In the matter of:

Canadian Judicial Council Inquiry of Justice Paul Cosgrove

Reply Factum of Justice Paul Cosgrove

(Motion for Declaration of Invalidity of s. 63(1) of *Judges Act*)

1. Justice Cosgrove supports and adopts the submissions made by the Canadian Superior Court Judges' Association, and by the Criminal Lawyers' Association/Canadian Council of Criminal Defence Lawyers.

Constitutional Foundation of Judicial Independence in Canada

2. At paragraph 39 of its factum the Independent Counsel submits that ss. 96, 99 and 100 of the *Constitution Act, 1867* "provide a code governing the constitutional status of superior court judges". While these provisions are obviously an important foundation for the constitutional protections enjoyed by the judiciary, it is incorrect to consider them to be anything approaching a complete code. In *Valente*, the Supreme Court of Canada identified the *Canadian Charter of Rights and Freedoms* as an important source of a constitutional foundation for judicial independence. In addition, in the *PEI Reference*, the Supreme Court of Canada was clear:

> **Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the Constitution Act, 1867, I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867.**
>
> **....**

> **In conclusion, the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.**
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> ***P.E.I. Reference re: Remuneration of Provincial Court Judges ("PEI Reference")*, [1997] 3 S.C.R. 3, at para. 83, 109 (IC Authorities, Vol. 2, Tab 15)**

Content of the Principle of Judicial Independence

3. At paragraphs 50 and 51 of its factum the Independent Counsel agrees that there is now a constitutional requirement for a judicial determination of incapacity prior to the invocation of s. 99 of the *Constitution Act, 1867*. Both the Attorney General of Ontario and the Minister of Justice disagree. Justice Cosgrove relies on the submissions contained in his main factum and in the facta of the Canadian Superior Court Judges Association and the Criminal Lawyers Association. Justice Cosgrove also submits that there is ample judicial recognition of two fundamental propositions implicit in Justice Cosgrove's position regarding the scope of the constitutional protection of judicial independence, in particular:

   a. First, modern jurisprudence has expanded the scope of the constitutional protection of independence, for example to extend its reach to the protection of justices of the peace:

> **Historically, the principle of judicial independence was confined to superior courts. As a result of the expansion of judicial duties beyond that realm, it is now accepted that all courts fall within the principle's embrace. See *Provincial Court Judges Reference, supra,* at para. 106:**
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> > **…our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act*, *1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.**
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> **The scope of the unwritten principle of independence must be interpreted in accordance with its underlying purposes…..**

***Alberta v. Ell*, [2003] 1 SCR 857, at para. 20 (CSCJA Authorities, Vol. 2, Tab 23)**

b. Secondly, modern jurisprudence recognizes that the constitutional protection of judicial independence will sometimes require the establishment of institutional mechanisms to provide objective legal guarantees of independence. For example, in *Mackin* the Supreme Court of Canada recognized that the legislative attempt by the government of New Brunswick to reorganize the structure of the provincial courts was a "perfectly legitimate purpose" however, it found the legislation to be unconstitutional because it did not provide for an "independent, effective and objective" commission to review the impact on judicial remuneration.

> **In short, I consider the opinion stated by this Court in the *Provincial Court Judges Reference, supra,* requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary on the one hand, and the executive and legislative branches on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. (emphasis in original)**
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> ***Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 at para. 69, 70 (CSCJA Authorities, Vol. 2, Tab 24)**

4. Given the obligation recognized in *Valente* and *Therrien* for there to be a judicial determination of incapacity prior to the removal of a provincial court judge, it is very difficult to understand how superior court judges would not be entitled to a similar "institutional filter" as an aspect of the constitutional guarantee of the judicial independence. It is submitted that this is precisely the sort of "institutionalization" through appropriate "legal mechanisms" referenced by the Supreme Court of Canada as being necessary to ensure that the essential characteristics of judicial independence be protected and be seen to be protected:

> **40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente, supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general perception of the court's independence. Moreover, these three characteristics must also be seen to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. *Thus, each of them must be institutionalized through appropriate legal mechanisms*. (emphasis added)**
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> ***Mackin v. New Brunswick (Minister of Finance)*, *supra* at para. 40 (CSCJA Authorities, Vol. 2, Tab 24)**

5. At paragraph 53 of its factum the Independent Counsel submits that a corollary of the position advanced by Justice Cosgrove in this case is that the process followed in the *Landreville* case was constitutionally deficient. Although it is not necessary for this Inquiry Committee to comment on prior cases, it is submitted that the process undertaken in *Landreville* could not survive an analysis based on a modern understanding of judicial independence. It is not insignificant that the *Landreville* process was subject to significant criticism, both at the time and subsequently. The report of Justice Rand was ultimately quashed by the court because the process used was fundamentally unfair to the Judge Landreville.

