conditions of judicial independence are absent it does not matter that the power in s.63(1) has not, in the opinion of independent counsel, been employed in an improper manner.

126. The factum of the independent counsel states at para.62:

> While s.63(1) might afford an improperly-motivated attorney-general or Minister of Justice a potential means for an attempt to usurp judicial independence by causing inquiries to be struck when judges render decisions adverse to the Crown, one may presume that if s.63(1) should ever be abused in this matter, the Canadian Judicial Council has the ability and the will to sharply rebuff such an attempt and that the political cost to such an attorney-general will be high.

127. With respect, it is precisely the possibility of the interference and influence admitted in that passage that demonstrates the extent to which the necessary objective conditions and guarantees of judicial independence are lacking. This possibility grounds the perception of the reasonable person that judges are not genuinely secure if they can be forced to respond to an Inquiry Committee upon Executive request alone. It is not clear how the Council would have the ability to refuse to convene the Inquiry Committee if s.63(1) is read to require it. Nor is it clear that there will be political costs associated with the use of s.63(1): indeed there may be a political advantage to be gained by the Executive complaining about a judge who made an unpopular decision on a matter of public interest. In

any event it is the constitution, not political costs, which exists to ensure the separation of powers and the public's right to an independent judiciary.

128. A reasonable person would also conclude that, on its face and in its effect, s.63(1) creates, at a minimum, a reasonable perception that judicial independence is infringed.

129. The Intervener accepts the factum of Justice Cosgrove in its claim that s.63(1) impugns the reputational interests of judges and may have a chilling effect on judicial behaviour.

130. A reasonable person fully informed of the facts would know:

(a) Superior court justices are at the core of the judiciary and act as the protectors of the Constitution.

(b) The federal and provincial governments, including the Minister of Justice and the Attorneys General are frequent litigants before the courts, including the superior courts.

(c) Such litigation often involves the liberty of the subject or other matters of constitutional rights, where the individual is pitted against the state.

(d) The public needs impartial and independent judicial decision makers. A judge must have the full ability to apply the law to the facts without fear or favour. The judge must be free, and appear to be free, to make findings that either support or criticise state action.

(e) Errors in judicial decision making are properly remedied by appeal.

(f) Section 63(1) allows the Minister or Attorneys General to choose to circumvent the normal Complaints Procedures and proceed directly to an Inquiry Committee, without the numerous safeguards of that system.

(g) There is a known and obvious stigma associated with being the subject of an Inquiry Committee. Judges most often refrain from sitting pending the

determination of an Inquiry Committee and the announcement of an Inquiry Committee may itself lead to judicial ineffectiveness and reduced public confidence of the judiciary.

(h) Such stigma is intensified when it is understood that an Inquiry Committee is a serious process, far along in the complaint process and where the result is directed at the removal of a judge from office.

(i) Section 63(1) allows an unsuccessful government litigant to question issues which may go to the heart of judicial decision making without peer review and based on the government's view of whether it would like to see the judge removed for what he or she did.

131. When an Attorney General is a party to the litigation and the trial judge finds numerous breaches of the *Charter* rights of the accused, makes findings adverse to and comments negatively on the conduct of the Crown, and the Attorney General has a statutory right to force that judge to explain his or her reasoning and conduct in a public inquiry addressed to the question of whether that judge should be removed from office, there is a reasonable perception that the separation of powers may not be separate enough to ensure impartial justice.

132. Even when the government is not a party, the threat of immediate referral to the Inquiry Committee allowed by s.63(1) creates, at a minimum, the appearance that the executive has the ability to interfere with the judge's impartiality and independence.

133. Section 63(1) offends the objective conditions and guarantees of judicial independence and in purpose and effect creates in the mind of a reasonable person the apprehension that judicial security of tenure is infringed.

B. Section 63(1) is an Unjustified Restriction on a Judge's Right to Free Expression

134. The Association adopts the analysis of this issue in the factum of Justice Cosgrove.

V. REMEDY REQUESTED

135. The Association requests that s.63(1) be read in conformity with established principles of statutory interpretation and the Constitution with the result that under 63(1) the Council shall start a process of review when requested by the Minister and Attorneys General. This process would take place under the Complaints Procedure.

136. This result is obtained by a finding that the *Judges Act* should be read in this manner either on its own or to achieve constitutional compliance. Additionally, if s.63(1) is found to be unconstitutional there is the option of striking s.63(1) entirely or reading it down in this manner.

137. The Canadian Superior Courts Judges Association submits that the Inquiry Committee should answer the constitutional questions in the following way:

> 1. Is section 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1 of no force and effect pursuant to s.52 of the *Constitution Act, 1982* because it contravenes the principles of judicial independence inherent in the *Constitution Act, 1982* and the *Constitution Act, 1867*?
>
> Answer: Yes
>
> 2. Is section 63(1) of the *Judges Act*, R.S.C. 1985, c.J-1 of no force and effect pursuant to s.52 of the *Constitution Act, 1982* because it contravenes the right to freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: Yes, for the reasons provided by in the factum submitted by Justice Cosgrove.

All of which is respectfully submitted.

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Per: _____

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