Date: 20070312

Docket: A-562-05

Citation: 2007 FCA 103

CORAM: **SEXTON J.A.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

THE HONOURABLE MR. JUSTICE PAUL COSGROVE

Respondent

and

THE CANADIAN SUPERIOR COURT JUDGES ASSOCIATION
THE CRIMINAL LAWYERS' ASSOCIATION
THE CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS
INDEPENDENT COUNSEL
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF NEW BRUNSWICK
THE ATTORNEY GENERAL OF NOVA SCOTIA

Interveners

Heard at Toronto, Ontario, on December 11, 2006.

Judgment delivered at Ottawa, Ontario, on March 12, 2007.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: SEXTON J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] Part II of the *Judges Act*, R.S.C. 1985, c. J-1 (sections 58 to 71), establishes the Canadian Judicial Council (the Council), consisting of the Chief Justice of Canada, all Chief Justices and Associate Chief Justices of the superior courts, and certain senior judges of the superior courts.

Among other things, Part II of the *Judges Act* empowers the Council to investigate and conduct inquiries into complaints about the conduct of judges of the superior courts.

[2] Most complaints about judicial conduct are submitted under subsection 63(2) of the *Judges Act*, and are subject to a screening procedure that, in the vast majority of cases, results in a decision that no investigation or inquiry is warranted. However, if the federal Minister of Justice or the Attorney General of a province requests the Council pursuant to subsection 63(1) of the *Judges Act* to commence an inquiry as to whether the judge should be removed from office for one of the reasons specified in paragraphs 65(2)(a) to (d), the screening procedure applied to complaints under subsection 63(2) is not engaged.

[3] The Federal Court has held that subsection 63(1) of the *Judges Act* is unconstitutional in so far as it gives a legal power to provincial Attorneys General to compel the Council to commence an inquiry into the conduct of a judge of a superior court without the screening procedure applied to complaints submitted under subsection 63(2). The reasons for that decision are reported as *Cosgrove v. Canadian Judicial Council*, 2005 FC 1454.

[4] Before this Court is an appeal of that judgment. For the following reasons, I would allow the appeal.

[5] For convenience, these reasons are organized under the following headings:

1. Preliminary note on terminology

[6] The decision under appeal deals with the constitutionality of subsection 63(1) of the *Judges Act* only in relation to the Attorneys General of the provinces. The federal Minister of Justice is, *ex officio*, the Attorney General of Canada (subsection 2(2) of the federal *Department of Justice Act*, R.S.C. 1985, c. J-2). Therefore, where it is necessary in these reasons to refer collectively to all persons who have the right under subsection 63(1) of the *Judges Act* to compel the Council to commence an inquiry into the conduct of a judge of a superior court, I will use the term "Attorneys General". Where is it necessary to differentiate, I will use the term "Minister" or "Attorney General of Canada" to refer to the federal Minister of Justice or the Attorney General of Canada, and the term "provincial Attorney General" to refer to the Attorney General of a province.

2. Facts

[7] Justice Cosgrove is a judge of the Superior Court of Justice of Ontario. He was appointed to the Ontario County Court in 1984. In 1989, he became a Judge of the Ontario Court (General Division) upon the restructuring of the Ontario courts. The name of that Court has since been changed to the Superior Court of Justice.

[8] Justice Cosgrove has presided in countless cases during his judicial career, including many civil and criminal matters involving the Attorney General of Ontario.

[9] From 1997 to 1999, Justice Cosgrove presided in the murder trial of Julia Elliott. The prosecution of Ms. Elliott was conducted by counsel employed by the Attorney General of Ontario, in accordance with the normal practice in Ontario. Ms. Elliott was also represented by counsel.

[10] Over the course of the trial, Ms. Elliott's counsel moved three times for a stay of proceedings. The first two motions were denied. The third was granted on September 7, 1999 on the basis of the conclusion of Justice Cosgrove that there had been over 150 violations of Ms. Elliott's rights under the *Canadian Charter of Rights and Freedoms*. The Crown in right of Ontario was also ordered to pay Ms. Elliott's legal costs from the outset of the proceedings.

[11] The individuals implicated in the Charter violations, as found by Justice Cosgrove, included 11 Crown counsel and senior members of the Ministry of the Attorney General of Ontario. Justice Cosgrove's reasons are reported as *R. v. Elliott* (1999), 105 O.T.C. 241.

