APPENDIX A

REASONS FOR JUDGMENT in R. v. ELLIOTT
(7 September 1999)

Indexed as:

R. v. Elliott

Between
Her Majesty the Queen, respondent, and
Julia Yvonne Elliott, applicant

[1999] O.J. No. 3265

105 O.T.C. 241

43 W.C.B. (2d) 417

Ontario Superior Court of Justice
Brockville, Ontario

Cosgrove J.

Heard: August 17, 1998 - August 24, 1999.
Judgment: September 7, 1999.

(385 paras.)

Civil rights -- Trials, due process, fundamental justice and fair hearings -- Criminal and quasi-criminal proceedings -- Right to just and fair trial -- Right of accused to obtain information or evidence -- Speedy trial, accused's right to -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, stay of proceedings -- Remedies, costs.

This was an application by Elliott for stay of a criminal proceedings against her. Elliott was arrested and charged with second degree murder in August 1995. The estimated date for completion of her trial was March 2000. In the meantime, there had been voir dires and two juries had been empanelled. Elliott alleged that the Crown failed to disclose evidence, misled the Court, and acted with mala fides. She alleged that the police failed to disclose, or destroyed, notes and other evidence, and that they presented perjured or misleading evidence. She also alleged that her right to be tried within a reasonable time under section 11(b) of the Canadian Charter of Rights and Freedoms was violated.

HELD: Application allowed. There were more than 150 breaches of Elliott's fair trial prospects.

From the time of her arrest, scant attention was given to her Charter rights and her right to be tried within a reasonable time was violated. The effect of the breaches and the obvious prejudice caused thereby would be manifested, perpetuated or aggravated through the conduct of the trial. No other remedy but a stay of the proceedings was reasonably capable of removing that prejudice. A fair-minded and reasonable member of the community would conclude that a fair trial was not possible and would not want the case to proceed. Due to the conduct of the police and Crown, it was appropriate to award costs against the Crown.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 10, 10(a), 10(b), 11(b), 11(d), 12, 24, 24(1), 24(2).

Criminal Code.

Immigration Act.

Counsel:

David M. Humphrey and Miriam Saksznajder, for the respondent.
Kevin Murphy and Jeffrey Meleras, for the applicant.

Reasons for Judgment
On
Renewed Applications for Stay of Proceedings

COSGROVE J.:--

INDEX

INDEX OF APPENDICES

[Ed. note: The following appendices were not available in electronic format and will be placed online as soon as they are processed.]

A	APPLICANT'S MOTION RECORD ON APPLICATION FOR STAY	AUGUST 17, 1998
B	REASONS FOR DECISION -- APPLICATION SEEKING STAY OF PROCEEDINGS	MARCH 16, 1998
C	RULING -- RENEWED APPLICATION FOR STAY OF PROCEEDINGS	MAY 27, 1998
D	RULING -- APPLICATION RESPECTING BAIL	JANUARY 12, 1999
E	RESPONSES TO JUDGE COSGROVE'S REQUEST -- J. HUTTON, SUPERINTENDENT OTTAWA CARLETON DETENTION CENTRE	SEPTEMBER 18, 1998
F	REASONS FOR DECISION -- VOIR DIRE RE: Admissibility of statements August 25 and 26, 1995 VOIR DIRE RE: Validity of Search Warrant August 27, 1995	DECEMBER 23, 1997
G	RULING -- "WORK PRODUCT"	AUGUST 5, 1999
H	REASONS FOR DECISION -- CHADWICK J. DISMISSAL OF STAY APPLICATION OF COSGROVE J.	AUGUST 6, 1999

BACKGROUND

1 On August 17th, 1998, counsel for the accused renewed the Application for a Stay of Proceedings because of the alleged "continuing unabated abuse of process in the investigation and prosecution of the applicant by the Ontario Provincial Police and the Ministry of the Attorney General for Ontario".

2 Included in the grounds for the Application was the disclosure to defence counsel on August 14, 1998, that then Det. Insp. MacCharles had admitted that he ordered O.P.P. officers under his command in another investigation to illegally dispose of a handgun belonging to a police agent and to lie to O.P.P. investigators (on threat of losing their jobs) to cover up the incident.

3 In an August 11, 1998, Statement of then Det. Insp. MacCharles provided to defence counsel, then Det. Insp. MacCharles stated in part:

> Sometime later, I believe it may have been the next day, I instructed DOUGHERTY to dispose or "get rid of the gun". I was aware DOUGHERTY was being assisted by Provincial Constable Gary SNIDER.
>
> My judgement at that point was clouded by my health problems.
>
> I felt we had to dispose of the gun for the safety of the witness GAUDREAULT and his family.
>
> Within a few days, DOUGHERTY and SNIDER made me aware that the gun had been disposed of and would not show up again.
>
> I told the officers that this could not be discussed again and in effect "didn't happen".
>
> After the investigation into this matter started, I discussed it with DOUGHERTY and SNIDER and told them we had to stand firm on our original story.
>
> I initially believed we had to handle this situation the way we did, to protect the case, but had the case been threatened by our actions, I would not have allowed that to happen.

4 The complete statements provided to defence counsel, together with the statements of Officers Dougherty and Snider are included in Appendix "A" to these Reasons, which is the entire August

17th Stay Application.

