

**THE CANADIAN JUDICIAL COUNCIL**

**IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED  
PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985,  
C. J-1 AS AMENDED INTO THE CONDUCT OF  
THE HONOURABLE PAUL COSGROVE OF  
THE SUPERIOR COURT OF JUSTICE OF ONTARIO**

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**HELD BEFORE THE HONOURABLE LANCE S.G. FINCH (CHAIRPERSON),  
THE HONOURABLE ALLAN H. WACHOWICH  
THE HONOURABLE J. MICHAEL MACDONALD  
KIRBY CHOWN and JOHN P. NELLIGAN, Q.C.**

at Federal Court of Canada

180 Queen Street West, Courtroom No. 7A, Toronto, Ontario  
on Friday, September 11, 2008 at 9:28 a.m.

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**APPEARANCES:**

Earl Cherniak, Q.C.  
Cynthia Kuehl

Independent Counsel appointed  
pursuant to the *Complaints Procedure*

Chris Paliare  
Richard Stephenson  
Robert A. Centa

for The Honourable Paul Cosgrove

George K. Macintosh, Q.C.

for the Inquiry Committee

1                   unacceptable. Accordingly,  
2                   we answer the first question  
3                   put to us as follows: The  
4                   judge in question failed in  
5                   the due execution of his  
6                   office in regard to the duty  
7                   to act in a reserved manner,  
8                   and thus infringed the  
9                   provisions of Paragraph  
10                  65.2(c) of the Judges Act.  
11                  Now what to do?"

12                   MR. MACDONALD: So they took the  
13                  extra step of marrying the impugned conduct to a  
14                  section of the Act?

15                   MR. PALIARE: They did. That is  
16                  exactly it, and that is what I wanted to bring to  
17                  your attention.

18                   In Paragraph 77, they say:

19                    "In answer to the second  
20                    question, we now apply to the  
21                    impugned conduct of Mr.  
22                    Justice Flynn the test for  
23                    removal set out in Marshall,  
24                    which has been considered  
25                    earlier in these reasons.

1 The question may be posed as  
2 follows: Is the breach of  
3 the duty to act in reserved  
4 manner demonstrated by Mr.  
5 Justice Flynn so manifestly  
6 and profoundly destructive of  
7 judicial impartiality,  
8 integrity and independence  
9 that it undermines individual  
10 confidence in the justice  
11 system, thereby rendering the  
12 judge incapable of performing  
13 the duties of his office. In  
14 this connection, we  
15 particularly noted the  
16 following: the irreproachable  
17 career of the judge in  
18 question, the isolated nature  
19 of the incident complained  
20 of, the unlikelihood of a  
21 similar incident reoccurring,  
22 the judge's acknowledgement  
23 of his remarks, his letter  
24 and the acknowledgement made  
25 by his counsel that the judge

1 in question made a mistake in  
2 making the statements  
3 complained of to the  
4 journalist."

5 They are all comments endorsed by  
6 my friend, Mr. Cherniak, on the penalty phase.

7 "We remain convinced that the  
8 judge in question retains his  
9 independence and complete  
10 impartiality to continue  
11 deciding matters brought  
12 before him now and in future.

13 I view of all of the  
14 circumstances, we are of the  
15 opinion that the conduct of  
16 Mr. Justice Bernard Flynn has  
17 not incapacitated or disabled  
18 him from the due execution of  
19 his office within the meaning  
20 of s. 65.2 of the Judges Act,  
21 and thus we do not recommend  
22 his removal."

23 From our perspective, we say to  
24 the panel that either approach, either Marshall or  
25 Flynn, is perfectly acceptable from our

1 perspective. We are not advancing one or the  
2 other; there are those two different approaches.

3                   We say that like in the Marshall  
4 case and the Flynn case, Justice Cosgrove has  
5 admitted his actions were inappropriate. We do not  
6 dispute that an admonition may be appropriate.

7                   One other difference that Mr.  
8 Cherniak and I have -- and I must say we are, to  
9 use the vernacular, on the same page with respect  
10 to most of our submissions to you. But where we do  
11 part company again is the letters that we filed.

12                   In our respectful view, they are  
13 absolutely relevant to the determination of whether  
14 Justice Cosgrove should be removed from the bench.

15                   They do not go to the question of  
16 your deciding the conduct part of it, whether or  
17 not the conduct did or didn't amount to judicial  
18 misconduct or inappropriate judicial conduct. They  
19 don't go to that.

20                   And my friend is quite right, when  
21 you get a letter from a judge, they don't know what  
22 went on in the judge's court in that case, nor do  
23 they know what happens most of the time.

24                   But like Justice Flynn, where the  
25 CJC made comments about this very issue, we say

1 they are relevant to determining whether the  
2 conduct that you find constitutes sufficient  
3 gravity to warrant removal.

4                   The letters did not come just from  
5 jurists. They came from the regional senior  
6 judges, who have administrative duties over him.  
7 They came from lawyers who had practiced in front  
8 of him, who then became jurists. And they came  
9 from lawyers who have practiced in front of him for  
10 many years.

11                   What you can glean from those  
12 letters, in my respectful view, is that this case  
13 was an anomaly in a twenty-four year career in  
14 which Justice Cosgrove has provided distinguished  
15 service in a judicial capacity, acting as what his  
16 colleagues describe as a "judicial workhorse".

17                   The letters, in my respectful  
18 view, are important with respect to the  
19 determination of what you recommend as being the  
20 appropriate disposition of the matter, once you  
21 determine how you are going to characterize that  
22 conduct.

23                   I hope I have made my position  
24 clear on what I understood to be a central issue  
25 for you this morning. That is not only my

1 position; it is obviously Justice Cosgrove's  
2 position as well.

3 I had a hard time with my friend  
4 trying to differentiate between me and Justice  
5 Cosgrove. They are one and the same; those are the  
6 submissions we make on his behalf, with his  
7 knowledge and with his concurrence.

8 Unless the panel has any  
9 questions, those are our submissions.

10 MR. CHERNIAK: I have just a  
11 couple of observations to make, Chief Justice.

12 Let me take issue with one of the  
13 first propositions my friend made, with respect to  
14 errors of fact and law that are often the subject  
15 matter of appeal.

16 Of course, in and of themselves,  
17 they do not amount to matters that would be the  
18 proper subject matter of a finding of judicial  
19 misconduct.

20 But they can be combined with the  
21 way they were made, and amount to facts and  
22 circumstances that would amount to judicial  
23 misconduct and could lead to a finding -- not  
24 because the findings themselves were in error, but  
25 because in the course of getting there, there were