> **Friedland, *A Place Apart, supra,* p. 86-87 (Cosgrove Authorities, Tab 1)**
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> ***Landreville v. Canada* [1977] 2 F.C. 726**

6. Professor Freidland notes that the perceived deficiencies of the process used in *Landreville* was one of the major reasons for the creation of the CJC in 1971:

> **There is no doubt that the awkwardness and uncertainty of the Landreville proceeding was a factor motivating Parliament to adopt this new procedure, although there were surprisingly few specific references to Landreville in the debates. Still, it must have been in the parliamentarians' minds. As Peter Russell states: "The Rand Inquiry in the Landreville case did not provide an impressive precedent for the use of a single judge-royal commission in removal proceedings….The**

> **creation of the Canadian Judical Council in 1971 and the statutory role it now has in the removal process is a distinct improvement over the one judge ad-hoc inquiry." One of the chief justices actively involved in the setting up of the Council referred to the "awful fiasco" of the single commissioner approach in Landreville. And John Turner, the then minister of justice, later stated in an interview:**
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> > **We felt that after the *Landreville* case it was a better vehicle for the self discipline of the Bench that the *Inquiries Act*. And a lot of these matters could be handled more discreetly at an earlier stage by the judges themselves with the [Council] than allowing an issue to deteriorate and then go public under the *Inquires Act.***
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> **Friedland, *A Place Apart*, *supra,* at p. 88 (Cosgrove Authorities, Tab 1)**

7. The comments of then Minister Turner are not insignificant, as they reflect a concern at the time for the very mischief identified by Justice Cosgrove in this case: the damage caused to the judiciary by premature publication of untested allegations of improper conduct.

8. On the other hand, there can be no presumption that Parliament's response in 1971 to this identified problem properly accounted for the full range of constitutional protections on judicial independence that are recognized today. Obviously, Parliament could not have anticipated subsequent developments, including the adoption of the *Canadian Charter of Rights and Freedoms*, as well as the various judicial pronouncements contained in *Valente*, the *PEI Reference* and their progeny.

9. At paragraph 54 of its factum, the Independent Counsel submits that Justice Cosgrove's position appears to assume that the procedure set out in s. 63(2) of the *Judges Act* is constitutionally mandated, and that it would be a serious step for this Inquiry Committee to "constitutionalize" one provision of the *Judges Act* while, at the same time striking down another provision. This submission does not accurately reflect Judge Cosgrove's position.

10. Justice Cosgrove recognizes that the *Judges Act* is an ordinary statute. It is subject to repeal or amendment by Parliament. However, like all government action, such action must be consistent with the fundamental law of Canada: the Constitution. It is Justice Cosgrove's position that the constitutional guarantees of judicial independence require that there be a judicial assessment of a complaint of judicial misconduct, and a determination by that process that the matter could potentially warrant removal prior to a public inquiry into the matter. So long as these minimum conditions are satisfied, Parliament can devise whatever processes, structures and mechanisms that it deems appropriate. This is precisely the approach recognized by the Supreme Court of Canada in *PEI Reference* when it found that independent, effective and objective commissions to determine judicial remuneration were a constitutionally guaranteed aspect of judicial independence:

> **167. I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the Constitution Act, 1867. This is one reason why we held in *Valente*, supra, at p. 694, that "[t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".**
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> ***PEI Reference, supra,* at para. 167 (IC Authorities, Vol. 2, Tab 15)**

11. There is nothing novel in the approach to the constitutional review of s. 63(1) proposed in this case. Just one example is the approach taken by the Supreme Court of Canada to the execution of search warrants in lawyers' offices undertaken in the *Lavallee* case. In that case, the Court was called upon to consider detailed provisions of the *Criminal Code* which set out a mechanism of how such searches were to be conducted. The Court determined that some of the provisions were consistent with (and arguably required by) s. 8 of the *Charter*, and others were not. In considering the appropriate remedy, the Court stated:

> **Some of the procedural shortcomings of s. 488.1 could be addressed by such techniques as severance or reading in. For instance, s. 488.1(4)(*b*) could be severed from the rest of the section, thus removing the offensive provision permitting the Attorney General to inspect documents that may be privileged. Section 488.1(3)(*a*) could be read to include after the words "within fourteen days" and "not later than twenty-one days" the expression: "or such time as the court deems appropriate". However, these are not at the heart of the constitutional infirmity of the provision. The need to ensure that privilege holders are given a genuine opportunity to enforce the protection of their confidential communications to their lawyers, at the time when they need the protection of the law the most, cannot easily be met by a judicial redrafting of the provision. Neither can the need to ensure that the courts are given enough flexibility and discretion to remain the protectors of constitutional rights and the guardians of the law. In my view, the process for seizing documents in the possession of a lawyer is indeed a delicate matter, which presents some procedural options that are best left to Parliament. It also requires that legislation be carefully drafted. This Court is not asked to rewrite s. 488.1, nor am I inclined to do so. Rather, I think the proper course of action is to declare s. 488.1 unconstitutional and strike it down pursuant to s. 52 of the *Constitution Act, 1982.* As Côté J.A. properly observed in *Lavallee*, *supra*, at para. 105: "There is doubtless more than one constitutional way to legislate to alleviate the legitimate concerns of the police, of lawyers, and of their clients, over privilege claims during searches. Parliament should be allowed to choose that way which it thinks most apt." However, Parliament's prerogative to legislate anew in this area of criminal law enforcement would be better exercised, in my view, with the benefit of further consultation with those charged or affected by its interpretation and application.**
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> ***Lavallee v. Canada (Attorney General)*** **[2002] 2 SCR 209, at para. 48**