5 The trial of the accused had been scheduled to resume on August 17th, 1998, with the selection of the second Jury. The Court was unable to proceed with jury selection in June and July of 1998 following my May 27th Ruling on the renewed Application for a Stay because of the inability of the administrative process to generate a panel of six hundred persons at that time. Accordingly, August 17th was set for a resumption of the process and two hundred panelists were summoned every second day to complete jury selection. Jury selection was completed on September 21st using almost all of the panel of six hundred persons: this second jury was dismissed on January 18, 1999, when the "new" Crowns requested a further three-month delay to prepare for argument.

6 The Court has been engaged in the voir dire generated by the disclosures respecting then Det. Insp. MacCharles until August 24, 1999. Fresh disclosures made by Crown counsel on August 23rd and August 24th, 1999, were the subject of further written submissions received by me on August 26, 1999.

7 The process of the voir dire over the period August 17, 1998, to August 26, 1999, was extraordinary and by times bizarre. Attendance in Court of then Det. Insp. MacCharles who was central to the renewed Application for a Stay was only accomplished by the threat of contempt proceedings by the Court. In a letter by Crown Attorney McGarry August 12, 1998, defence counsel was advised that then Det. Insp. MacCharles was "on sick leave" and "at present in the hospital" at an undisclosed location. After the Inspector's doctor attended to testify on threat of a warrant being issued, it was determined after a few weeks of delay that the doctor's original opinion that the Inspector was too ill to give evidence was withdrawn as a result of clinical reports which did not support his original diagnosis. When the Inspector finally testified in October, 1998, he was represented by counsel in the Court who was permitted to make representations to the Court respecting concern for the Inspector's health condition.

8 The Court learned from the evidence of then Det. Insp. MacCharles on the voir dire that he was aware that Cst. Laderoute had not recorded the licence number 301 HOM on August 18, 1995, as testified to by Cst. Laderoute at the preliminary inquiry and at various times on this voir dire. The cross-examination of then Det. Insp. MacCharles established that he had, in fact, returned to full-time duty in December of 1997 (contrary to his evidence given in February of 1998) and, accordingly, was available to testify at that time as had been requested by defence counsel. The cross-examination demonstrated again and again attempts by the Inspector to dissemble and mislead the Court which was apparent to anyone familiar with the background of the investigation and the prosecution of the accused.

9 The saga of the non-production, delayed production and selective production of police officers' notes during the voir dire will be the subject of numerous of my findings with respect to Charter breaches of the applicant's rights. The erratic performance of police note-production required the Court to name certain officers and to threaten contempt proceedings unless officers' notes were

produced.

10 Det. Insp. Bowmaster, who was assigned to replace then Det. Insp. MacCharles was cited for contempt by the Court for allegedly tipping off officers called on the voir dire to testify, thus interfering with the cross-examination. The contempt hearing was scheduled to be heard upon completion of the trial. Subsequently, the Court further ordered Det.Insp. Bowmaster to refrain from any contact whatsoever with trial witnesses, especially police officers, when it was disclosed he had a telephone conversation with Cst. Laderoute respecting the R.C.M.P. investigation. The Court was advised that a third supervising Detective Inspector has been named to replace Det. Insp. Bowmaster without any admission that Det. Insp. Bowmaster's conversation with Cst. Laderoute was improper.

11 Lead Det. Cst. Ball was cited for contempt of Court for allegedly employing assaultive language and actions against defence counsel in the Court cafeteria. Unlike the citation against Det. Insp. Bowmaster, I began to hear the contempt proceedings myself as I considered the complained of assault as a potential contempt in the face of the Court: counsel representing Det. Cst. Ball admitted there may have been words and actions as complained of by defence counsel (the Court adjourned for a half-day at the request of defence counsel following the incident with Det. Cst. Ball) and the proceedings were adjourned to the completion of the trial to deal with the issue of whether there was intent to interfere with defence counsel.

12 The conduct of the investigation by the R.C.M.P. of the O.P.P. investigation of this case (referred to as the FOSTER Homicide in the terms of reference between the two police services) in relation to then Det. Insp. MacCharles was bizarre. The Terms of Reference dated October 9, 1998, of the criminal investigation by the R.C.M.P. under the title SCOPE OF INVESTIGATION provides as follows:

> 2. Address the key Kemptville investigation (FOSTER homicide) in relation to Detective Inspector L. MacCharles' involvement regarding any possible tampering with witnesses by investigating:
>
> (a) the actions of a subordinate officer who it is alleged and according to court records altered his notebook, and
> (b) any other witness who provided information and/or testimony regarding this investigation that may have been directly or indirectly influenced by Detective Inspector MacCharles.

13 It was six months after the investigation was begun that the R.C.M.P. first required release for forensic testing of the Court exhibit of Cst. Laderoute's notes which I had ruled in my March 16, 1998, decision had been contrived and back-dated: during oral argument on the voir dire in July, 1999, the R.C.M.P. asked to do a follow-up series of forensic tests-both tests were inconclusive on the controversial issue of fixing the dates of the challenged entries.

