Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

REPLY FACTUM OF THE INDEPENDENT COUNSEL

(Regarding the constitutionality of s. 63(1) of the *Judges Act*)

LERNERS LLP
Barristers & Solicitors
130 Adelaide Street West
Suite 2400
Toronto ON M5H 3P5

Tel: (416) 601-2350
Fax: (416) 867-2402

Earl A. Cherniak, Q.C.

Independent Counsel

TO:

Farris, Vaughan, Wills & Murphy
Barristers & Solicitors
25th Floor - 700 West Georgia Street
Vancouver, B.C. V7Y 1B3

George K. Macintosh, Q.C.

Tel: 604-661-9332 (dir)
Fax: 604-661-9349

Counsel for the Canadian Judicial Council

AND TO:

Paliare Roland Rosenberg Rothstein LLP
Barristers and Solicitors
501 - 250 University Avenue
Toronto, ON M5H 3E5

Chris G. Paliare

Tel: 416-646-4300
Fax: 416-646-4301

Counsel for The Honourable Mr. Justice Paul Cosgrove

Department of Justice Canada
Ontario Regional Office
3400 - 130 King Street West
Toronto, ON M5X 1K6

Donald J. Rennie / Kathryn A. Hucal

Tel: 416.954.0625
Fax: 416.952.0298

Counsel for the Intervener Attorney-General of Canada

Ministry of the Attorney General
Constitutional Law Branch
720 Bay Street, Fourth Floor
Toronto, ON M5G 2K1

Robert E. Charney

Tel: 416.326.4452
Fax: 416.326.4015

Counsel for the Intervener Attorney-General of Ontario

Code Hunter Barristers
840 440 2 Avenue SW
Calgary, AL T2P 5E9

Dr. Sheilah Martin, Q.C.

Tel: 403.234.9800
Fax: 403.261.2054

Counsel for the Intervener Canadian Superior Court Judges Association

Gold & Associate
Barristers
210 - 20 Adelaide Street East
Toronto, ON M5C 2T6

Alan D. Gold

Tel: 416.368.1726
Fax: 416.368.6811

Counsel for the Intervener Criminal Lawyers Association

IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

FACTUM OF THE INDEPENDENT COUNSEL

I N D E X

TAB		Page
1.	Factum	1
A.	Schedule A	8
B.	Schedule B	9

1. The Independent Counsel replies to the facta of the intervenors as follows.

A. The Definition of the Issues

2. The Independent Counsel agrees with paragraph 56 of the Canadian Superior Court Judges Association ("CSCJA") factum[1] that a clear distinction exists between the *decisions* of judges and the *conduct* of judges. However, it should be presumed that the Canadian Judicial Council (the "CJC") and the Inquiry Committee will only inquire into the conduct of Justice Cosgrove if there are reasonable grounds to believe that his conduct may meet the criteria set out in s. 65(2) of the *Judges Act,* R.S.C. 1985, c. J-1 ("*Judges Act*"). It should also be presumed that Independent Counsel will place before the Inquiry Committee only allegations of conduct by Justice Cosgrove that is capable of meeting those criteria.

3. The issues on this motion are the interpretation and constitutionality of s. 63(1) of the *Judges Act,*.

B. The Interpretation of the Judges Act

4. The Independent Counsel agrees with the factum of the CSCJA that the *Judges Act,* correctly interpreted, does not give the attorneys-general or the federal Minister of Justice (the "Minister") the power to compel the Canadian Judicial Council ("the CJC") to require the appointment of an Inquiry Committee.[2]

5. Section 63(1), however, gives the attorneys–general and the Minister the power to require that the CJC *itself* inquire into the conduct of a superior court judge to determine whether the criteria in s. 65(2) of the *Judges Act* apply. How the CJC decides to carry out its statutorily mandated task is, pursuant to s. 63(3), up to it. The CJC has the power to delegate

---

[1]Factum of the Intervener Canadian Superior Courts Judges Association (Regarding the constitutionality of s. 63(1) of the *Judges Act*) (hereinafter "CSCJA Factum"), paragraph 56.

[2] CSCJA Factum, paragraph 40.

its task of "conducting an inquiry or investigation" in a particular case to an Inquiry Committee, but it also retains the discretion to carry out either an "inquiry" or an "investigation" itself. Under the CJC by laws, where as here, the CJC has chosen to proceed through a Inquiry Committee, that Committee, under s. 89 of the by-law reports back to the CJC, and it is the CJC that reports to the Minister, pursuant to s. 65(1).

6. The Independent Counsel agrees with the proposition in paragraphs 28 - 48 of the factum of the CSCJA that the words "inquiry" and "investigate" in the *Judges Act* should be taken very generally as meaning "review." The word "inquiry" refers to the process commenced under s. 63(1), whereas the word "investigation" refers to the process commenced under s. 63(2).

