IN THE MATTER OF:

Section 65 of the *Judges Act*, R.S., 1985, c. J-1, and the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Paul Cosgrove of the Ontario Superior Court of Justice.

SUBMISSIONS OF INDEPENDENT COUNSEL

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PART I - OVERVIEW

1. The inquiry regarding the conduct of Justice Paul Cosgrove was initiated following a complaint by the Attorney General of Ontario in April, 2004 in respect of the manner in which Justice Cosgrove conducted the trial and proceedings in *R. v. Julia Elliott*, a high profile murder case in Eastern Ontario, which culminated, after two years, in a stay of proceedings in September, 1999. That stay was set aside by the Court of Appeal in December, 2003, in a decision that was very critical of Justice Cosgrove's decision and conduct, following which the Attorney General of Ontario made his complaint and the inquiry was constituted. The inquiry itself was not heard, however, until September, 2008, due to a constitutional challenge brought by Justice Cosgrove, and the subsequent appeals of that issue.

2. Independent Counsel was appointed pursuant to the Inquiries and Investigations By-Laws of the Canadian Judicial Council (the "By-laws") to "present the case" to the Inquiry Committee, a five-person panel comprised of (a) three Chief Justices: The Honourable Chief Justice Lance Finch; the Honourable Chief Justice Alan Wachowich; and the Honourable Chief Justice Michael MacDonald; and (b) two lay members, John Nelligan and Kirby Chown. As part of his or her duty, and after investigation, Independent Counsel must provide notice of the particulars of the case to be presented to the judge. The Notice to Justice Cosgrove (the "Notice") was delivered on February 29, 2008. The role of Independent Counsel then is to assist the Inquiry Committee by putting before it the relevant facts and providing submissions as to facts and law. In presenting the case, Independent Counsel is at all times to act impartially and in the public interest.

3. However, the Inquiry Committee and, ultimately, the Canadian Judicial Council bear the responsibility for determining whether the facts presented by Independent Counsel support a finding of judicial misconduct and, if so, whether they also support a recommendation for removal of office.

4. In this case, the Inquiry Committee found that the conduct of Justice Cosgrove constituted judicial misconduct. Those findings are not challenged by Justice Cosgrove, who has admitted to the misconduct. The findings that were made represent serious misconduct of the nature that, without more, would, in the opinion of Independent Counsel, be capable of supporting a recommendation for removal from judicial office.

5. On the seventh day of hearing, Justice Cosgrove proffered an apology, the nature and extent of which led Independent Counsel to revise his position. While Independent Counsel was of the opinion that the totality of the evidence, including the apology, was no longer capable of supporting a recommendation for removal from judicial office, but rather a strong admonition Independent Counsel made it clear that determination was, and is, exclusively for the Canadian Judicial Council (and the Inquiry Committee at first instance) to make. Nothing in Independent Counsel's opinion was intended to fetter the exclusive jurisdiction of the Inquiry Committee and the Canadian Judicial Council to determine whether such a recommendation ought to be made. These submissions are to assist the Canadian Judicial Council in its review of the relevant facts and law, when considering the Inquiry Committee's report.

PART II - THE FACTUAL BACKGROUND

6. The factual background is canvassed in some length in the submissions of Justice Cosgrove to the Canadian Judicial Council. Independent Counsel agrees substantially with that factual background and seeks only to highlight some areas that appeared to be of importance and relevance to the Inquiry Committee as set out in its report and in the reasons of Wachowich C.J., dissenting only with the recommendation.[1]

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[1] Report of the Inquiry Committee concerning the Hon. Paul Cosgrove, November 27, 2008 [Inquiry Committee Report], Tab 1, Book of Documents of Cosgrove, J. [Book of Documents]

Delay in the Commencement of the Inquiry

7. This inquiry was constituted as a result of the letter of complaint by the then-Attorney General of Ontario dated April 22, 2004[2], but was not heard until September, 2008. The significant delay in the proceeding of this inquiry was the result of a challenge by Justice Cosgrove to the constitutionality of s. 63(1) of the *Judges Act*. That challenge, which was dismissed by the Inquiry Committee, found merit in the Federal Court. The Court of Appeal restored the decision of the Inquiry Committee. Leave to appeal was denied by the Supreme Court of Canada.