14 In one of its monthly up-dates to the O.P.P., the R.C.M.P. reported in March, 1999, that it was unlikely any incriminating findings had been identified to warrant complaints as charges with respect to the "FOSTER homicide". When it became apparent by the cross-examination of Inspector Nugent of the R.C.M.P. who had over-all responsibility of the investigation in March, 1999, that the R.C.M.P. lacked any rudimentary understanding of the issue respecting Cst. Laderoute's notes, a number of bizarre events occurred. The actual physical exhibit of Cst. Laderoute's notes was requested for forensic testing; five new R.C.M.P. officers were assigned then (March, 1999) to interview approximately seventy witnesses; counsel in the Dept. of Justice, Canada, appeared in Court after Insp. Nugent had given testimony for a day claiming privilege with respect to the investigation file and requesting an "O'Connor" process for its production. The cross-examination of Insp. Nugent was adjourned pending completion and production of the final Report.

15 The appearance of Federal Crown counsel at this point of the proceedings was all the more bizarre as the Court had advised the R.C.M.P. officers early in the investigation that they should seek legal advice (presumably from the R.C.M.P. legal services) as to whether they could speak to persons who were witnesses on the voir dire in light of a witness non-communication order: what is even more bizarre, the R.C.M.P. officers decided to delay their interviews of O.P.P. officer witnesses because of the non-communication order after consulting with Ontario Crown officers who themselves were witnesses on the voir dire!

16 The action (or non-action) of the Crown in providing in a timely manner Crown counsel able to continue prosecution of this trial was bizarre. The Court was initially surprised when advised by Crown Ramsay early in 1998 that he would not be able to continue as trial counsel if the Stay Application was unsuccessful. When the application was dismissed on March 28th with terms requiring a change of venue and other terms referred to in my previous Rulings (which are attached as Appendix B and C to these Reasons), the trial was further delayed because transcripts of the proceedings had not been ordered by the Crown - although the Crown was aware that new Crown counsel would require these. When new Crown counsel were necessitated as a result of Crowns McGarry and Cavanagh being called as witnesses on the voir dire, the Court again commented on the necessity (to avoid delay) of appointing Crown counsel who could continue with the expanding complication of the trial in the event the trial continued. Unexplainably, the Crown chose to proceed in the opposite direction: first, a Crown was appointed but limited this time only to the evidence-gathering portion of the renewed Stay Application! Crown Hoffman, who represented the Crown between October and December, then advised the court that new Crowns had been retained from the defence bar to argue the motion; the present "defence" counsel, now Crown counsel on the voir dire on their initial attendance in Court requested a three-month adjournment to prepare for argument and advised that their retainer did not authorize them to continue as counsel if the trial proceeded! The Court was advised during oral argument on the voir dire that yet another Crown counsel had been appointed to proceed with the trial and that she had been preparing for that eventuality.

17 At Page 5 of my Ruling of May 28, 1998, I indicated on the renewed Application that I would

respond to the complaints of additional breaches of the applicant's Charter rights in the order in which they appeared in the renewed Notice of Application and, after the initial assessment of whether any additional breaches had been established, consider as a separate (but closely related) issue the significance or impact of the breaches. I indicated as well the analysis had to consider the individual breaches and the breaches cumulatively, taking into account my findings and order of March 16, 1998. I intend to follow the same process on this renewed Stay Application. Reference to the alleged further breaches will appear as identified and numbered in the various renewed Notices of Application. Evidence on the renewed Application beginning in August, 1998, generated new and expanding alleged breaches to which I have responded in order.

18 I have been assisted in this process by the exchange and filing of written submissions by counsel respecting these additional complaints (since August 17, 1998) and, as well, by oral argument concluding on August 24, 1999. I have not reproduced verbatim in my FINDINGS the individual allegations contained in the renewed Applications (as I did in my March 16, 1998 Reasons) but, rather, I have responded to each allegation with a decision which by context should identify each issue (which I have done as well in my May 28th Reasons). In my Findings respecting Charter breaches where blanks are indicated in response to numbered allegations in the renewed Applications, I have combined a response thereto by implication in the preceding paragraph.

FINDINGS

19 I intend to respond to each of the alleged breaches of the applicant's Charter rights contained in the following renewed Notices of Application for Stay of Proceedings relied upon by counsel for the applicant:

1. Renewed Notice of Application - November 23, 1998
2. Renewed Notice of Application - January 5, 1999
3. Renewed Notice of Application - January 15, 1999
4. Renewed Notice of Application - March 29, 1999
5. Renewed Notice of Application - July 14, 1999
6. Applicant's Further Written Submissions on Crown's Admissions - August 23, 1999

1. RENEWED NOTICE OF APPLICATION -- November 23, 1998

20 I have reproduced the Table of Contents contained in this Application for ease of reference to the organization of the alleged breaches.

21 The Grounds for the Application set out at Page 1 of the document are as follows:

> That in addition to the 28 extant breaches of the Applicant's Charter rights by the Crown and police found by this Honourable Court in its rulings of March 16th

and June 27th, 1998 on evidence heard on the initial and renewed applications to stay the proceedings for abuse of process that began on February 13th, 1998, the following circumstances constitute further irreparable and irrevocable prejudice to the Applicant's ability to make full answer and defence to the said charges and to have a fair trial before a jury on the said charges, in further breach of her rights under Sections 7, 8, 10, 11(b), 11(d), and 12 of the Charter of Rights.