[12] Counsel employed by the Attorney General of Ontario, again in accordance with the normal practice, appealed the decision of Justice Cosgrove. Counsel for Ms. Elliott (not the same counsel who had represented her at trial) conceded that the findings of breaches of the Charter and abuse of process could not be sustained and that the award of costs was not warranted, but argued that the stay of proceedings was appropriate because Ms. Elliott's counsel at trial was incompetent and that it was his actions, not those of Crown counsel or other government officials, that resulted in a breach of Ms. Elliott's Charter rights. The Ontario Court of Appeal did not accept that argument. On December 4, 2003, the Crown's appeal was allowed, the stay of proceedings was set aside, and a

new trial was ordered, for reasons that are summarized as follows (*R. v. Elliott* (2003), 179 O.A.C. 219, 181 C.C.C. (3d) 118, 114 C.R.R. (2d) 1, at paragraph 166):

> [166] We conclude this part of our reasons as we began. The evidence does not support most of the findings of Charter breaches by the trial judge. The few Charter breaches that were made out, such as non-disclosure of certain items, were remedied before the trial proper would have commenced had the trial judge not entered the stay of proceedings. The trial judge made numerous legal errors as to the application of the Charter. He made findings of misconduct against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.

[13] On April 23, 2004, the Attorney General of Ontario wrote to the Council requesting pursuant to subsection 63(1) of the *Judges Act* that an inquiry be commenced into the conduct of Justice Cosgrove during the *Elliott* trial. Relying on material from the trial and the appeal, the Attorney General of Ontario expressed the opinion that the conduct of Justice Cosgrove throughout the trial had so undermined public confidence in the administration of justice in Ontario that Justice Cosgrove had become incapable of the due execution of his office, within the meaning of subsection 65(2) of the *Judges Act*.

[14] The opinion expressed by the Attorney General of Ontario was said to be based on the test for judicial incapacity stated in the 1990 *Decision of the Inquiry Committee of the Council in relation to the complaint of the Attorney General of Nova Scotia about the conduct of the Royal Commission on the Donald Marshall Jr. Prosecution* (published (1990), 40 U.N.B.L.J. 212):

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[15] In accordance with the usual practice of the Council, Justice Cosgrove was provided with a copy of the complaint and a letter outlining certain aspects of the procedure that would be followed, including the appointment of an Inquiry Committee and the appointment of Independent Counsel.

[16] On April 27, 2004, the Council issued a press release announcing that, at the request of the Attorney General of Ontario, there would be an inquiry into the conduct of Justice Cosgrove in relation to the *Elliott* trial. Justice Cosgrove was not consulted before the press release was issued. The press release received significant media coverage.

[17] Between September 7, 1999 when Justice Cosgrove rendered his decision staying the *Elliott* proceedings, and April 23, 2004 when the Attorney General of Ontario submitted his complaint, Justice Cosgrove heard a number of civil and criminal matters involving the Attorney General of Ontario, including two in which individuals appeared as counsel who had also acted as Crown counsel in the *Elliott* trial. In none of those cases was Justice Cosgrove asked to recuse himself.

[18] As a result of discussions after April 27, 2004 between Justice Cosgrove and the Chief Justice of the Superior Court of Justice, it was determined that Justice Cosgrove would not sit on any cases until the inquiry was resolved.

[19] Shortly after the complaint of the Attorney General of Ontario was received by the Council, an Inquiry Committee was appointed. The Chairperson is Chief Justice Lance Finch of the British Columbia Court of Appeal. The other members are Chief Justice Allan Wachowich of the Alberta Court of Queen's Bench, Chief Justice Michael MacDonald of the Supreme Court of Nova Scotia, Mr. John Nelligan, Q.C. of the Ontario Bar, and Ms. Kirby Chown of the Ontario Bar. Mr. Earl Cherniak, Q.C., was appointed Independent Counsel to the Inquiry Committee.

[20] Justice Cosgrove brought an application to the Inquiry Committee to challenge the constitutionality of subsection 63(1) of the *Judges Act* on the basis that it infringes the constitutionally protected independence of the judiciary. On December 16, 2004, the Inquiry Committee dismissed the application, giving written reasons.

[21] On January 20, 2005, Justice Cosgrove commenced an application in the Federal Court for judicial review of the decision of the Inquiry Committee dismissing his constitutional challenge. By virtue of Rule 303(2) of the *Federal Courts Rules*, SOR/98-106, the Attorney General of Canada was named as the respondent in that application. On October 26, 2005, the application for judicial review was allowed. The Order reads as follows:

1. This application for judicial review is allowed;
2. The December 16, 2004 decision of the Inquiry Committee is set aside;
3. This Court declares that to the extent that subsection 63(1) of the *Judges Act* confers the right on a provincial attorney general to compel the Canadian Judicial Council to inquire into the conduct of a judge, the provision does not meet the minimal standards required to ensure respect for the principle of judicial independence, and is thus invalid;

4. This Court further declares that the Inquiry Committee is without jurisdiction to proceed with this inquiry; and

5. Costs were not sought, nor are they ordered.

[22] The Attorney General of Canada, representing the Crown in right of Canada, has appealed the Order of the Federal Court. For ease of reference, I will refer to the appellant as the "Crown".

