

Court File No. T-101-05

FEDERAL COURT – TRIAL DIVISION

THE HONOURABLE MR. JUSTICE PAUL COSGROVE

Applicant

and

THE CANADIAN JUDICIAL COUNCIL AND THE ATTORNEY GENERAL OF
CANADA

Respondents

APPLICATION UNDER Section 18 of the *Federal Court Act*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor or, where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613.992.4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**LHADEN BHUTIA
AGENT DU GREFFE
REGISTRY OFFICER**

Date: January 20, 2005

Issued by:

Registry Officer

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I HEREBY CERTIFY that this document is a true copy of the
original copy of the document filed in the Court on the
day of **JAN 20 2005** at **10:20**
Dated this _____ day of _____ 2005

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APPLICATION

This is an application for judicial review in respect of:

1. A decision rendered by the Inquiry Committee of the Canadian Judicial Council (the "Inquiry Committee") on December 16, 2004 that:
 - a. section 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended does not violate the *Constitution Act, 1867* or section 2(b) of the *Canadian Charter of Rights and Freedoms*; and that,
 - b. the Inquiry Committee has jurisdiction to proceed with the inquiry into whether Mr. Justice Cosgrove has been incapacitated or disabled from the due execution of the office of judge.

The applicant makes application for:

1. An order quashing and setting aside the decision issued by the Inquiry Committee on December 16, 2004.
2. A declaration that the Inquiry Committee erred in law in deciding that the power granted to the Attorney General of Ontario pursuant to section 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended does not interfere with the constitutionally protected principle of judicial independence.
3. A declaration that the Inquiry Committee erred in law in deciding that section 2(b) of the *Canadian Charter of Rights and Freedoms* does not protect judicial expression.
4. A declaration that section 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as amended, violates the *Constitution Act, 1867* and/or section 2(b) of the *Canadian Charter of Rights and Freedoms* and is therefore invalid and of no force or effect.

5. An order quashing or declaring unlawful the Inquiry commenced by the Respondent Canadian Judicial Council pursuant to section 63(1) of the *Judges Act*, R.S.C., c. J-1, as amended, into whether the Applicant has become incapacitated or disabled from the due execution of the office of judge.
6. Such further and other relief as to this Honourable Court seems just.

The grounds for the application are:

1. In rendering its decision of December 16, 2004, the Inquiry Committee erred in law in determining that s.63(1) of the *Judges Act* does not violate the guarantee of judicial independence entrenched in the *Constitution Act, 1867* and the *Constitution Act, 1982*.
2. The Inquiry Committee erred in law in failing to find a violation of the constitutional guarantee of judicial independence on the following basis:
 - a. An Inquiry was commenced by the Canadian Judicial Council (the "CJC") upon the request of Ontario Attorney General Michael Bryant (the "Attorney General") pursuant to his authority under s.63(1) of the *Judges Act* into whether the Honourable Justice Paul Cosgrove was incapacitated or disabled from the due execution of the office of judge;
 - b. Pursuant to the provisions of s.63 (1) of the *Judges Act*, the CJC is required to conduct an inquiry when requested by the Attorney General of Canada, or of a province. Pursuant to the by-laws of the CJC such an inquiry is presumed to take place in public;
 - c. The power granted to the attorneys general under s. 63(1) of the *Judges Act* is unique. Any person in Canada is entitled to file a complaint with the CJC against a judge. In such cases, the by-laws of the CJC set out a comprehensive scheme whereby the complaint

is assessed by various members of the CJC. Specifically, the by-laws prescribe that a complaint must be scrutinized at a number of different stages prior to an inquiry. The complaint may be resolved without an inquiry on a variety of bases, including a determination that the "matter is not sufficiently serious to warrant removal". In those circumstances the complaint would not enter the public domain;

- d. While the CJC provides a public summary of the basis upon which complaints are resolved, the judge against whom the complaint is received is not identified, nor is the complaint process a public one;
- e. This Inquiry raises for the first time the situation where an attorney general has exercised his powers pursuant to s. 63(1) as a result of the judge's treatment of the attorney general and/or his agents during a trial where the attorney general was the unsuccessful litigant;
- f. The guarantee of security of tenure for judges is a fundamental aspect of the constitutional guarantee of judicial independence which includes, at a minimum:
 - i. the requirement for "objective conditions and guarantees" to protect judicial independence and to ensure that reasonable persons will perceive that judges are secure from interference from the executive and legislative branches of government;
 - ii. a restriction on the power of the executive and legislative branches of government to impair materially the ability of a judge to exercise his or her judicial function; and
 - iii. that a superior court judge may only be removed under section 99 of the *Constitution Act, 1867* after a "judicial determination" of incapacity;