TABLE OF CONTENTS

IV. CONTINUING NON-DISCLOSURE

(A) Non-Production of O.P.P. Commissioner's Letter and Terms of Reference
(B) Denial of the Existence of Police Officers' Notes
(C) Non-Production of Police Notes on the Witness Stand
(D) Former Kemptville Police Chief (Now O.P.P. Sgt.) Chris McCurley
(E) Conversation Between Ball and Laderoute on August 24th, 1995
(F) Conversation Between Laderoute and Holmes on August 18th, 1995
(G) MacCharles Aware Laderoute Did Not Record "301 HOM" in his Notes
(H) Threatening Phone Calls to Victim Traced to Facsimile Machine
(I) Bell Canada Security and Telephone Records
(J) Continuing Material Non-Disclosure Concerning Victim
(K) Forensic Examination of Kemptville Sewer or Water Works
(L) Decision to Lay Police Services Act charges Against MacCharles
(M) O.P.P. Decision to Promote of Det. Cst. Riddell and Det. Cst. Lamarche
(N) Non-Disclosure Concerning Constable Michelle Mahoney
(O) Refusal to Disclose Order of Crown Witnesses at Trial
(P) Non-Disclosure concerning Reluctant or Unavailable Witnesses

V. TUNNEL VISION

(A) Wilful Blindness to Charter rulings of this Court
(B) Re-Interviewing Barbados Witnesses to Obtain "K.G.B. Statements"
(C) Further Request for Assistance from Barbados Authorities
(D) Wilful Blindness to Momy "Alibi" Witnesses

VI. LOSS AND DESTRUCTION OF EVIDENCE

(A) Concealment and Destruction of CPIC and Related Information on Victim
(B) Loss or Destruction of Kemptville Police Chief's Notes
(C) Loss or Destruction of O.P.P. Response to Defence Complaint
(D) Loss or Destruction of Det. Insp. Sweeney's Notes
(E) Loss or Destruction of Leonard Foster's Original Witness Statement

VII. PERJURED, FALSE OR MISLEADING EVIDENCE

(A) Detective Superintendent Larry Edgar
(B) Det. Insp. Lyle MacCharles
(C) Detective Inspector Leo Sweeney
(D) Detective Inspector Glen Bowmaster
(E) Det. S. Sgt. Linroy Scobie
(F) Det. Cst. George Ball
(G) Det. Cst. Paul Alarie

VIII. PRECLUDING FULL ANSWER AND DEFENCE

(A) Conflicting Ulterior Theories: "Financial" Motive
(B) Conflicting Ulterior Theories: Motive Based on Sexual Orientation
(C) Conflicting Ulterior Theories: Applicant's Bad Character
(D) Ongoing Revision of the Crown Theory of the Case

IX. TRIAL WITHIN A REASONABLE TIME

(A) Unreasonable Delay Caused By Continuing Non-Disclosure
(B) Other Unreasonable Crown-Caused Delay
(C) Effect of Delay on Leading Mind of Investigation

X. INTERFERENCE WITH SOLICITOR-CLIENT RELATIONSHIP

(A) O.P.P. Use of Jailhouse Informants
(B) Collusion Between O.P.P. and Correctional Services
(C) "Cage Rattling" By Jail Authorities
(D) Derogatory Comments About Defence Counsel in Accused's Presence
(E) Verbal and Physical Harassment of Defence Counsel

I. BREACHES OF PROSECUTORIAL DUTY

(A) December 1997 - Non-Disclosure of MacCharles' Return to Duty

22 (i) I find that the failure of Crowns Flanagan and Findlay on December 15th, 1997, to disclose to defence counsel that the senior O.P.P. investigator, Det. Insp. Lyle MacCharles, had returned to active duty as of that date-one month earlier than the date indicated by his cardiologist in a letter given to the Crown on October 17th, 1997, knowing that the applicant's defence counsel had sought to have Det. Insp. MacCharles testify on the applicant's pre-trial motions pursuant to Sections 7, 8, 10(a), (b), 11(b), (d), 12 and 24(2) of the Charter, beginning in October, 1997, is a breach of the applicant's Charter rights.

23 (ii) I find that the failure or refusal of Crown Ramsay to honour his undertaking to defence counsel and this Court on February 25th, 1998, to "check on" and disclose to defence counsel and the Court that Det. Insp. MacCharles had, in fact, returned to active duty and was available to testify on the defence's abuse of process motion at any time from that date until March 12th, 1998, when he was called by Crown Ramsay as a "reply witness" after the applicant's counsel had called no further evidence on the initial motion is a breach of the applicant's Charter rights.

24 (iii) I find that the continuing failure or refusal of Crowns Flanagan, Findlay and Ramsay to disclose to the applicant's defence counsel that Det. Insp. MacCharles was indeed available to testify on the abovementioned Charter applications at any time during the three-month period

between December 15th, 1997, and March 12th, 1998, knowing that Det. Insp. MacCharles had returned to active, full-time duty during that period and was actively working on at least four major homicide cases in the Eastern Region is a breach of the applicant's Charter rights.