8. While every citizen has a right to challenge the constitutionality of legislation that affects him or her, the result of Justice Cosgrove's challenge was that a hearing on the merits of the very serious allegations of judicial misconduct, the majority of which were substantiated, was delayed by over four years.

Evidence and Findings made by the Inquiry Committee

9. At the inquiry, the case presented by Independent Counsel came from two sources: the transcripts from the proceedings in *R. v. Julia Elliott* and the evidence of four participants in that trial. While the whole of the transcripts formed the evidence, binders of excerpts relevant to the particulars enumerated in the Notice[3] were read to the Inquiry Committee over the course of six days.

10. The evidence of the witnesses[4] did not seek to supplement the written transcript of events. Rather, they provided context to that evidence and unique insight into the effect of the

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[2] Letter of the Hon. Michael Bryant, April 22, 2004, Appendix "C" of the Inquiry Committee Report, Tab 1C, Book of Documents

[3] Notice to Justice Paul Cosgrove, February 29, 2008, Appendix "D" to the Inquiry Committee Report, Book of Documents, Tab 1d

[4] The witnesses called to give oral evidence were Curt Flanagan, Crown Attorney for Brockville; David Humphrey, acting as Crown counsel in *R. v. Elliott*; Glen Bowmaster, former Det. Inspector with the Ontario Provincial Police; and Steven Foster, son of the victim.

judicial misconduct on them and others. The Inquiry Committee commented that "the credibility of the witnesses was beyond question and they gave compelling evidence."[5] Their evidence is excerpted and quoted at length in the majority reasons of the Inquiry Committee in support of its findings.[6]

11. Upon review of all of the evidence, the Inquiry Committee made numerous findings of judicial misconduct, none of which are challenged by Justice Cosgrove. These findings are reviewed here for ease of reference as they are, in the opinion of Independent Counsel, relevant to the Canadian Judicial Council's consideration of the proper disposition of this matter.

12. In the context of its overall finding that Justice Cosgrove's conduct gave rise to the appearance of bias and demonstrated, at times, an abuse of judicial powers and a lack of judicial restraint, the Inquiry Committee also found the following as cited in the Inquiry Committee Report:

(a) Justice Cosgrove allowed defence counsel to "take control of the trial" (para 36)

(b) Justice Cosgrove made "remarkable findings" against Assistant Deputy Attorney General, Murray Segal" when he was "never given notice that his conduct was in issue" (para 42)

(c) Justice Cosgrove's orders for non-communication "served to sterilize the prosecution" and were "extremely detrimental" (paras 43, 48)

(d) The transcripts contained "endless examples" of cross-examination by defence counsel that was "wholly improper" to which Justice Cosgrove either took no action or criticized the Crown for objecting (para 60)

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[5] Inquiry Committee Report, para. 108
[6] Inquiry Committee Report, paras. 109-119

(e) Repeat conduct by Justice Cosgrove gave rise to an "appearance of anti-Crown bias" (para 74)

(f) In light of Justice Cosgrove's failure to control or seek to control the "grossly unprofessional conduct" of defence counsel and, at times, his support of the defence, "an observer of the trial could only have concluded that Justice Cosgrove continually exhibited a bias against the Crown's position" (para 90)

(g) Justice Cosgrove repeatedly abused his contempt powers (para 103)

(h) The conduct of Justice Cosgrove in requiring Crown counsel to respond to scurrilous allegations against them gave "those allegations credence, and he actually caused harm to the reputation of Crown counsel" (para 146)

(i) His conduct spanned the range that "includes everything from rude, abusive or intemperate language up to the misuse of the contempt power, or threats to do so, and beyond that to defamatory statements of persons who had done no wrong and who, in some cases, had no opportunity to answer the judge's damning allegations" (para 153)