12. As in *Lavallee*, (and for that matter, the *PEI Reference* and *Mackin*) Justice Cosgrove submits that the Constitution requires that certain mechanisms be followed. Ultimately, it is up to Parliament to craft those mechanisms, in accordance with Constitutional requirements. Justice Cosgrove submits that the s. 63(2) process does meet the minimum Constitutional standards. Justice Cosgrove recognizes, however, that Parliament can revise and re-craft that mechanism, so long as it continues to respect those minimum Constitutional standards.

13. At paragraph 69 of its factum the Attorney General of Ontario submits that the effect of this application would be a declaration that s. 99(1) of the *Constitution Act, 1867* is itself deficient. Justice Cosgrove disagrees. There

is no dispute that the text of ss 96-100 of the *Constitution Act, 1867* does not constitute an exhaustive code of the constitution protection for judicial independence. Justice Cosgrove does not suggest that Parliament lacks the authority to remove a superior court judge pursuant to s. 99. Justice Cosgrove simply asserts Parliament's authority must be read together with protections created by other aspects of the Constitution. Justice Cosgrove submits that read together, the procedural protections sought herein should be recognized.

14. At paragraphs 56 – 62 of its factum the Independent Counsel submits that, notwithstanding the constitutional requirement for a judicial determination of incapacity prior to a recommendation for removal to Parliament, there is no constitutional requirement for a judicial assessment of the complaint prior to a public inquiry, for the following four reasons:

    a. Section 63(1) has only been invoked rarely;

    b. The role of the Inquiry Committee is investigative, not adjudicative, and is subject to review by the CJC as a whole;

    c. Neither the Inquiry Committee nor the CJC as a whole has the power to "impose any form of sanction" on a judge, and any decision they make is not determinative of the question of removal;

    d. An inquiry commenced pursuant to s. 63(1) need not be a public one.

    It is submitted that none of these propositions addresses the fundamental harm asserted by Justice Cosgrove in this case.

15. The frequency with which s. 63(1) has been invoked is irrelevant to its constitutional validity. If anything, this may explain why the constitutionality of the provision has not been previously tested. As noted in Justice Cosgrove's main factum, the fact that Attorneys General have previously used the mechanism prescribed by s. 63(2) does not support the constitutionality of s.

63(1) but rather confirms that the s. 63(2) process is viable and adequate to address the government's valid concerns with respect to judicial accountability, and that s. 63(1) serves no valid governmental purpose.

16. Justice Cosgrove agrees that the function of the Inquiry Committee is primarily investigative. However, in discharging its function to make recommendations to the CJC as a whole, the Inquiry Committee is clearly also undertaking an adjudicative function, as it is called upon not only to find facts regarding a judge's conduct, but also to assess those facts, together with the overall context, in order to determine whether a recommendation for removal is warranted.

17. Regardless of the classification of the Inquiry Committee's function, the Independent Counsel's submission entirely ignores the harm that Justice Cosgrove describes and relies upon, in particular:

    a. Adverse publicity surrounding the announcement of the inquiry prompting the need for Justice Cosgrove to be sidelined from active judicial duties until the inquiry has been concluded;

    b. Adverse publicity from the announcement of the inquiry and from its ongoing proceedings damaging the public credibility of the judge and undermining the ability of the judge to resume active duties, even where no recommendation for removal is ultimately made;

    c. Creation of the "chilling effect" in the minds of judges in cases where the Attorney General is a litigant before them;

    d. Creation of the perception in the minds of the public that they do not face a "level playing field" when they enter the court adverse in interest to the Attorney General.

It is submitted that each of these forms of harm is created, notwithstanding the fact that the Inquiry Committee makes no final determination with respect to the judge in question.

18. Justice Cosgrove recognizes that neither the Inquiry Committee nor the CJC as a whole has the power to remove a superior court judge. However, Justice Cosgrove submits that for the reasons summarized above, the harm arising from the public notoriety associated with this Inquiry is a form of sanction in and of itself. Justice Cosgrove recognizes that this harm is inevitable when a public inquiry into alleged judicial misconduct is to occur. However, his core submission is that it should only occur when it is absolutely necessary. That is achieved when the complaint has received a judicial assessment, and has been found to have sufficient merit and be sufficiently serious that it could potentially warrant removal.