7. However, the Independent Counsel cannot agree with the proposition in paragraphs 45- 47 that the appointment of an Inquiry Committee necessarily entails a formal hearing process. On the contrary, ss. 63 (3) and (4) contemplate that the CJC itself or an Inquiry Committee may proceed to inquire *or* investigate by way of a formal hearing or otherwise.

8. As the factum of the Attorney–General of Canada observes, regardless of whether the CJC appoints an Inquiry Committee itself or undertakes an inquiry or investigation itself, pursuant to s. 63(6), the Minister and the CJC itself, but not the provincial attorneys–general, may require that the investigation or inquiry be carried out in public.[3] It is not the Attorney–General of Ontario, in the present case, who has required the appointment of an Inquiry Committee or who has required the inquiry to proceed in public. Rather, these are the decisions of the CJC.

9. Moreover, nothing in the *Judges Act* precludes the Minister from requiring that the inquiry or investigation be carried out in public from the *beginning* of the process. Similarly, the CJC itself *could*, if it decided to do so, determine that either an investigation or an inquiry be carried out in public right from its outset.

---

[3]AG-Canada Factum, paragraph 22.

10. The Independent Counsel thus cannot agree with the proposition in the factum of the CSCJA that the *Judges Act* itself contemplates that a complaint from either an attorney-general or a private person must progress through an *in camera* screening phase process to a public inquiry conducted by an Inquiry Committee.[4] While this may be the most practical and traditional manner of proceeding, and one that is reflected in the CJC's by-laws and policies, nothing in the *Judges Act* prescribes that the CJC will necessarily proceed in this manner. As stated above, the Minister or the CJC itself both retain the power to require that either an inquiry or an investigation proceed in public from the outset.

11. As well, nothing in the *Judges Act* precludes an Inquiry Committee from conducting an investigation or an inquiry *in camera*, if the CJC decides that a private process would best serve the public interest, and the Minister does not require that it be in public. On the contrary, s. 63(6) expressly provides for this.

12. As paragraph 14 of the factum of the Attorney–General of Canada points out,[5] the CJC has a broad discretion as to the determination of its procedures. Further, s. 71 of the *Judges Act* provides that the omission of anything required under ss. 63-70 of the *Judges Act* does not preclude the power, right or duty of the two houses of Parliament or the Executive under s. 99 of the *Constitution Act, 1867*. It would thus be open for the Minister to, for example, appoint an commission of inquiry under the *Inquiries Act,* should the CJC fail to act as required under s. 63(1).

13. Therefore, the interpretation of the *Judges Act* advanced by the CSCJA does not obviate the necessity of addressing the underlying constitutional issue in this case, which is whether the Constitution requires an *in camera* review of a complaint, before there can be a public process before an Inquiry Committee or the CJC.

---

[4]CSCJA Factum, paragraphs 32-62.

[5]Factum of the Attorney General of Canada (hereinafter "AG-Canada Factum"), paragraph 14.

C. The Constitutional Issue

14. Nothing in the express words of the *Constitution Acts* or the jurisprudence requires a process of inquiry or investigation that proceeds from an *in camera* review to a public hearing. The constitutional issue can therefore be framed in terms of whether the structural principle of judicial independence requires such a process. Both Justice Cosgrove and the CSCJA appear to be advancing the position that the present by-laws and policies of the CJC for dealing with complaints initiated by private persons be constitutionalized as the only method by which a complaint against a judge, whether by an attorney-general or a member of the public. For the reasons stated in its original factum,[6] the Independent Counsel believes that this approach is unwise and unnecessary for the protection of the judiciary and is not a constitutional requirement.

15. The factum of the Attorney-General of Ontario (at paragraph 62)[7] cites ***Valente*** for the proposition that the process of a joint address to Parliament to remove a superior court judge is "solemn, cumbersome, and publicly visible"[8]. In other words, the ultimate check the Constitution provides against the potential for the abuse of the power of the Executive and the Legislature is the scrutiny of the people. In a similar vein, paragraph 38 of the factum of the Attorney-General of Canada sates that "[i]t is only through an open and transparent process that public confidence in the integrity of the judiciary can be maintained."

16. The approach of the Attorneys-General may be contrasted with paragraphs 120-121 of the CSCJA factum, which respond to the point made at paragraph 120 in the initial factum of the Independent Counsel that, if an Attorney-General attempted to abuse the power under s. 63(1) of the *Judges Act* to require an inquiry because of a disagreement with the decision

---

[6] Factum of the Independent Counsel (regarding the constitutionality of s. 63(1) of the *Judges Act* (hereinafter, "Independent Counsel Factum"), paragraphs 53-65.

[7] Factum of the Attorney General of Ontario (hereinafter "AG-Ontario Factum"), paragraph 62.