(j) "No judge in the exercise of his office has liberty to malign innocent persons as Justice Cosgrove did" (para 155)

(k) Justice Cosgrove's orders and actions towards the Crown constituted conduct that was "a deliberate and unwarranted interference in the presentation of the Crown's case" that went beyond reviewable exercise of judicial discretion or mere incompetence, but was "abusive" and "unprincipled" (para 157)

(l) The use of intemperate and denigrating language, the requirement for Crown counsel to testify on irrelevant issues without legitimate or lawful reason, the

> interference with a RCMP investigation, the quashing of a federal immigration warrant with no jurisdiction to do so, the attempted direction to the media about what to print in the face of a possible contempt citation, and the repeated threats of contempt by Justice Cosgrove constituted repeated acts of abuse of the powers of the judicial office and a failure to exercise restraint. (paras 158-164)

13. The Inquiry Committee concluded that this conduct and "its damaging effect on public confidence in the administration of justice" met the high test for removal from judicial office, subject only to the apology given by Justice Cosgrove on the seventh day of hearing.[7] Justice Cosgrove does not appear to take issue with the conclusions as they pertain to the nature of the misconduct or its gravity.

Apology of Justice Cosgrove

14. On the seventh day of the hearing, Justice Cosgrove gave a statement in which he acknowledged the errors he had made and made certain apologies. That statement is reproduced in the submissions filed by Justice Cosgrove.[8] Based on the understanding that the apology was unequivocal, constituted an admission of judicial misconduct and was sincerely given, Independent Counsel advised the Inquiry Committee that his opinion regarding whether the totality of the evidence was capable of supporting a recommendation for removal was modified.[9] However, Independent Counsel made it clear that it remained the obligation of the Inquiry Committee to decide the impact of the apology, and to make its own recommendation.[10]

15. In his submissions, Justice Cosgrove states that there was no opportunity to provide an apology sooner than he did. While apologizing earlier would have undermined the other

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[7] Inquiry Committee Report, paras. 165, 167
[8] Submissions of Justice Paul Cosgrove, para. 48
[9] Transcript of the Proceedings of the Inquiry Committee Concerning the Hon. Paul Cosgrove, September 10, 2008 [September 10th Transcript], Book of Documents, Tab 7, p. 1669, line 1 - p. 1671, line 18; p. 1773, lines 7-p.1774, line 15
[10] September 10th Transcript, p.1668, lines 13-19

positions taken by Justice Cosgrove prior to the commencement of the hearing, including that the Notice did not particularize any judicial misconduct which could be subject to review,[11] there is no reason why Justice Cosgrove, through his counsel, could not have indicated at any time after receipt of the reasons of decision of the Court of Appeal that he wanted to, or intended to, concede his misconduct and apologize. As stated at the hearing, however, Independent Counsel was, and is, of the view that the timing of the apology did not detract from its sincerity, once given.

PART III – SUBMISSIONS OF INDEPENDENT COUNSEL

Role of Independent Counsel

16. Subsection 3(2) of the By-Laws provides that the role of Independent Counsel is to "present the case" which includes making submissions on law and procedure.[12] As noted in the Inquiry Committee Report in respect of the conduct of Justice T. Matlow, Independent Counsel does not bear an onus of proof.[13]

17. The lack of onus is consistent with the fact that the position of Independent Counsel is *sui generis*. Independent Counsel has no client or position to advance. Rather, Independent Counsel is to act "impartially and in accordance with the public interest".[14]

18. In fulfilling his or her duty, Independent Counsel is charged with the responsibility to determine, upon investigation of the complaint, whether the facts are capable of supporting a finding of judicial misconduct and, secondarily, a recommendation for removal of office. If

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[11] The "Boilard motion" is discussed in some detail at pp. 13-15 of the Submissions of Justice Paul Cosgrove. The Boilard motion was withdrawn at the inquiry.