19. Finally, the power of the Inquiry Committee to conduct the inquiry in private is no answer to the issues raised by Justice Cosgrove. First, it ignores the harm caused by the public announcement that this Inquiry was to be undertaken. Secondly, it ignores the important reason why inquiries *should* be conducted in public, and why an inquiry committee should be reluctant to go *in camera*. That is because judicial accountability is the necessary corollary to judicial independence. As in the case of other aspects of the justice system, just as important as the fact that justice is done, is the fact that it is seen to be done. It is this policy that is embedded in s. 6 (1) of the CJC By-law regarding inquires which provides that:

> **Any hearing of the Inquiry Committee shall be conducted in public unless, subject to s. 63(6) of the Act, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.**
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> ***Canadian Judicial Council Inquiries and Investigations By-laws*, s. 6(1) (IC Authorities, Vol. 3, Tab 38)**

20. Justice Cosgrove submits that the strong presumption in favour of public inquiries is entirely justified and appropriate where the matter in issue has already been judicially investigated and assessed (outside the public eye) and found to have sufficient merit and be sufficiently serious that it could potentially warrant removal. The fundamental problem with s. 63(1) of the *Judges Act* is that it collapses the investigatory stage into the inquiry stage and makes both of them public.

21. This shortcoming in s. 63(1) was specifically identified by Professor Friedland in *A Place Apart*:

> **The visibility of the process is also a matter that requires careful consideration. At the early stages of the process, there has to be a large measure of confidentiality. *An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing.* (One cannot prevent a complainant from going public.) There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. *No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage.* The new American Bar Association procedures maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers. And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken. (emphasis added)**
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> **Friedland, *A Place Apart*, *supra*, p. 134 (Cosgrove Authorities, Tab1)**

22. Neither the Independent Counsel, nor the Attorney General of Ontario nor the Minister of Justice has even attempted to answer the Professor Friedland's compelling analysis.

23. Contrary to the submission of the Independent Counsel, making the inquiry process a private one in order to protect judicial independence does not strike any balance. It would make the public interest in judicial accountability totally subservient to the interests of judicial independence. The appropriate balance is struck by retaining the presumption in favour of a public inquiry

process, but only after a prior judicial investigation and screening of the complaint.

Adequacy of Evidence with Respect to "Chilling Effect"

24. At paragraphs 80-82 of the factum the Attorney General of Ontario and paragraph 53 of the factum of the Minister of Justice it is submitted that the evidence filed by Justice Cosgrove regarding the alleged chilling effect of s. 63(1) is inadequate. Justice Cosgrove submits that the material filed by him does meet the judicially recognized requirements for evidence to demonstrate chilling effect. In *Falkiner v. Ontario (Minister of Community and Social Services)*, the Ontario Divisional Court described the factors to consider when assessing the adequacy of chilling effect evidence, specifically:

> **i. Is the subjective fear linked at all to the impugned provisions of the Act?**
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> **ii. Does the person with the fear know of the existence of the Act or the tenor of any of its provisions?**
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> **iii. Would the person have the same fear if the Act did not exist or if some of its provisions were struck down?**
>
> **iv. Is the fear reasonable?**
>
> **v. How does the evidence connect the subjective fear (if it is related to the impugned provisions) to the alleged *Charter* violations?**
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> ***Falkiner v. Ontario (Minister of Community and Social Services),* [2000] O.J. No. 2433 Ont. Div Ct. at para. 32, 43-45**

25. It is submitted that the evidence of Justice Cosgrove, and the Honourable James Chadwick, a respected former judge, clearly conforms to these requirements. Notably, neither was cross-examined on his affidavit.

26. It is interesting to note that on the appeal of the *Falkiner* decision to the Ontario Court of Appeal, that court confirmed the existence of the chilling effect, and noted that the existence of a chilling effect could also be inferred from the text of the impugned provision itself. In other the words, the court

can infer the reasonable consequences of the legislative enactment. In the instant case, it is submitted the inference of the chilling effect is abundantly clear.

> ***Falkiner v. Ontario (Minister of Community and Social Services)*, (2002) 59 O.R. (3d) 481, Ont. C.A. at para. 103**

27. Certainly, there has been academic commentary with respect to the chilling effect on the judiciary, caused both by the issue of unwarranted publicity, and by inadequate standards and procedures for judicial discipline:

> **The Judiciary as an institution, and individual judges in many countries, have been subjected to increased public criticism in recent years. The increasing popular pressure on judges creates continuous tension between judicial independence and public accountability of judges in a democracy. *Excessive popular pressure on judges, like too facile procedures and too malleable standards for judicial removal and discipline, might have a chilling effect on judicial independence. The tension between public accountability and judicial independence should be resolved by a careful exercise of judgment in order that the proper balance between these very important values be maintained.* (emphasis added)**
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> **S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in *Judicial Independence*, S. Shetreet and J. Deschenes, eds. (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers) 1985, at p. 657 (IC Authorities, Vol. 3, Tab 35)**