[23] Intervening in support of the Crown's appeal are the Attorneys General of Ontario, New Brunswick and Nova Scotia, and Independent Counsel.

[24] Intervening in support of the position of Justice Cosgrove are the Criminal Lawyers' Association, the Canadian Council of Criminal Defence Lawyers, and the Canadian Superior Court Judges Association.

3. Standard of review

[25] The Judge concluded that the standard of review applicable to the Inquiry Committee's decision on the constitutional question raised in this case is correctness, and that the standard of review on its findings of fact is patent unreasonableness. I agree. No other standard of review has been proposed.

4. Findings of fact

[26] The undisputed facts are summarized above. There are only two conclusions of the Inquiry Committee that could be characterized as findings of fact.

[27] First, the Inquiry Committee found no basis for concluding that the Attorney General of Ontario has relied upon subsection 63(1) of the *Judges Act* for an improper purpose. That

conclusion is not challenged. (Indeed, it appears there was no allegation of that nature against the Attorney General of Ontario.)

[28] Second, the Inquiry Committee found no basis for concluding that judges of the superior courts are intimidated by the knowledge that an Attorney General may compel the Council to commence an inquiry into their conduct. That conclusion was intended to address concerns raised by Justice Cosgrove about the potential chilling effect of subsection 63(1) on a judge of a superior court who is asked to make a finding adverse to the Attorney General. However, counsel for Justice Cosgrove argued, and I agree, that this finding is of little consequence because the question of whether there is an unconstitutional infringement of judicial independence is tested objectively, not on the basis of the perceptions of individual judges.

5. Judicial independence and judicial conduct

[29] An independent judiciary is essential to the rule of law in a democratic society. Indeed, the Inquiry Committee in this case said that judicial independence is the single most important element in the rule of law in a democratic society, followed closely by the necessity for an independent bar (Inquiry Committee decision, paragraph 26). I agree.

[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 paragraph 21, and *R. v. Lippé*, [1991] 2 S.C.R. 114 at page 139.

[31] Justice Strayer expressed this principle as follows in *Gratton v. Canadian Judicial Council (T.D.)*, [1994] 2 F.C. 769, at paragraph 16 (cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paragraph 329):

> 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 judicial independence. But it is equally important to remember that protections for judicial tenure were "not created for the benefit of the judges, but for the benefit of the judged".

[32] However, judicial independence does not require that the conduct of 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. N.B. (Judicial Council)*, [2002] 1 S.C.R. 249 at page 285.

6. Whether provincial Attorneys General have any role in reviewing judicial conduct

[33] One question raised in this case is whether provincial Attorneys General have or should have any part to play in the review of the conduct of judges of the superior courts given that, by virtue of section 96 of the *Constitution Act, 1867*, judges of the superior courts are appointed by the Governor General. It was pointed out in argument that there is no evidence that provincial Attorneys General had any such responsibilities or powers prior to the enactment of subsection 63(1) of the

Judges Act. Assuming that is so, it does not necessarily follow that provincial Attorneys General are precluded by law from participating in the review of the conduct of judges of the superior courts.

[34] Under the Canadian constitution, the superior courts of the provinces are the descendants of the Royal Courts of Justice, and thus are courts with inherent jurisdiction over all matters except to the extent that a different forum is validly specified by law: *Hunt v. T&N plc*, [1993] 4 S.C.R. 389; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307. Similarly, the Attorneys General collectively are the descendants of the Attorney General of England (see section 135 of the *Constitution Act, 1867*, section 5 of the federal *Department of Justice Act*, section 5(d) of the *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17 and analogous provisions in other provincial statutes relating to the office of Attorney General). The legislatures of the provinces have exclusive legislative authority with respect to the administration of justice in the province (subsection 92(14) of the *Constitution Act, 1867*).

[35] An important aspect of the traditional constitutional role of the Attorney General of England is to protect the public interest in the administration of justice. In Canada, that role is now shared by all Attorneys General – the provincial Attorneys General within their respective provinces, and the Attorney General of Canada in federal matters.

[36] The public interest in an appropriate procedure for the review of the conduct of judges is an aspect of the public interest in the administration of justice. Therefore, it seems to me to be consistent with Canadian constitutional principles for provincial Attorneys General to play a part in the review of the conduct of judges of the superior courts of their respective provinces.