25 (iv) I find that the deliberate failure or refusal by Crown Attorney Ramsay to disclose to the applicant's defence counsel until March 12th, 1998 - after the defence had closed its abuse of process motion-that Det. Insp. MacCharles was available and would be called to testify for the Crown in reply on that motion, thereby prejudicing the applicant's ability to make full answer and defence on her motions pursuant to Sections 7, 8, 10, 11(b), (d) and 24 of the Charter is a breach included in (iii) above.

(B) January 1998 - Non-disclosure of O.P.P. Investigation of MacCharles

26 (i) I find that the failure or refusal of any Crown Attorney in the Ministry of the Attorney General to disclose to the applicant's defence counsel that then Det. Insp. MacCharles had been under investigation by the O.P.P. for serious professional and criminal misconduct since January 1998 with respect to, inter alia, the disposal of a handgun by Det. Insp. MacCharles and his subordinate officers on the Project Toy-Cumberland homicide case in September 1997 is a breach of the applicant's Charter rights.

27 (ii) I find that the deliberate failure or refusal of any Crown Attorney in the Ministry of the Attorney General to notify or otherwise apprise the prosecutors on the applicant's case-namely, Crowns Flanagan, Findlay, Ramsay, Cavanagh or McGarry-at the earliest opportunity of the abovementioned O.P.P. investigation of Det. Insp. MacCharles that had been initiated and conducted at the Crown's request in January, 1998, is a breach of the applicant's Charter rights.

28 (iii) I find that the failure or refusal by Crown Cavanagh to disclose that Det. Insp. MacCharles was under investigation by the O.P.P. to the applicant's defence counsel is a breach of the applicant's Charter rights.

(C) February 1998 - Crown in Regular Contact with MacCharles

29 (i) I find that the deliberate failure or refusal of Crown Flanagan or Findlay to disclose to the applicant's defence counsel that Det. Insp. MacCharles had been in communication with the Crown concerning the case during February, 1998, including two meetings that were scheduled on February 6th and 13th, 1998, knowing that defence counsel had been seeking to compel him to testify on Charter applications since September, 1997, that Crown Flanagan had last advised the Court in November, 1997, that Det. Insp. MacCharles may be available to testify, and that the issue of Det. Insp. MacCharles' non-availability had been reserved upon by this Court is a breach of the applicant's Charter rights.

(D) March 1998 - MacCharles' Role in Obtaining Further Reply Evidence

30 (i) The failure of Crown Ramsay to disclose his March 30th, 1998, letter to Det. Insp. MacCharles requesting that he appoint an O.P.P. officer with "no prior involvement in the case" to get witness statements from the deceased victim's sister and nephew concerning the latter's claim that he had seen his uncle wearing a "t-shirt that may have had a bunny on it" is a breach of the applicant's Charter rights.

31 (ii) I find that the deliberate failure or refusal of the Crown to disclose to the applicant's defence counsel that Det. Cst. Ball, the "lead investigator", and Cst. Mahoney, the witness liaison officer, met with Det. Insp. MacCharles in Renfrew on April 2nd, 1998, and was directed by him to contact Det. Sgt. Dave Cook and instruct him that Det. Insp. MacCharles wanted Cook to appoint a particular officer, Det. Cst. Paul Alarie, to conduct the April 6th, 1998, witness interviews with Violet and Christopher Pender is a breach of the applicant's Charter rights.

(E) April 4th, 1998 - Wilful Blindness to Results of Polygraph Interview

32 (i) I find that the wilful blindness of Regional Senior Crown Pelletier, Senior Berzins, and Crowns Cooper, Bair, McGarry and Cavanagh in failing to read the entire investigative brief prepared by Det. Insp. Klancy Grasman about the allegations against Det. Insp. MacCharles which was completed and submitted to the Crown on July 19th, 1998, and which included a transcript of an April 4th, 1998, polygraph interview by the O.P.P. in which Det. Insp. MacCharles was implicated by name and conduct in the aforementioned gun incident in the Project Toy-Cumberland homicide case fell below the standard required of the Crown officers and is a breach of the applicant's Charter rights.

33 (ii) I find no breach in the one month delay of release of the Grasman report.

34 (iii) Failure of Crowns to read the Grasman report is included in the above.

(F) April 6th, 1998 - Wilful Blindness to Pender "Witness Statements"

35 (i) I find that the failure of Crown Ramsay to notify defence counsel immediately prior to the testimony of Det. Cst. Ball on February 25th, 1998, that the Crown had subpoenaed Violet Pender, the victim's sister, as a witness, thereby leading defence counsel into believing-on the basis of Crown Ramsay's representation to the Court-only that she "may" be called is a breach of the applicant's Charter rights.

36 (ii) I find that the failure, refusal or wilful blindness of Crown Ramsay in failing to make or direct further inquiries to be made into either the circumstances in which the April 6th, 1998, statements by the victim's sister and nephew were brought forward, or the contents of the statement of Christopher Pender, is not a breach of the applicant's Charter rights.

37 (iii) I find that Crown Ramsay's continuing conduct in instructing and relying upon Det. Insp. MacCharles to take direct responsibility for obtaining "witness statements" from the victim's sister

and nephew is not a breach of the applicant's Charter rights.

38 (iv) I find that there was no negligence or wilful blindness of Crown Ramsay or his successors, Crowns McGarry or Cavanagh, to inquire into the circumstances and contents of the statements obtained by Det. Cst. Alarie on April 6th, 1998.