28. Finally, the existence of the potential for a "chilling effect" was recognized by Friedland in *A Place Apart*, as referred to at paragraph 80 of Justice Cosgrove's main factum. Professor Friedland's analysis of this issue was expressly adopted by the Supreme Court of Canada in *Moreau-Berube.*

> ***Moreau-Berube v. New Brunswick (Judicial Council)*, [2001] 1 SCR 249, at para. 44 (CSCJA Authorities, Vol. 2, Tab 29)**

29. The "proper balance" between the important values of public accountability for judicial integrity and judicial independence referred to by Professor Shetreet are achieved by the use of the s. 63(2) and a judicial assessment of the merit and seriousness of the allegations measured against the standard of removal. In *Moreau-Berube*, the Supreme Court of Canada specifically commented on

the unique ability of judicial councils to assess and maintain the delicate balance between judicial independence and judicial integrity:

> **As Gonthier J. made clear in *Therrien*, other judges may be the only people in the position to consider and weigh effectively all the applicable principles, *and evaluation by any other group would threaten the perception of an independent judiciary. A council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, must in my view attract in general a high degree of deference.***
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> ***Moreau-Berube v. New Brunswick (Judicial Council)*, [2001] 1 SCR 249, at para. 60 (CSCJA Authorities, Vol. 2, Tab 29)**

30. By contrast, s. 63(1) of the *Judges Act* is a blunt instrument which fails to effect the balancing of these two important values before the complaints made by the Attorney General take on a public life.

Role of the Attorney General as "Protector of the Public Interest"

31. Justice Cosgrove recognizes that the federal Minister of Justice and the provincial Attorneys General have certain responsibilities for the administration of justice in the Canadian system of government. However, it is submitted that those roles play no part in the determination of the constitutionality of s. 63(1) of the *Judges Act*.

32. There is no suggestion that the Minister of Justice or a provincial Attorney is exercising any form of prerogative when they request an inquiry pursuant to s. 63(1) of the *Judges Act*. To the contrary, the power is simply the exercise of statutory power, granted by Parliament. The scope of the power and the manner of its exercise, are those prescribed by the statute.

33. It is submitted that the Attorney General of Ontario and the Minister of Justice are mistaken if they are suggesting that either officer has any special

traditional or historical role (in the public interest or otherwise) in matters relating to the tenure of superior court judges.

34. With respect to the provincial Attorneys General, since *MacKeigan v. Hickman* there is grave doubt whether a province is constitutionally competent to even undertake an investigation of the conduct of superior court judges. More fundamentally, with respect to both the provincial and federal Attorneys General, under the *Constitution Act, 1867*, matters relating to the tenure of superior court judges are reserved to Parliament and not the Attorney General, however his office is characterized.

> ***MacKeigan v. Hickman*** **[1989] 2 SCR 796, per LaForest J., Wilson J. (IC Authorities, Vol.1, Tab 11)**

35. The power of the Attorneys General under s. 63(1) is purely statutory. Prior to 1971, the provincial Attorneys General had no role whatsoever to play in the examination of the conduct of superior court judges. Prior to 1971, the federal Minister of Justice would likely have, as a practical matter, initiated any s. 99 proceeding before Parliament. However, there is no legal basis why any other member of Parliament could not have performed that same function.

> **Friedland, *A Place Apart, supra,* p. 77 (Cosgrove Authorities, Tab1)**

36. Moreover, neither the Independent Counsel, nor the Attorney General of Ontario, nor the Minister of Justice offers any explanation whatsoever as to why the power of the Attorney General under s. 63(1) is required at all in order to protect any public interest. As submitted in Justice Cosgrove's main factum, requiring a complaint from an Attorney General to receive a judicial assessment prior to a public inquiry in no way derogates from the ability of the Attorney General to assert its authority in the public interest.

37. It is significant that neither the Independent Counsel, the Federal Minister of Justice nor the Attorney General of Ontario makes the submission (nor could it) that the obligation of the Attorney General to act "in the public interest" in exercising its powers under s. 63(1) is an adequate substitute for a judicial pre-screening process. As noted Justice Cosgrove's main factum, on only one occasion has the CJC determined that a matter referred to them pursuant to s. 63(1) warranted a recommendation for removal.

38. Certainly, the recent experience of Justice Boilard is a vivid example of the shortcomings of the s. 63 (1) process as an alternative mechanism for ensuring that a complaint is sufficiently meritorious and sufficiently serious that it could warrant removal. Contrary to the submissions of the Independent Counsel, in *Boilard*, both the Inquiry Committee and the CJC as a whole determined no recommendation for removal of the judge was warranted. In fact, the CJC as a whole went farther than the Inquiry Committee and concluded that the complaint did not even raise a *prima facie* case for removal. It is submitted that the *Boilard* complaint is a perfect example of a case where the judge was needlessly exposed to public allegations of misconduct, and a public examination of those allegations, in circumstances where the complaint should have, and would have been resolved by an adequate judicial pre-screening mechanism.