7. Constitutionality of subsection 63(1) of the *Judges Act*

[37] While it is appropriate for provincial Attorneys General to play some role in the review of judicial conduct, the question in this case is whether the particular role given to the provincial Attorneys General by subsection 63(1) of the *Judges Act* impairs judicial independence.

(a) The objective test

[38] Whether a particular statutory provision is unconstitutional because it infringes judicial independence must be tested objectively and practically. The relevant question, paraphrasing from the reasons of Justice de Grandpré in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394, is whether a reasonable and right minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension that the statutory provision would impair a judge's impartiality. This test is intended to minimize the effect of subjective perceptions and individual sensitivities, as well as remote and speculative possibilities, while at the same time recognizing the importance of public perception in ensuring public confidence in the impartiality of judges.

[39] Three essential conditions of judicial independence, as recognized in *Valente v. The Queen*, [1985] 2 S.C.R. 673, are security of tenure, financial security, and institutional independence with respect to matters of administration bearing on the exercise of the judicial function. The element of judicial independence of concern in this case is security of tenure. That is because one possible outcome of an inquiry under the *Judges Act* is that the Council may recommend to the Minister that the judge be removed from office, and the Minister may agree and set in motion the Parliamentary procedure required for the judge's removal from office.

[40] Also, history has shown that an inquiry requested by an Attorney General under subsection 63(1) of the *Judges Act* may result in the judge's resignation. Since 1977, there have been seven requests by an Attorney General for an inquiry under subsection 63(1). Four of those resulted in a recommendation that the judge not be removed. One of those (the 1990 Marshall inquiry) involved five judges, two of whom resigned before the inquiry commenced. Of the remaining three cases, two resulted in the judge's resignation before the inquiry commenced its work, and one resulted in the judge's resignation after a recommendation of removal.

[41] The question to be asked is this: Would a reasonable and right minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, have a reasonable apprehension that subsection 63(1) of the *Judges Act* would impair a judge's impartiality because it requires the Council to commence an inquiry at the request of a provincial Attorney General, without engaging the screening procedure applied to complaints about judicial conduct made under subsection 63(2)?

(b) Applying the objective test

[42] The hypothetical reasonable person who must consider this question would understand the role of a judge of a superior court, the relevant constitutional principles (including those summarized above, and the constitutional provision by which judges of the superior courts are assured security of tenure), the historical and legislative context, how and in what circumstances a judge may be removed from office, and the roles that may be played by the Attorneys General and the Council in the investigation of judicial conduct complaints. The following discussion touches upon what I perceive to be the relevant aspects of all of those points.

(i) Section 99 of the *Constitution Act, 1867*

[43] An understanding of the security of tenure of judges of the superior courts must begin with the *Constitution Act, 1867*, which gives judges of the superior courts the highest possible assurance of security of tenure. Subsection 99(1) of the *Constitution Act, 1867*, reads in relevant part as follows:

99. (1) […] the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.	99. (1) […] les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

[44] The *Constitution Act, 1867*, does not establish guidelines for the procedure to be followed, or the principles to be applied, when the Senate and House of Commons are asked to consider whether the conduct of a judge warrants removal. It is generally accepted that the Minister is responsible for presenting the question to the Senate and the House of Commons, but it seems that on those rare occasions when judicial conduct was in issue, the procedural details were devised on an *ad hoc* basis.

(ii) Historical context of Part II of the *Judges Act*

[45] The absence of procedural and substantive guidance created significant problems in the late 1960s in a case involving Justice Léo Landreville: see *Landreville v. Canada*, [1973] F.C. 1223 (*Landreville No. 1*); *Landreville v. Canada* [1977] 2 F.C. 726 (*Landreville No. 2*); *Landreville v. Canada* [1981] 1 F.C. 15 (*Landreville No. 3*); Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Toronto: Canadian Judicial Council, 1995) at page 88; and William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville* (Toronto:

University of Toronto Press, 1996). The experience of that case led the Minister in 1971 to propose the enactment of what is now Part II of the *Judges Act*.

[46] The complaint against Justice Landreville was conducted under the *Inquiries Act* (now R.S.C. 1985, c. I-11) by a retired Supreme Court Justice. The Commissioner concluded that Justice Landreville was unfit for the proper exercise of the judicial function. The Commissioner's report was tabled in the House of Commons in August of 1966. Later that year, a special joint committee of the Senate and the House of Commons was appointed to "enquire into and report upon the expediency of presenting an address" for the removal of Justice Landreville from the office of judge. That committee reported in April of 1967, and recommended removal proceedings, based at least in part on the report of the Commissioner. The matter had not yet come before Parliament when Justice Landreville resigned in 1967.