- g. The power of Parliament to remove a judge pursuant to s. 99 of the *Constitution Act, 1867* is limited by these constitutional guarantees of security of tenure. Section 63(1) of the *Judges Act* violates these constitutional protections because it:
- i. fails to provide objective conditions or guarantees on the unilateral power of the Attorney General to force a judge to respond to an inquiry, conducted in public, particularly where no other person, and including any other litigant before the court has a similar power;
 - ii. materially impairs the ability of the judge to exercise his or her judicial function by damaging the judge's public credibility by exposing him or her to public allegations of misconduct, where there has been no prior judicial assessment of the merits or substance of the allegations;
 - iii. exposes the judge to a capacity hearing having a procedure which is not consistent with and which does not protect the purposes and objects underlying judicial independence. The hearing exposes the judge to a public allegation of serious misconduct without the opportunity for any prior judicial assessment of the merits of the complaint, including an assessment of whether or not the complaint is sufficiently serious to warrant removal;
- h. Moreover, the ability of the Attorney General to require an inquiry in cases where the basis for the request arises from a case where the Attorney General was an unsuccessful litigant before the judge will give rise to the reasonable apprehension in the minds of judges, and the public, including the accused, that judges will be at risk if they criticize or find against the Crown. It creates the risk of a "chilling effect" that will undermine the ability of judges to adjudicate

cases fearlessly as justice requires. This chilling effect undermines and is wholly inconsistent with judicial independence;

- i. Requiring the Attorney General to comply with the same complaints process used by the CJC to deal with all other complaints against judges fully protects the Attorney General's legitimate public interest in the administration of justice, while at the same time interfering with judicial independence as little as possible;
 - j. Therefore, the process established pursuant to s. 63(1) of the *Judges Act* does not meet the standards constitutionally required by the principle of judicial independence. Consequently, s. 63(1) of the *Judges Act* is *ultra vires* the Parliament of Canada and the CJC and Inquiry Committee have no jurisdiction to proceed with this Inquiry.
3. In rendering its decision of December 16, 2004, the Inquiry Committee erred in law in determining that s.63 (1) of the *Judges Act* does not violate s.2 (b) of the *Charter of Rights and Freedoms*. The Inquiry Committee erred in this regard on the following basis:
- a. A judge's words and conduct during a judicial proceeding are expressive activity, protected by the Constitutional guarantee of freedom of expression;
 - b. The infringement of judicial freedom of expression caused by s. 63(1) is not justified by s. 1 of the *Charter*;
 - c. There is no rational connection between any legitimate government objective (presumably the need to remove judges whose conduct has rendered them incapable to continuing to exercise their judicial office), and the means used to achieve that objective. There is no reason why the government's objective cannot be completely protected by maintaining the right of the Attorney General to file a complaint with the Canadian Judicial Council and to have any such

complaint processed in the same manner as any other complaint;
and

- d. In addition, the provisions of s. 63(1) of the *Judges Act* do not impair the guarantee of freedom of speech "as little as possible". The mere fact that a inquiry has been commenced, together with the public nature of its proceedings cause serious damage to the credibility and reputation of a judge, without any prior judicial assessment of the merit of the underlying complaint. By contrast, the provisions of the complaints procedure of the Canadian Judicial Council provide a clear example of a process which sensitively balances the legitimate interests of the government and the public with the important societal interest in protecting judicial freedom of expression.

The application will be supported by the following material:

1. Decision of Canadian Judicial Council Inquiry Committee Reasons for Decision dated December 16, 2004;
2. The Record before the Inquiry Committee, including:
 - a. The affidavit of the Honourable Paul J. Cosgrove, sworn October 14, 2004; and,
 - b. The affidavit of the Honourable James Chadwick Q.C., sworn October 12, 2004;
 - c. Request for Inquiry from the Honourable Michael Bryant, Attorney General of Ontario, dated April 22, 2004, with Appendix; and,
 - d. Decision of Court of Appeal in *R. v. Elliott*, released December 4, 2003.
3. Such further material as counsel may advise and this Honourable Court may permit.

Date: January 20, 2005

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