> ***Report to the CJC of the Inquiry Committee Appointed Pursuant to s. 63(1) of the Judges Act Concerning Justice Boilard*, August, 2003 (IC Authorities, Vol. 1, Tab 3)**

39. Interestingly, the Attorney General of Ontario relies (at paragraph 28 of its factum) on *Mackin v. New Brunswick (Judicial Council)*, for the proposition that the Attorney General of a province is an appropriate person to bring forward concerns with respect to the conduct of a provincial court judge. Justice Cosgrove agrees. However, the New Brunswick legislation that was at issue in *Mackin* was very different than s. 63(1) of the *Judges Act* and very

similar to the Ontario *Courts of Justice Act*. Specifically, under the New Brunswick *Provincial Court Act*, the Attorney General had no special power to require that an inquiry be undertaken. Rather, it had the same power as any other person to file a complaint with the judicial council which would be investigated. Only if the results of the investigation were such that the judicial council determined that a public inquiry was warranted would one be ordered. This is precisely the regime which is urged by Justice Cosgrove, and opposed by the Attorney General of Ontario.

***Mackin v. New Brunswick (Judicial Council)*, (1987) 44 DLR (4th) 730 NBCA**

Judicial Freedom of Expression and s. 2(b) of the *Charter*

40. At paragraph 67 of its factum the Independent Counsel submits that the s. 2(b) issue raised by Justice Cosgrove is redundant because it stands or falls on the same issues as the judicial independence argument. Certainly Justice Cosgrove agrees that the s. 2(b) *Charter* argument is in the alternative, and in addition to the judicial independence argument. As a result, if the judicial independence argument is successful, it may not be necessary to address this issue. However, the s. 2(b) argument is not redundant.

41. It is possible that the Inquiry Committee might conclude that, notwithstanding the adverse impact experienced by Justice Cosgrove directly, as well as the negative impact on the judiciary more generally, the ambit of the constitutional protection of judicial independence does not extend to providing a judicial pre-screening mechanism of complaints against judges. In that case, Justice Cosgrove submits that he, and other judges are protected against these same negative impacts by an independent (albeit complementary) constitutional protection contained in s. 2(b) of the *Charter*.

42. At paragraph 68 of its factum the Independent Counsel submits that expressive activities of judges *qua* judge are not protected by s. 2(b) of the Charter. The Minister of Justice makes similar submissions at paragraphs 64-72 of its factum. Justice Cosgrove disagrees. Implicit in the Independent Counsel's submission is a recognition that extra-judicial expressive activity *would* be protected by the *Charter*. It would be paradoxical indeed if extra-judicial expression were afforded greater constitutional protection than the expression of judges in their judicial capacity. That surely could not have been the intention of the framers of the Constitution.

43. Moreover, in *Osborne* the Supreme Court of Canada specifically considered a variety of submissions with respect to how the scope of s. 2(b) of the *Charter* should be limited. While recognizing that certain forms of speech (eg. violence and threats of violence) were outside scope of the protected freedom, the Court categorically rejected the notion that the scope of s. 2(b) was limited by the particular status of the holder of the right, specifically in that case, public servants.

> ***Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69, at p. 93 (IC Authorities, Vol. 2, Tab 13)**

44. At paragraph 69 of its factum the Independent Counsel submits that judicial speech "that takes place as part of the exercise of his power as a judge" is "conceptually very different" than the speech of ordinary individuals, and therefore outside the ambit of s. 2(b) protection. Whatever the differences between "judicial expression" and the expression of "ordinary individuals" the law recognizes at least one fundamentally important common element. In both cases, it is an anathema to a free society for the state to be permitted to impose sanctions on them for the content of their thoughts and expressive activities.

45. The literature and jurisprudence regarding judicial independence is replete with the recognition of the extraordinarily high value that is placed on the need to ensure that judges are protected from attempts by the state to impose sanctions based upon the content or result of their decisions. However, the existence of protection in one part of the Constitution is no reason for denying the protection of other applicable aspects of the Constitution.

46. At paragraph 72 of its factum the Independent Counsel submits that the "historical record" does not support the application of s. 2(b) to judges acting in their judicial capacity. Justice Cosgrove disagrees. The fact that judicial speech is protected by other constitutional provisions is no basis to limit the reach of s. 2(b). In *Valente*, the *PEI Reference* and other post-*Charter* judicial independence cases the Supreme Court of Canada has made it clear that the adoption of the *Charter* has supplemented and extended the pre-existing Constitutional bases for judicial independence.

47. Certainly Justice Cosgrove recognizes that the need for judicial decorum and impartiality will place very real practical limits on what is appropriate for a judge to say or do during the course of a hearing. However, that is not a basis for denying the protection of the s. 2(b) to judges acting in their judicial capacity. Rather, these are legitimate and important factors to be taken into consideration in defining the reasonable limits to judicial freedom of expression pursuant to s. 1 of the *Charter*.

48. With respect to the intention of the framers, the words of s. 2 of the *Charter* are clear: "everyone" has the benefit of the fundamental freedoms enumerated therein, including freedom of expression. It is submitted that it would take very clear words to exclude judges from the definition of "everyone".