[47] Mr. Landreville later brought an application in the Federal Court, seeking to nullify the report of the Commissioner. The application resulted in a declaration by Justice Collier that the Commissioner erred in law in making a finding that was not within his terms of reference, and in failing to give proper notice of a certain allegation of misconduct as required by section 13 of the *Inquiries Act* (see *Landreville No. 2*, at page 759). The judge in that case also commented that the Commissioner had not recorded Mr. Landreville's personal history in a completely objective way. Mr. Landreville later sued for the annuity that was not paid to him upon his resignation. It was determined that the Governor in Council had not properly considered his request for an annuity (see *Landreville No. 3*). Mr. Landreville's claim eventually was settled with an *ex gratia* payment.

[48] Many criticisms may be made about the procedure followed in the Landreville case, but it seems to me that the root of the problem was the lack of a fair and properly focused procedure for

investigating complaints about the conduct of judges of the superior courts. The solution involved the enactment, in 1971, of Part II of the *Judges Act*. As stated above, those provisions established the Council and empowered the Council to conduct investigations into judicial conduct and to report its recommendations to Parliament.

(iii) Section 71 of the *Judges Act*

[49] I pause at this point to note that the power of the Governor General to remove a judge from office upon the joint address of the Senate and the House of Commons is not affected by anything done, or omitted to be done, under Part II of the *Judges Act*. Section 71 of the *Judges Act* is explicit on that point. That means, in my view, that it is possible in theory for a judge to be removed from office even if the inquiry procedure in Part II of the *Judges Act* is never engaged. As a practical matter, however, and especially with the lessons learned from the Landreville experience, it seems to me improbable that Parliament could be moved to recommend the removal of a judge without the kind of firm foundation in fact and principle that is likely to be obtained through an inquiry under Part II of the *Judges Act*, or its functional equivalent.

(iv) Procedure for an Attorney General's complaint under subsection 63(1)

[50] The procedure followed in an inquiry into the conduct of a judge of a superior court is found in part in the *Judges Act*, and in part in the *Canadian Judicial Council Inquiries and Investigations By-Laws*, SOR/2002-371 (the "*Inquiry By-Laws*"), made by the Council under the authority of paragraph 65(3)(c) of the *Judges Act*. In the discussion below, I summarize the provisions and rules governing the inquiry procedure that seem to me to be relevant to this case. However, it is useful first to take note of the limits on the discretion of an Attorney General to exercise the power in subsection 63(1) to compel the commencement of an inquiry.

[51] The most important constraint, in my view, flows from the traditional constitutional role of Attorneys General as guardians of the public interest in the administration of justice. Attorneys General are constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest: *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; The Hon. Ian G. Scott, "Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s", (1989), 39 U.T.L.J. 109 at page 122; The Hon. J.C. McRuer, *Royal Commission of Inquiry into Civil Rights*, Report No. 1, vol. 2, c. 62 (Toronto: Queen's Printer, 1968) at page 945; The Hon. R. Roy McMurtry, "The Office of the Attorney General", in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at page 7. Attorneys General are entitled to the benefit of a rebuttable presumption that they will fulfil that obligation.

[52] A second constraint is found within subsection 63(1) itself. As I read that provision, an Attorney General is entitled to request the commencement of an inquiry under subsection 63(1) only in relation to judicial conduct that is sufficiently serious to warrant removal of the judge from office for one of the reasons specified in paragraphs 65(2)(a) to (d). The Council, in the *Report of the Canadian Judicial Council to the Minister of Justice under ss. 65(1) of the Judges Act concerning Mr. Justice Jean-Guy Boilard of the Superior Court of Québec (2003)*, said (at page 3) that it may decline to commence an inquiry on the basis of a request under subsection 63(1), or the Inquiry Committee may decline to continue an inquiry, if the letter of request from an Attorney General does not allege bad faith or abuse of office, and does not on its face disclose an arguable case for removal. In my view, this principle (which I will refer to as the "*Boilard* rule") is a valid expression of the general principle that a tribunal, as master of its own procedure, may decline to proceed in any case that is outside its mandate or is an abuse of its process.

[53] It is true that an Attorney General, while acting in good faith, may submit a request that is not well founded. That is demonstrated by the fact that not every inquiry requested by an Attorney General results in a recommendation for removal and that, in at least one instance, the request did not disclose even a *prima facie* case. However, the question of whether judicial conduct in a particular case warrants removal is a matter on which reasonable and knowledgeable people may disagree. The possibility that an Attorney General may misjudge the seriousness of particular judicial conduct bears little weight in determining the constitutionality of subsection 63(1).