39 (v) I find that there was no breach of the applicant's Charter rights by the conduct of Crowns Ramsay, McGarry and Cavanagh in allowing or acquiescing or being wilfully blind to the participation of Det. Sgt. Cook in the obtaining of the April 6th, 1998, witness statements by Det. Cst. Alarie.

40 (vi) I find that there was no negligence or wilful blindness of the Crown in permitting Det. Cst. Ball to continue as lead investigator on the case, knowing he had lost any objectivity with respect to the investigation and considered himself a "friend" of the victim's family members.

41 (vii) I find that there was no negligence or wilful blindness of the Crown in permitting Det. Cst. Alarie to act as the "independent police officer with no prior involvement in the case" who would obtain the Pender witness statements, knowing he had been chosen by Det. Insp. MacCharles.

(G) April 7th, 1998 - Removal of MacCharles from Project Toy Case

42 (i) I find that the failure or refusal of the Crown to disclose to defence counsel either that Det. Insp. MacCharles had been removed as chief investigator on the Project Toy-Cumberland case by Det. Supt. Edgar on April 7th, 1998, or all of the reasons for his removal-namely, the handgun incident, as well as aberrant and unprofessional conduct that was known to the Crown beginning as early as June, 1996, and continuing up to April, 1998, is a breach of the applicant's Charter rights.

43 (ii) I find that Crown Cavanagh's awareness of the removal of Det. Insp. MacCharles from Project Toy-Cumberland between April 7th and July 19th, 1998, and his continuing failure or refusal to disclose that information to defence counsel at the earliest opportunity, knowing that issues had arisen with respect to the conduct of Det. Insp. MacCharles in the investigation and prosecution of the applicant's case is a breach of the applicant's Charter rights.

44 (iii) ...

(H) April 1998 - Continuing Negligence Regarding Physical Exhibits

45 (i) I find no continuing negligence or wilful blindness of the Crown with respect to the continuing failure of the O.P.P. investigators to take adequate steps or measures to ensure the security, integrity and continuity of the physical exhibits in evidence before the Court as alleged.

46 (ii) ...

(I) May 1997 - Continuing Involvement of MacCharles in the Investigation

47 (i) I find that the failure of the Crown to disclose that on or after May 27th, 1998, Crown McGarry conveyed a request to Det. Insp. MacCharles through Det. Cst. Churchill for the appointment of an "independent" officer with no prior involvement in the case to re-interview Jean-Yves Momy's "alibi witnesses", in response to which Det. Cst. Dougherty approached Crown McGarry and advised that he was available to assist as he had just been removed from Project Toy and was under investigation, and that Crown McGarry declined Det. Cst. Dougherty's offer on that basis is a breach of the applicant's Charter rights.

48 (ii) I find that the continuing failure of Crown Cavanagh, who was aware of the approach to Crown McGarry by Det.Cst. Dougherty on or after May 27th, 1998, to inform Crown McGarry that Det. Insp. MacCharles had already been removed from Project Toy-Cumberland and was also under investigation by the O.P.P., and his continuing failure to disclose that to defence counsel until Crown Cavanagh testified on the voir dire on November 19th, 1998, is a breach of the applicant's Charter rights.

(J) June 1998 - Renewed Immigration Investigation

49 (i) I find no breach of the applicant's Charter rights because of the failure or refusal of the Crown to make full disclosure of all of the circumstances of the June, 1998, investigation by federal Citizenship and Immigration officer Mary Anne MacManus of the applicant.

50 (ii) I find that the failure or refusal of the Crown to disclose the fact of or reasons for the renewal of the investigation of the applicant's "outstanding" 1992 and 1993 criminal charges in Barbados in July, 1998, three years after the initial immigration detention order against the applicant had been ordered cancelled by Citizenship and Immigration authorities is a breach of the applicant's Charter rights.

(K) July 1998 - Grasman Investigative Report

51 (i) I find no breach of the applicant's Charter rights because of the failure of any Crown to take adequate steps to ensure that the Det. Insp. Grasman investigative brief concerning the Det. Insp. MacCharles allegations was disclosed to the applicant's defence counsel at the earliest opportunity upon its submission by Det. Insp. Grasman to the Crown on July 19th, 1998, and prior to the disclosure of its edited version on August 13th, 1998.

L. August 10th, 1998 - Removal of MacCharles from Applicant's Case

52 (i) I find that the failure or refusal of any Crown in the Ministry of the Attorney General to advise defence counsel or the Court either of the fact or reasons for the removal of Det. Insp. MacCharles as senior investigator and "case manager" on the applicant's case and replaced on August 10th, 1998, by Det. Insp. Bowmaster is a breach of the applicant's Charter rights.

M. August 20th, 1998 - Decision to Refer to the R.C.M.P.

53 (i) I find that the failure or refusal of the Crown to disclose to the applicant's counsel that the O.P.P. investigation of Det. Insp. MacCharles was completed by August 20th, 1998, and that a decision to refer the matter to the R.C.M.P. and an out-of-province prosecutor for further "independent investigation" was made on that date, including a decision to include allegations of wrongdoing by Det. Insp. MacCharles in the applicant's case in the terms of reference for that "independent investigation" is a breach of the applicant's Charter rights. I find as well that the steps required to formalize this "independent investigation" were viewed by the Crown and O.P.P. simply as formalities - in effect, the date for the decision was August 20, 1998.