[12] Canadian Judicial Council Inquiries and Investigations By-Laws, SOR/2002-371, (Approved by the CJC, September 27, 2002, effective July 1, 2003) ("CJC By-laws"), s.3(2), Brief of Authorities of Independent Counsel, ("Brief of Authorities"), Tab 3

[13] Report of the Inquiry Committee Concerning The Hon. P. Theodore Matlow, May 28, 2008, Brief of Authorities, Tab 9, p.5

[14] CJC By-Laws, s.3(3)

Independent Counsel is of the opinion that the facts are capable of supporting such a finding, Independent Counsel then has an obligation to present that case to the Inquiry Committee for its consideration.

19. At this stage, the role of Independent Counsel is to respond to the submissions of Justice Cosgrove and provide his view for the guidance of the Canadian Judicial Council. As before, Independent Counsel puts forward no position as to what the Canadian Judicial Council *should* do in its consideration of the evidence and factual findings by the Inquiry Committee, for the reasons that follow.

Judicial Accountability and the Role of the Canadian Judicial Council

20. The regime, as set out in the *Judges Act* and the By-laws, makes clear that the jurisdiction for reviewing judicial conduct lies with the Canadian Judicial Council. It is the Canadian Judicial Council who must, following an inquiry, report its conclusions to the Minister of Justice and who may make recommendations for removal.[15] While Inquiry Committees may be constituted to include lawyers (as this one did)[16], its function is to report to the Canadian Judicial Council in order that it may exercise its jurisdiction.

21. Thus, it is the judiciary, through the Canadian Judicial Council, that is invested with the sole authority to make or not make a recommendation for removal to the Minister of Justice. That recommendation would then have to proceed to both Houses of Parliament for review.[17]

22. In considering whether to make such a recommendation, the Canadian Judicial Council is exercising its role in a system of judicial accountability that is geared to protecting the integrity of the judicial system as a whole. As noted by Justice Sharlow in *Cosgrove v. Canadian Judicial Council*, judicial accountability is integral to the maintenance of judicial independence:

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[15] *Judges Act*, R.S.C., 1985, c.J-1, as amended, ("*Judges Act*"), Brief of Authorities, Tab 1, s.65(1)
[16] *Judges Act*, s.63(3)
[17] *Judges Act*, s.71; *Constitution Act*, 1867 (U.K.), 30 & 31 Vict c., Brief of Authorities, Tab 2, ss. 96-101

> [30] The independence of the judiciary is a constitutional right of litigants, assuring them that judges will determine the cases that come before them without actual or apparent interference from anyone, including anyone representing the executive or legislative arms of government: see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at page 69, and *R. v. Lippé*, [1991] 2 S.C.R. 114, at page 139.
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> [31] Justice Strayer expressed this principle as follows in *Gratton v. Canadian Judicial Council*, [1994] 2 F.C. 769 (T.D.), at page 782 (cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R., at paragraph 329):
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> > Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure free from improper interference is essential to the judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of judges, but for the benefit of the judged." [Footnotes omitted.]
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> [32] However, judicial independence does not require that the conduct of the judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at paragraphs 58-59.[18]

23. The importance of the role of judicial council was also the subject of comment by Madam Justice Arbour in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, *infra*:

> Part of the expertise of the Judicial Council lies in its appreciation of the distinction between impugned judicial actions that can be dealt with in the traditional sense, through a normal appeal process, and those that may threaten the integrity of the judiciary

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[18] *Cosgrove v. Canadian Judicial Council*, [2007] 4 F.C.R. 714 (C.A.) at 729, Brief of Authorities, Tab 10

> as a whole, thus requiring intervention through the disciplinary provisions of the Act. The separation of functions between judicial councils and the courts, even if it could be said that their expertise is virtually identical, serves to insulate the courts, to some extent, from the reactions that may attach to an unpopular council decision. To have disciplinary proceedings conducted by a judge's peers offers the guarantees of expertise and fairness that judicial officers are sensitive to, while avoiding the potential perception of bias or conflict that could arise if judges were to sit in court regularly in judgment of each other. As Gonthier J. made clear in *Therrien*, other judges may be the only people in a 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.[19]

24. Although speaking in the context of a provincial judicial council, the comments regarding the judicial accountability and the exclusive jurisdiction of the judiciary to review judicial conduct are equally applicable, in the submissions of Independent Counsel, to the Canadian Judicial Council.