[54] I turn now to the inquiry procedure itself. The inquiry is conducted in the first instance by an Inquiry Committee, which has the power of a superior court to summon and compel the attendance of witnesses and to require the production of documents.

[55] An Inquiry Committee consists of an uneven number of members. The majority are members of the Council designated by the Chairperson or Vice-Chairperson of the Judicial Conduct Committee of the Council. The others, designated by the Minister, may be members of the bar of a province of at least 10 years standing. An Inquiry Committee cannot include any person who is a member of the same court as the judge who is the subject of the inquiry. The Chairperson or Vice-Chairperson of the Judicial Conduct Committee chooses the Chairperson of the Inquiry Committee.

[56] The Chairperson or Vice-Chairperson of the Judicial Conduct Committee also appoints Independent Counsel to the Inquiry Committee, who must be a member of the bar of a province of at least 10 years standing whose ability and experience is recognized within the legal community. Independent Counsel is responsible for presenting the case to the Inquiry Committee and making submissions on questions of procedure and applicable law that are raised during the proceedings. Independent Counsel must perform their duties impartially and in the public interest.

[57] Proceedings of the Inquiry Committee must be conducted in accordance with the principle of fairness. The judge who is the subject of the inquiry must be given reasonable notice of the subject matter of the inquiry and of the time and place of any hearing, and must be afforded an opportunity, in person or by counsel, of being heard at the hearing, of cross-examining witnesses and adducing evidence on his or her own behalf. It is the responsibility of Independent Counsel to give the judge sufficient notice of all complaints or allegations that are being considered by the Inquiry Committee to enable the judge to respond fully to them.

[58] A hearing of the Inquiry Committee is held in public unless the Inquiry Committee determines that the public interest and the due administration of justice requires that all or part of it be conducted in private, or the Minister requires that it be held in public. The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest.

[59] The Inquiry Committee reports to the Council setting out its findings and conclusions as to whether or not a recommendation should be made for the judge's removal. A copy of the report is provided to the judge, to Independent Counsel and to any other person with standing before the Inquiry Committee. If the hearing was conducted in public, the report is made available to the public.

[60] Within 30 days of receiving the report of the Inquiry Committee, or such further time as may be allowed by the Council, the judge may make a written submission to the Council regarding the report. Independent Counsel is provided with a copy of any written submission the judge makes to the Council, and may submit a written response within 15 days.

[61] If the judge makes an oral statement to the Council, the statement is given in public unless the Council determines that it is not in the public interest to do so. Independent Counsel must be present and may be invited to make an oral statement in response.

[62] The Council considers the report of the Inquiry Committee and any written submission or oral statement of the judge or Independent Counsel. Members of the Inquiry Committee do not participate in these deliberations.

[63] The Council provides the Minister with a report of its conclusions, and the record of the inquiry. A copy of the report is provided to the judge. If the Council is of the opinion that the judge has become incapacitated or disabled from the due execution of the office of judge for any of the reasons set out in subsection 65(2) of the *Judges Act* (namely, (a) age or infirmity, (b) having been guilty of misconduct, (c) having failed in the due execution of the office of judge, or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of the office of judge), the Council may, in its report to the Minister, recommend that the judge be removed from office.

[64] As explained above, the Council has no power to remove a judge from office. That can be done only by the Governor General on the joint address of the Senate and House of Commons. If the question of removal is to be put before Parliament, it is the Minister who does so. It is open to the Minister to put the question to Parliament, or to decline to do so. Like all acts of an Attorney General, the Minister's discretion in that regard is constrained by the constitutional obligation to act in good faith, objectively, independently and with a view to safeguarding the public interest. It is presumed, in the absence of evidence to the contrary, that the Minister will fulfil that obligation.

[65] I would emphasize five aspects of the inquiry procedure that, taken together, establish that the inquiry, once commenced, is fair to the judge who is the subject of the inquiry:

1) The judge is given notice of the allegations of the complainant, and an opportunity to respond and to be heard.

2) The inquiry is entrusted in the first instance to a group of senior judges and lawyers, and their recommendation is reviewed independently by a larger group consisting of Chief Justices, Associate Chief Justices and other senior judges of the superior courts. That ensures that the issues are considered by a number of different individuals whose collective knowledge and experience is not only appropriate to the task, but the best available in terms of their knowledge of the relevant constitutional principles and the work of the judiciary.