[8] *Valente* v. *The Queen,* [1985] 2 S.C.R. 673 at p. 697.

of a judge, the CJC has the ability to rebuff such attempted abuse in a manner that would cause the attorney–general to pay a high political cost. The CSCJA maintains that:

a) it is "precisely the ***possibility*** of interference and influence" of the Attorney-General that encroaches on judicial independence [Emphasis added.];

b) it is not clear that an attorney-general will pay a high political cost; and,

c) "it is the constitution, not political costs, which exists to ensure the separation of powers and the public's right to an independent judiciary."

17. It is the view of Independent Counsel that:

a) The *possibility* of abuse is insufficient to render a statutory provision unconstitutional. All sorts of statutory powers and the Crown prerogative (for instance, the power to command the state's monopoly on armed force) may contain the *potentia*l for attempts to usurp the separation of powers. This does not mean such provisions are necessarily unconstitutional.

b) The separation of powers in a constitutional democracy depends on a system of checks and balances which, in part, works by imposing the risk of high political costs on those who would abuse their powers. As James Madison observed in the Federalist Papers, "mere declarations in the written constitution are insufficient to restrain the several departments within their legal rights."[9]

c) It is true that one can envision a worst case scenario where the Executive or Parliament might not pay a high political cost for encroaching on judicial independence. However, no constitution can withstand an absence of will on

---

[9] The Federalist No. 49, *The Federalist Papers* 2nd. Ed., Roy P. Fairfield, ed., (Doubleday & Company Inc. Garden City, N.Y., 1966) at p. 155

the part of the people to defend it. Ultimately, the preservation of the Constitution and the separation of powers depends on the willingness of *all* branches of government and the people themselves to respect its structure and core values. It is an oversimplification to state that the judiciary is "*the* guardian" of the Constitution because *all* branches of the government, including the attorneys-general in their unique constitutional roles, and, ultimately, the people, are the guardians of the Constitution.

d) A public process for dealing with complaints that are capable of resulting in the removal of a judge is not necessarily inimical to the independence of the judiciary but, rather, can strengthen the public's understanding of its Constitution, and the role of judges and the concept of judicial independence.

18. As paragraph 37 of the factum of the Attorney-General of Canada notes, it is not inconceivable, although highly remote, that the CJC itself might wrongfully refuse to conduct an inquiry. For that reason, the Constitution must provide for an ultimate check on the judiciary itself. The power to invoke that ultimate check cannot rest with the judiciary, but must reside, as s. 99 of the *Constitution Act, 1867* provides, with the Executive and Parliament.

19. The Independent Counsel, for that reason, agrees with paragraphs 62-68 of the factum of the Attorney-General of Ontario[10] that ***Valente***[11] and ***Therrien***[12] may not require that a judicial process occur before s. 99 of the *Constitution Act, 1867* is invoked to remove a superior court judge from office. At the very least, there is no requirement that the procedures in s. 63-65 of the *Judges Act* take place. Section 71 of the *Judges Act* contemplates this possibility by providing that the omission of anything done under the authority of ss. 63-70 of the *Judges Act* does not preclude the Executive and Parliament from exercising their rights

---

[10]AG-Ontario Factum, paragraphs 62-68.

[11]*Supra* footnote 8.

[12]*Therrien v. Québec*, [2001] 2 S.C.R. 3.

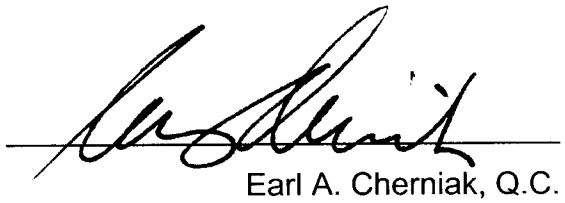
and carrying out their duties relating to the removal of judges from office. Section 71 is a reminder that the Constitution does not give the judiciary the power to unilaterally frustrate the removal process. In any event, the Independent Counsel accepts that it is probably not necessary to resolve this question in this case.

D. Conclusion

20. The core issue on this motion is thus whether s. 63(1) of the *Judges Act,* when properly interpreted and viewed with a realistic appreciation of the constitutional roles of *all* branches of government and particularly the role of attorneys-general, fails to respect, and threatens to undermine, those checks and balances in the Constitution that preserve the independence of superior court judges, not whether it contains, in an abstract sense, the potential for abuse.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: December 3, 2004



Earl A. Cherniak, Q.C.
Independent Counsel

SCHEDULE A

1. *Valente* v. *The Queen,* [1985] 2 S.C.R. 673.

2. *Therrien v. Québec*, [2001] 2 S.C.R. 3.

SCHEDULE B

(See original Factum of the Independent Counsel for the full text of these provisions)

1. *Judges Act,* R.S.C. 1985, c. J-1, ss. 63(1), 63(3), 63(6)

2. *Constitution Act*, 1867,(U.K.), 30 & 31 Vict. c. 3., reprinted in R.S.C. 1985, Appl. II., No. 5, s. 99

G:\DOC\EAC\470470001\Pleadings\Reply Factum - DRAFT #2 - KFS.wpd