25. In light of this experience, and the legislative mandate of the Canadian Judicial Council as set out in the *Judges Act*, the duty of the Canadian Judicial Council at this stage, in the opinion of Independent Counsel, is to consider the case presented, giving due weight to the opinions of all members of the Inquiry Committee. In doing so, the Canadian Judicial Council should consider that the Inquiry Committee did have the benefit of hearing all of the evidence given, including the apology of Justice Cosgrove, in coming to its own recommendation.

The Relevant Legal Test and Factors for Consideration

26. Pursuant to subsection 65(2) of the *Judges Act*, if,

> in the opinion of Council the judge in respect of whom an inquiry or investigation has been made has become incapacitated and

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[19] *Moreau-Bérubé v. New Brunswick (Judicial Council)* [2007] 1 S.C.R. 249 *("Moreau-Bérubé")* at 287 Brief of Authorities, Tab 11

> disabled from due execution of the office of the judge by reason of...
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> (b) having been guilty of misconduct... or
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> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
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> the Council in its report to the Minister under subsection (1), may recommend that the judge be removed from the office.[20]

27. Subsection 65(2) contemplates a two-stage process. The first is a determination as to whether or not a judge has been "incapacitated or disabled from the due execution of the office of judge." In this case, the Inquiry Committee made unanimous findings of fact that Justice Cosgrove had become incapacitated due to his misconduct, a finding of fact not challenged by Justice Cosgrove. The second stage in the analysis is to determine whether, having made that determination, a recommendation ought to be made that he be removed from office.

28. It is implicit from a review of the Inquiry Committee's report that the statutory scheme set out in subsection 65(2) was followed by the Inquiry Committee in this case. The distinction in the opinions and findings between the majority and minority reasons of the Inquiry Committee lay not with the first step of the analysis, but whether, having found judicial misconduct, a recommendation for removal ought to be made.

29. In considering whether recommendation for removal is the appropriate sanction, the Report of the Canadian Judicial Council to the Minister of Justice regarding Justice Matlow (the "Matlow Report") makes clear that the test from the Marshall Inquiry (the "Marshall test") is the appropriate test:[21]

> Is the conduct allegedly so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently

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[20] *Judges Act*, s. 65(2)

[21] Report of the Canadian Judicial Council to the Minister of Justice concerning Mr. Justice Ted Matlow of the Ontario Superior Court of Justice, December 3, 2008 ("Matlow Report"), Brief of Authorities, Tab 8, para 164

> undermined to render the judge incapable of executing the judicial office.[22]

30. In determining whether or not the removal from office is warranted in the circumstances of this case, Independent Counsel is of the view that the Canadian Judicial Council can consider the following factors which have been considered in previous reports by the Canadian Judicial Council:[23]

(a) The nature of the allegations as found by the Inquiry Committee;

(b) Whether those allegations are isolated in nature or constitute a pattern of conduct;

(c) Whether the misconduct was related or arose out of the exercise of judicial duties;

(d) The judicial history and career of the judge; and

(e) The likelihood of such future events occurring again.

31. The weight given to any of these factors is within the discretion of the Inquiry Committee first, in its recommendation to the Canadian Judicial Council; and then of the Canadian Judicial Council in its report to the Minister of Justice. While the Canadian Judicial Council shall, pursuant to subsection 65(1) of the *Judges Act* make its own report to the Minister of Justice following its review of the record, weight can be given to the opinions of the Inquiry Committee regarding the appropriate sanction following a finding of misconduct, given the Inquiry Committee's familiarity with the whole of the record before it and its ability to hear the witnesses.