54 (ii) ...

55 (iii) I find that the deliberate failure or refusal by Crowns McGarry and Cavanagh to disclose the referral decision and expanded terms of reference to the applicant's defence counsel or the Court at the earliest opportunity, knowing that they had been specifically asked to do so by the Court and that their failure to do so would cause further unreasonable and unnecessary delay in the proceedings before the Court is a breach of the applicant's Charter rights.

56 (iv) ...

N. Crown Allows the Court to be Misled by Det. Insp. Bowmaster

57 (i) ...

58 (ii) I find that the silence of Crown McGarry before the Court on September 8th, 1998, when, in response to a direct question by defence counsel about whether Det. Insp. Bowmaster had any other notes for August 20th, 1998, apart from his entry for "1500 hours", Bowmaster stated, "That's it", knowing that he did, in fact, have a subsequent notebook entry for "1600 hours" on August 20th pertaining to his attendance with Crowns McGarry and Cavanagh at a meeting with Det. Supt. Edgar and Det. Insp. Grasman at which they were informed of the decision to refer Det. Insp. MacCharles to the R.C.M.P. for investigation is a breach of the applicant's Charter rights.

59 (iii) I find that the continuing failure of Crowns McGarry and Cavanagh to advise the Court that Det. Insp. Bowmaster did have another note for August 20th, 1998, and, in particular, a note pertaining to their presence at the meeting with Det. Supt. Edgar and Det. Insp. Grasman, thereby allowing Det. Insp. Bowmaster to leave defence counsel and the Court with the distinct but completely false and misleading impression that no such note had ever been recorded and that no such meeting had ever occurred, an impression that they knew themselves to be false and misleading is a breach of the applicant's Charter rights.

II. DELIBERATELY MISLEADING THE COURT

(a) Misrepresentations by the Ministry of the Attorney General

60 (i) I find that the failure of any Crown in the Ministry of the Attorney General to disclose to this Court or to defence counsel, the fact or extent of the Crown's involvement in the August 20th, 1998, decision to refer the Det. Insp. MacCharles allegations in both the Cumberland the Elliott cases to the R.C.M.P. and an out-of-province Crown for "independent investigation" is a breach of the applicant's Charter rights.

61 (ii) I find that Assistant Deputy Attorney General Segal's recommendation in September, 1998, to adjourn the applicant's trial until after the completion of the R.C.M.P.'s investigation, not to be a Charter breach.

62 (iii) ...

(B) Subterfuge by Attorney General in Officially "Isolating" Trial Crowns

63 (i) I find that the deliberate deception of this Court by the Crown and senior O.P.P. officers - including Regional Senior Crown Pelletier, Senior Crown Berzins, Det. Supt. Edgar, Det. Insp. Grasman, and Det. Insp. Bowmaster - in purporting to formally "isolate" trial Crowns McGarry and Cavanagh from evident involvement in or knowledge of the August 20th, 1998, decision-while "informally" apprising them of it the same day-so they could disavow responsibility for its non-disclosure to the Court and to defence counsel is a breach of the applicant's Charter rights.

64 (ii) I find that the conduct, acquiescence or wilful blindness of the Crown - including Assistant Deputy Attorney General Segal, Regional Senior Crown Pelletier, Senior Crown Berzins, and Crowns Cooper, Bair, Dandyk, McGarry and Cavanagh - in permitting this Court to be deliberately deceived about the actual or "informal" knowledge and involvement of Crowns McGarry and Cavanagh in the August 20th, 1998, meeting and decision is a breach of the applicant's Charter rights.

65 (iii) ...

(C) Motions to Quash Subpoenas

66 (i) I find that the conduct of Assistant Deputy Attorney General Segal in seeking to quash defence subpoenas served on Crowns Berzins, Pelletier, Cooper, Bair, McGarry and Cavanagh between September 14th and October 7th, 1998, on the basis of inconsistent, contradictory, unfounded and misleading representations to the Court as to the materiality, relevance and necessity of the evidence sought from those Crowns about the August 20th, 1998, decision by the Crown and O.P.P. to refer the Det. Insp. MacCharles allegations to the R.C.M.P. for independent investigation, thereby causing further unreasonable delay in the proceedings is a breach of the applicant's Charter rights.

67 (ii) I find specifically the conduct of Assistant Deputy Attorney General Segal in instructing Crown Lindsay to appear before this Court on September 14th, 1998, to oppose subpoenas served on Crowns Pelletier and Berzins on the basis that they had "no material or relevant evidence to give" about the August 20th decision, when Mr. Segal was involved in that decision and knew that they did have material and relevant evidence to give is a breach of the applicant's Charter rights.

68 (iii) I find the subsequent conduct of Deputy Attorney General Segal in instructing or permitting Crown Cavanagh to represent to this Court on September 16th, 1998, that Crowns Cooper and Bair were not involved in the applicant's case at all and had no relevant or material evidence to give about the August 20th, 1998, meeting, knowing that representation was untrue and calculated to mislead the court is a breach of the applicant's Charter rights.