49. At paragraph 82 of its factum the Independent Counsel refers to the *Allen* case from the Manitoba Court of Appeal for the proposition that the *effect* of legislation permitting removal of a judge for misconduct including comments made by the judge from the bench was not to detract from the freedom of the judge to speak out, but rather to prevent misuse of judicial power, neglect of duty and demonstrated incapacity. The *Allen* case certainly indicates that this is the *purpose* of such legislative provisions. However, *Allen* is entirely silent on the issue of the *effect*. Justice Cosgrove submits that s. 63(1) violates s. 2(b) of the *Charter* not because of its purpose, but rather because of its unconstitutional effect in suppressing judicial freedom of expression.

50. Justice Cosgrove does not dispute that in certain cases the statements made by a judge in his or her judicial capacity could potentially form the basis for a case for removal. However, that does not mean that judicial expression is not captured by s. 2(b) of the *Charter*. To the contrary, Justice Cosgrove submits that would constitute a *prima facie* breach of s. 2(b). The issue then is whether the mechanism and grounds by which potential removal is investigated and considered is sufficiently carefully tailored so as to constitute a justifiable limit pursuant to s. 1 of the *Charter.*

51. Justice Cosgrove submits that the analysis drawn from the *Little Sisters* case referred to a paragraph 84 of the Independent Counsel's factum is of limited assistance here. It is possible to imagine cases where an Attorney General's exercise of its power under s. 63(1) would not engage s. 2(b) considerations, for example where an inquiry was requested by the Attorney General into allegations that a judge had accepted a bribe. However, that is not the situation in the instant case. There is no doubt that this inquiry was requested entirely in response to the rulings and other expressive activities of Justice Cosgrove. As a result, at a minimum s. 63(1) is unconstitutional as applied in

the circumstances of this case. That is sufficient for the Inquiry Committee to answer the constitutional questions and to determine that it does not have the jurisdiction to consider the request for inquiry as made by Attorney General Bryant.

Section 1 of the *Charter*

a. Rational Connection

52. At paragraph 87-92 of its factum the Independent Counsel submits that s. 63(1) is rationally connected to the objective of maintaining the public confidence in judicial accountability because of the historical role of the Attorney General to represent and defend the public interest. Justice Cosgrove agrees that the Attorneys General have this historical role. Further, Justice Cosgrove agrees that the existence of this role justifies the power of the Attorneys General to institute complaints against judges, even in cases where the complaint arises from a matter where the Attorney General was not directly involved.

53. For example, if a judge had engaged in improper conduct in the course of private litigation, it is appropriate for the Attorney General to have the power to file a complaint, regardless of the wishes of the parties to the particular case, in order to maintain public confidence in the administration of justice. However, there is no rational connection between this objective and the power of the Attorneys General to by-pass a judicial pre-screening process. As described above, the historical record establishes the fact that a complaint is made by an Attorney General is in no way a substitute for a judicial pre-screening process, and provides no independent assurance that the complaint is sufficiently meritorious and sufficiently serious that it could potentially merit removal of the judge.

54. At paragraph 91 of its factum the Independent Counsel refers to the provisions of the Ontario *Ministry of the Attorney General Act*. Justice Cosgrove submits that whatever other authority that statute may grant to the Attorney General for the Province of Ontario, it cannot grant him any special powers with respect to the removal of a superior court judge. It is clear that, pursuant to ss. 96-100 of the *Constitution Act, 1867*, these matters fall within the exclusive authority of the Parliament of Canada. In fact, but for the provisions s. 63(1) of the *Judges Act*, the Attorneys General of the provinces would have no particular powers in the process of judicial removal whatsoever.

b. Minimal Impairment

55. At paragraphs 78-90 of its factum the Minister of Justice submits that the benefit of a public inquiry outweighs any limitation on freedom of expression. This submission ignores the fact that Justice Cosgrove does not seek to eliminate the existence of publicly held inquiries. To the contrary, for the reasons expressed above, Justice Cosgrove recognizes that public accountability is enhanced by inquiries being conducted in public. Justice Cosgrove's submission is a much narrower one: a public inquiry should only be held where the matter in issue has been judicially investigated and assessed and determined to be one of sufficient merit and sufficient seriousness that it could warrant removal.

56. At paragraph 95-101 of its factum the Independent Counsel submits that s. 63(1) satisfies the "minimal impairment" component of the *Oakes* test because it falls within a range of reasonable alternatives available to the legislature. Justice Cosgrove acknowledges that s. 63(1) is not unconstitutional merely because, "it is possible to conceive of an alternative which might better tailor objective to impairment". However, that is not the situation here. This is not a case where the proposed alternative is some

fanciful or theoretical alternative of uncertain efficacy. To the contrary, the proposed alternative is the one which has been adopted by Parliament itself, and which Parliament deemed adequate and appropriate for every other person in Canada.