3) The substantive and procedural aspects of the inquiry are guided by the participation of Independent Counsel, who is required to act impartially and in the public interest, which necessarily includes the public's interest in maintaining the independence of the judiciary. I note parenthetically that it was Independent Counsel who argued for the summary dismissal of the Attorney General's request for an inquiry in the *Boilard* case (referred to above).

4) The Attorney General who requests an inquiry does not present or prosecute the case against the judge, and has no formal role in the conduct of the inquiry.

5) The outcome of the proceedings is a report and recommendation to the Minister, who must determine whether the matter will be referred to Parliament. The Minister, as the Attorney

General of Canada, is obliged and presumed to consider that question in good faith, objectively, independently and in the public interest.

(v) Screening procedure for ordinary complaints under subsection 63(2)

[66] I will now describe the screening procedure followed when a complaint is made under subsection 63(2) of the *Judges Act*, which is the procedure that is omitted when an Attorney General requests the commencement of an inquiry under subsection 63(1).

[67] A complaint under subsection 63(2) (which I will refer to as an "ordinary complaint") may be made by anyone, including a Chief Justice (that was the situation in *Gratton*, cited above). Even an Attorney General may have recourse to subsection 63(2) rather than subsection 63(1), and presumably may do so to make a complaint about the conduct of a judge that may not warrant removal for any of the reasons set out in paragraphs 65(2)(a) to (d).

[68] The Council normally does not publicize ordinary complaints or the results of the complaints procedure, unless the result is the establishment of an Inquiry Committee. However, the complainant is not obliged to keep the complaint confidential, and may not do so.

[69] An ordinary complaint is subject to a multi-tiered procedure to determine whether an inquiry is warranted. The procedure is set out in detail in the *Procedures for Dealing with Complaints made to the Canadian Judicial Council about Federally Appointed Judges.*

[70] At the first level, the complaint is reviewed by the Executive Director of the Council to determine whether it warrants the opening of a file. No file is opened if the complaint is clearly

irrational or an obvious abuse of the complaint process. If a file is opened, the complaint progresses to the second level.

[71] At the second level, the complaint is referred to the Chairperson (or the Vice-Chairperson) of the Judicial Conduct Committee. The Chairperson may dispose of the complaint summarily if it is outside the mandate of the Council (for example, a complaint that seeks a review of a judge's decision rather than a judge's conduct), or if it is trivial, vexatious, made for an improper purpose, manifestly without substance, or does not warrant further consideration. If the complaint is not dismissed summarily, the Chairperson may seek additional information from the complainant, the judge or the judge's chief justice. The complaint may be dismissed, resolved on the basis of remedial measures, or referred to a panel. If it is referred to a panel, it progresses to the third level.

[72] At the third level, the complaint is considered by a panel of three or five judges (not including a judge who is a member of the same court as the subject of the complaint, and not including the Chairperson of the Judicial Conduct Committee). The judge is informed of the constitution of the panel, provided with any information not previously disclosed, and invited to respond. If the complaint is not considered serious enough to warrant an inquiry, it may be resolved at that stage with a letter of concern, or a recommendation of remedial measures. If the panel considers the complaint serious enough to warrant an inquiry, the panel makes a recommendation to the Council that an Inquiry Committee be established. That moves the complaint to the fourth level.

[73] At the fourth level, the Council considers the recommendation of the panel and decides whether an inquiry is warranted. The judge has an opportunity to make submissions to the Council as to why the complaint should or should not be investigated further. If an inquiry is warranted, the Inquiry Committee procedure outlined above is followed.

[74] The experience of the Council is that the vast majority of ordinary complaints are dismissed summarily. Of the few that remain, almost all are resolved quickly with remedial measures or a letter of explanation. Only a miniscule percentage of ordinary complaints disclose conduct that warrants an inquiry, and even fewer result in a recommendation of removal.

(vi) Discussion

[75] The manner in which an ordinary litigant might perceive the power of an Attorney General to compel the commencement of an inquiry into the conduct of a judge was graphically described by counsel for the interveners, the Criminal Lawyers' Association and the Canadian Council of Criminal Defence Lawyers. He posed the hypothetical case of a criminal defendant being prosecuted in a superior court by counsel employed by the Attorney General, where the defendant knows that the Attorney General may request an inquiry under subsection 63(1) of the *Judges Act*, and so is in a position to hurt the judge more than the defendant could possibly do by making an ordinary complaint under subsection 63(2). It was argued that an ordinary litigant might well apprehend that the judge would hesitate to give effect to a challenge to the propriety of an act of Crown counsel or others employed by the Attorney General.