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[22] Report of the Nova Scotia Judges' Inquiry Committee to the Canadian Judicial Council, August 1990, ("Marshall Report"), Brief of Authorities, Tab 7 p. 27

[23] Matlow Report, pp. 56-60; Report of the Flynn Inquiry Committee to the Canadian Judicial Council, December 2002 ("Flynn Report"), Brief of Authorities, Tab 6 pp. 43-44

32. Independent Counsel was, and is, of the view that, absent Justice Cosgrove's apology, the facts presented to and found by the Inquiry Committee were capable for supporting a recommendation for removal to the Minister of Justice. The relevant factors included the breadth and depth of the judicial misconduct, its very serious nature and its impact on the family of the deceased, numerous Crown officials, witnesses, and on the public perception of the administration of justice, as exemplified by the compelling testimony of the witnesses.

33. Further, the misconduct of Justice Cosgrove extended over the course of two years, and was repetitive in its nature. Indeed, the Inquiry Committee found numerous repeated instances of similar conduct by Justice Cosgrove in the course of the proceedings in *R. v. Julia Elliott*. In this manner, it is distinguishable from the events which were considered by the Inquiry Committee who reviewed the conduct of Justice Flynn in speaking to a newspaper reporter about a municipal issue.[24]

34. The misconduct by Justice Cosgrove occurred in the exercise of judicial duties, which is a further aggravating factor.[25] The intemperate and denigrating language used by Justice Cosgrove during the course of the proceedings in *R. v. Julia Elliott*, directed primarily at Crown counsel, witnesses and civilians, is more akin to the kind of conduct (although not the content) that was demonstrated by Justice Bienvenue, for whom a recommendation for removal was made by the Canadian Judicial Council to the Minister of Justice following inappropriate remarks during the course of sentencing an accused.[26]

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[24] Flynn Report

[25] In the Matlow Report, the majority reasons of the Canadian Judicial Council distinguish the actions of Justice Matlow in respect of his private interests from those of Justices Bienvenue and Moreau-Berube, for whom recommendations for removal were made following comments made in the course of the exercise of their judicial duties (see para 183).

[26] Report of the Canadian Judicial Council to the Minister of Justice under ss. 63(1) of the Judges Act concerning the conduct of Mr. Justice Jean Bienvenue of the Superior Court of Quebec in R. v. T. Théberge, October 1996 ("Bienvenue Report"), Brief of Authorities, Tab 4; Report of the Bienvenue Inquiry Committee to the Canadian Judicial Council, June 1996 ("Bienvenue I.C. Report"), Brief of Authorities, Tab 5

35. In the Matlow Report, the Canadian Judicial Council has made clear that the interpretation of the Marshall test is prospective in nature and thus, the likelihood of the events occurring in future, must be examined.[27] The consideration as to the appropriate sanction must involve whether the misconduct is of such an egregious nature that public confidence in the administration of justice cannot be restored in future such that Justice Cosgrove ought to be removed from office.

36. In consideration of the prospective nature of the analysis, Independent Counsel was and is of the opinion that significant weight can be placed on the apology made by Justice Cosgrove, and it did affect the opinion of Independent Counsel as to the appropriate recommendation. But the decision as to what weight should be given to the apology in consideration of all the factors is ultimately that of the Canadian Judicial Council and not of Independent Counsel. The Inquiry Committee heard the apology and made its own assessment as to the weight it should be given.

37. Independent Counsel's opinion was and is influenced by the apparent weight given historically by the Canadian Judicial Council to whether or not the evidence demonstrated a recognition or understanding of how the judge fell into error and an assurance that the conduct complained of would not happen again. For example, in considering the conduct of Justice Bienvenue, the Canadian Judicial Council relied specifically on the comment by the Inquiry Committee that "the evidence cannot be any clearer - Mr. Justice Bienvenue does not intend to change his behaviour in any way."[28] The Canadian Judicial Council recommended removal.