57. Ironically, this is a case where, had Justice Cosgrove been a provincial court judge in Ontario, the Attorney General of Ontario would not have had the power that it has is sought to exercise here. There is no suggestion that the scheme embodied under the Ontario *Courts of Justice Act*, for provincial court judges has not adequately addressed the need to maintain public confidence in the accountability of the provincial judiciary.

***Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, s. 51.4, 51.5, 51.6**

58. Moreover, as described more fully above, this is not a case where referral by the Attorney General provides an adequate substitute for the protections afforded to judicial freedom of expression by the judicial pre-screening of complaints. The historical record establishes the fact that the Attorney General is the complainant provides no independent assurance that the complaint is sufficiently meritorious and sufficiently serious that it could potentially merit removal of the judge.

59. It is submitted that the various "checks and balances" referred to by the Independent Counsel regarding the s. 63(1) inquiry process in no way mitigate the harm to the judge caused by the process, or justify its use. These checks and balances all relate to the *outcome* of the inquiry, i.e. whether or not removal is recommended. The harm relied upon by Justice Cosgrove is the harm caused by the public announcement of the inquiry, together with its public proceedings. Without a prior judicial pre-screening to

establish that the complaint could warrant removal, this harm is an unjustified infringement of s. 2(b) of the *Charter.*

60. Ultimately, it is submitted that neither the Independent Counsel, nor the Minister of Justice, nor the Attorney General of Ontario has met the positive obligation on them to adduce evidence to justify the infringement imposed by s. 63(1). The situation in the instant case is very similar to that in the *RJR-MacDonald* case where the Supreme Court of Canada struck down the impugned legislation on the basis that the government had failed in its obligation to adduce evidence to demonstrate that less intrusive regulation would not achieve its goals as effectively as an outright ban:

> **Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter*. The Constitution, as interpreted by the courts, determines those limits. Section 1 specifically stipulates that the infringement may not exceed what is reasonable and "demonstrably justified in a free and democratic society", a test which embraces the requirement of minimal impairment, and places on the government the burden of demonstrating that limit. This the government has failed to do, notwithstanding that it had at least one study on the comparative effectiveness of a partial and complete ban. In the face of this omission, the fact that full bans have been imposed in certain other countries, and the fact that opinions favouring full bans can be found, fall short of establishing minimal impairment.**
>
> ***RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 SCR 199, at para. 168, see also para. 152, 165, 167.**
>
> **See also: *Mackin v. New Brunswick (Minister of Finance)*, *supra,* at para. 73**

61. As a result, it is submitted that this is far from a case where the government has established that s. 63(1) falls within the "range of reasonable alternatives" available to Parliament. To the contrary, there is no evidence that a less intrusive scheme would not achieve the government's objective, and in fact, there is abundant evidence to the contrary.

Remedy

62. Justice Cosgrove does not dispute the proposition made by the Minister of Justice at paragraph 96 of its factum. If the Inquiry Committee is not a superior court, it does not have the power to make a formal declaration of invalidity. On the other hand, it clearly does have the power to decide questions of law. As a result, Justice Cosgrove submits that the Inquiry Committee should answer, as a matter of law, the constitutional questions in the manner outlined in Justice Cosgrove's main factum. In addition, the Inquiry Committee should find, as a matter of law that because s. 63(1) is unconstitutional and or no force or effect, the Inquiry Committee is without jurisdiction to consider the matter submitted to it by Attorney General Bryant's correspondence dated April 3, 2004 to the CJC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Schedule "A"

1. *Reference re: Remuneration of Provincial Court Judges*, [1997] 3 S.C.R. 3

2. *Alberta v. Ell*, [2003] 1 SCR 857

3. *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405

4. Friedland, M.L., *A Place Apart: Judicial Accountability and independence in Canada, A Report Prepared for the Canadian Judicial Council* (Toronto: University of Toronto) 1995

5. *Landreville v. Canada* [1977] 2 F.C. 726

6. *Lavallee v. Canada (Attorney General)* [2002] 2 SCR 209

7. *Canadian Judicial Council Inquiries and Investigations By-laws*, s. 6(1)

8. *Falkiner v. Ontario (Minister of Community and Social Services)*, [2000] O.J. No. 2433 Ont. Div Ct

9. *Falkiner v. Ontario (Minister of Community and Social Services)*, (2002) 59 O.R. (3d) 481, Ont. C.A.

10. S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in *Judicial Independence*, S. Shetreet and J. Deschenes, eds. (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers) 1985

11. *Moreau-Berube v. New Brunswick (Judicial Council)*, [2001] 1 SCR 249

12. *MacKeigan v. Hickman* [1989] 2 SCR 796

13. *Report to the CJC of the Inquiry Committee Appointed Pursuant to s. 63(1) of the Judges Act Concerning Justice Boilard*, August, 2003

14. *Mackin v. New Brunswick (Judicial Council)*, (1987) 44 DLR (4^{th}) 730 NBCA

15. *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69

16. *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 SCR 199