[76] In my view, this example is flawed, primarily because it assumes that the relevant constitutional question is considered from the subjective view of a litigant, rather than on the basis of the objective test referred to above. More specifically, it fails to take into account the constitutional principle that an Attorney General must not exercise the power under subsection 63(1) in order to "hurt the judge", and the presumption that the Attorney General will not act improperly. It also disregards the fact that a complaint against a judge that is obviously

unmeritorious, however it is made or by whom, is unlikely to cause lasting damage. If it is unmeritorious it is likely to be dismissed, either summarily or after an inquiry.

[77] In practical terms, the screening procedure followed for an ordinary complaint under subsection 63(2) of the *Judges Act* is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint by remedial measures, without the establishment of an Inquiry Committee. I will discuss each of these in turn.

[78] Publicity. Much was made in the argument before this Court that in this case, the publicity attached to the complaint made by the Attorney General of Ontario, coupled with the inevitable consequence that Justice Cosgrove was unable to sit once the matter was publicized, was harmful or potentially harmful to the reputation of Justice Cosgrove. I have no doubt that a publicized complaint about judicial conduct is more difficult for a judge that an unpublicized complaint. However, it seems to me that in the debate about the constitutionality of subsection 63(1), the risk of publicity should be given little weight.

[79] Judicial or quasi-judicial procedures are conducted in public except in extraordinary circumstances. That is normally the case for inquiries under the *Judges Act*, although the Council has the authority to conduct its proceedings in private if required by the public interest and the due administration of justice. At the same time, it must be said as a practical matter that the *Elliot* trial and appeal had attracted considerable publicity before the Attorney General requested an inquiry. In any event, the risk of publicity is present even with ordinary complaints, because there are no constraints on a complainant who chooses to publicize the fact that a complaint has been made.

[80] Summary dismissal. Part of the function of the screening procedure for ordinary complaints is to facilitate the summary dismissal of complaints that on their face are unmeritorious. In the case of an Attorney General's request for an inquiry under subsection 63(1), that function is served by the *Boilard* rule, which effectively permits the summary dismissal of a complaint by an Attorney General if it is obviously unmeritorious or does not disclose judicial conduct warranting removal from office. The difference is that an ordinary unmeritorious complaint may be dismissed before an Inquiry Committee is established, while under the *Boilard* rule an Attorney General's complaint may be dismissed at an early stage by the Inquiry Committee itself, either before or after its work is commenced, or it may be dismissed later by the Council. Those differences are trivial, in my view.

[81] Remedial measures. It seems to me that the possibility of a resolution with remedial measures is unlikely to be a factor in cases involving judicial conduct that would warrant removal of the judge from office. If an Attorney General makes a request for an inquiry under subsection 63(1) on the basis of conduct that would not warrant removal from office, the *Boilard* rule would come into play and there would be no recommendation for removal. If the conduct would warrant removal, there can be no valid objection to the establishment of an Inquiry Committee on the basis that an ordinary complainant might be satisfied with a lesser remedy.

[82] In my view, the differences between the two complaint procedures are relatively minor when considered against the constitutional assurance of security of tenure given to judges of the superior courts, the constitutional role of Attorneys General and the presumption that the Attorneys General will act in accordance with their constitutional obligations, the substantial protection afforded by the appointment of Independent Counsel to the Inquiry Committee, and the procedural safeguards provided in the *Judges Act*, the *Inquiry By-Laws*, and the Council's rules of practice.

[83] I return to the question posed above: Would a reasonable and right minded person, knowing the relevant facts and circumstances, viewing the matter realistically and practically, and having thought the matter through, have a reasonable apprehension that subsection 63(1) of the *Judges Act* would impair a judge's impartiality because it requires the Council to commence an inquiry at the request of a provincial Attorney General, without engaging in the screening procedure applied to complaints about judicial conduct made under subsection 63(2)? My analysis compels me to answer no. I conclude that subsection 63(1) of the *Judges Act* is constitutional.

[84] I have not overlooked the argument that subsection 63(1) of the *Judges Act* cannot be justified because it serves no practical purpose. That argument is based on the proposition that an Attorney General may make an ordinary complaint under subsection 63(2) which will be the subject of an inquiry if it survives the screening. Perhaps the complaints procedure would not be substantially impaired if subsection 63(1) were repealed. However, it does not follow that subsection 63(1) is unconstitutional.

8. Conclusion

[85] I would allow this appeal, set aside the decision of the Federal Court, dismiss the application for judicial review, and refer this matter back to the Inquiry Committee.

[86] As the Crown has not asked for costs, none should be awarded.

"K. Sharlow"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	SEXTON J.A. EVANS J.A.
DATED:	MARCH 12, 2007

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