38. Similar consideration was given in the review of the conduct of Justice Flynn. There, the Canadian Judicial Council commented that they were influenced by the unlikelihood of a similar event recurring given the judge's acknowledgment of his errors. They concluded that they were convinced that Justice Flynn "retains his independence and complete impartially to continue

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[27] Matlow Report, para 166
[28] Bienvenue Report, p. 71

deciding matters before him now and in the future."[29] The Canadian Judicial Council recommended against removal.

39. Most recently, in reviewing the conduct of Justice Matlow, the Canadian Judicial Council found that his expressions of regret were sincerely made and, notwithstanding the very delayed timing of having made them, served to mitigate against the very serious findings of judicial misconduct.[30] The Canadian Judicial Council recommended against removal.

40. Apologies will not, in all instances, serve to sufficiently ameliorate concerns that judicial integrity has been undermined by misconduct.[31] However, the Canadian Judicial Council has historically given significant weight to the value of an apology if it is believed to be sincerely given and is a complete expression of acknowledgment of error and misconduct, with a sincere undertaking to improve on that conduct in future.

41. The recognition of errors made by Justice Cosgrove, his apparent understanding and recognition of the impact of his conduct, and the set of full and unreserved apologies he provided led Independent Counsel to the opinion that, in his view, it is unlikely that this conduct will happen again, such that public confidence in the administration of justice could be restored by a pointed and strong admonition. However, as the regime for judicial accountability and the preservation of judicial integrity is a matter entirely for the Canadian Judicial Council and not any other body, the views of the Independent Counsel were not intended to and did not fetter the discretion of the Inquiry Committee in first instance and now the Canadian Judicial Council to make its recommendation, including its own assessment of the evidence and the sufficiency and sincerity of the apology.

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[29] Flynn Report, p. 44
[30] Matlow Report, paras. 179-180
[31] See, for example, *Moreau-Bérubé*, whose apology for negative comments about Acadians was insufficient to avoid removal from judicial office.

42. Justice Cosgrove also submits that the majority of the Inquiry Committee erred by giving no weight to the many reference letters that were submitted on his behalf.

43. The majority reasons of the Inquiry Committee specifically states that no weight was given to these letters as those pertained to unrelated matters, *nor* was any weight given to previous reported decisions by the Court of Appeal,[32] the content of which may have suggested that certain impugned conduct (particularly the level of suspicion towards government) which was found by the Inquiry Committee to be misconduct in the context of the trial in *R. v. Julia Elliott* was not, in fact, isolated to that case. The Inquiry Committee, therefore, was consistent in its approach in not considering any evidence extraneous to the proceedings in *R. v. Julia Elliott*.

44. Though the Notice was provided to the individuals who provided the character reference, none of them had the benefit of reviewing the detailed evidence that was available to the Inquiry Committee for its deliberations. For those reasons, Independent Counsel gave little weight to the letters of reference in coming to his opinion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[32] Inquiry Committee Report, para 38 referencing *Perry v. Ontario* (1997), 33 O.R. (3d) 705 and *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735

SCHEDULE "A"

Cases

1. *Cosgrove v. Canadian Judicial Council*, [2007] 4 F.C.R. 714 (C.A.)

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

SCHEDULE "B"

Legislation and By-Laws

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

2. *Constitution Act, 1867*, (U.K.), 30 & 31 Vict. c. ss. 96-101

3. Canadian Judicial Council Inquiries and Investigations By-Laws, SOR/2002-371, Inquiries and Investigations By-Laws (Approved by the CJC, September 27, 2002, Effective July 1, 2003 "CJC By-Laws")

Canadian Judicial Documents

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

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

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

7. Report of the Nova Scotia Judges' Inquiry Committee to the Canadian Judicial Council ("Marshall Inquiry Report"), August 1990

8. Report of Canadian Judicial Council to the Minister of Justice under s.65 of the *Judges Act* concerning the Hon. T. Matlow, December 3, 2008

9. Report of the Inquiry Committee concerning the Hon. P. Theodore Matlow, May 28, 2008