69 (iv) I find the conduct of Assistant Deputy Attorney General Segal in instructing "independent" counsel, Crown Sotirakos, to appear before the Court on October 10th, 1998, to oppose subpoenas served on Crowns McGarry and Cavanagh on the basis that neither had any relevant or material evidence to give concerning the August 20th, 1998, meeting and decision, knowing that representation was deliberately false and misleading is a breach of the applicant's Charter rights.

70 (v) I find that the conduct of Assistant Deputy Attorney General Segal in subsequently instructing another Crown counsel, Mr. Thompson, to appear before the Court on October 13th, 1998, to argue a different position as to the compellability of Crowns McGarry and Cavanagh, and specifically, that although the said Crowns did have relevant and material evidence to give concerning the August 20th decision, their evidence was not necessary in that there was no "tenable allegation of bad faith" on their part as Crowns is not a breach of the applicant's Charter rights but is an issue of law.

III. MALA FIDES

(a) Deliberately Withholding Information from Court

71 (i) I find that the continuing failure of Crowns McGarry and Cavanagh over the course of a five-week continuing non-disclosure voir dire to advise or inform this Court or defence counsel that they had, in fact, attended a meeting on August 20th, 1998, at 4:00 p.m. with O.P.P. Det. Supt. Edgar, Det. Insp. Grasman, and Det. Insp. Bowmaster and were advised at that meeting of the decision reached earlier the same day by Crowns Pelletier, Berzins, Det. Supt. Edgar, Det. Insp. Grasman and Det. Insp. Bowmaster to refer the Det. Insp. MacCharles matters to the R.C.M.P. and an out-of-province Crown prosecutor for further "independent investigation", thereby misleading the Court and causing further unreasonable delay in the proceedings is a breach of the applicant's Charter rights.

72 (ii) I find the deliberate failure by Crowns Pelletier, Berzins, McGarry and Cavanagh to promptly disclose to the Court and defence counsel on August 21st, 1998, what was already known

to senior Crown and O.P.P. officers on that date to be a foregone conclusion-namely that, according to Det. Insp. Sweeney's notebook entry for that date, "Regional Crown going to call in R.C.M.P. to do an independent review of the investigation", thereby occasioning further delay to the applicant's trial and causing further prejudice to the applicant is a breach of the applicant's Charter rights.

73 (iii) I find that the conduct of Crowns McGarry and Cavanagh before this Court on August 17th and 18th, 1998, in allowing the Court and defence counsel to be misled into forming the distinct but false impression that a decision to involve the R.C.M.P. would not be made until well after the week of August 20th, and in any event, not before a "report" had been completed, submitted to and then considered by senior O.P.P. personnel, thereby causing the proceedings to be further unnecessarily and unreasonably delayed is a breach of the applicant's Charter rights.

74 (iv) I find that the failure of Deputy Attorney General Segal, Regional Senior Crown Pelletier, Senior Crown Berzins, and Crowns McGarry and Cavanagh to advise the court and defence counsel that Regional Senior Crown Pelletier had already confirmed and communicated his intention to O.P.P. Det. Supt. Edgar to request an independent R.C.M.P. investigation of the Det. Insp. MacCharles allegations on behalf of both the provincial Ministry of the Attorney General and the provincial Solicitor General on August 24th, 1998, is a breach of the applicant's Charter rights.

75 (v) I find that the continuing breach by Crowns McGarry and Cavanagh of their prosecutorial duties in sitting silently before the court during the continuing five-week non-disclosure voir dire while the applicant's defence counsel cross-examined a succession of Crown Attorneys and senior police inspectors about the August 20th, 1998, meeting and, more specifically, about when the decision to refer the Det. Insp. MacCharles allegations to the R.C.M.P. and an out-of-province Crown was communicated or otherwise made known to them is a breach of the applicant's Charter rights.

(B) Inviting the Court to Censure Defence Counsel

76 (i) I find that Crown Flanagan on February 16th, 1998, had been misled by the police respecting the propensity of the deceased victim for violence. I have previously ruled that this deception of the Crown and the Court by the police was a breach of the applicant's Charter rights.

77 (ii) ...

(C) Breach of Undertaking Concerning Subpoenas

78 (i) I find no mala fides conduct of Crowns McGarry and Cavanagh in failing to ensure that Det. Insp. Bowmaster did effect service of duly sworn and endorsed defence subpoenas on Det. Sgt. Cook, Det. Cst. Paul Alarie and Det. Insp. Leo Sweeney.

79 (ii) ...

80 (iii) I find prejudice caused to the applicant's ability to make full answer and defence and to have a fair trial within a reasonable time because of Det. Insp. Bowmaster contacting Det. Cst. Alarie and discussing his anticipated evidence in violation of the Court's witness exclusion order and thereby pre-empting and prejudicing the cross-examination of the said witness by the applicant's defence counsel and causing irreparable prejudice to the applicant's right to make full answer and defence is a breach of the applicant's Charter rights.

81 (iv) ...

(D) Breaches of Witness Exclusion Orders

82 (i) ...

83 (ii) I find that the conduct of Crowns Ramsay and Findlay at the commencement of Det. Cst. Ball's evidence on the voir dire on February 26th, 1998, in failing to positively affirm to the Court and defence counsel that there was potential overlap between the evidence of Violet Pender and Det. Cst. Ball, thereby leaving the Court and defence counsel with the misleading impression that Ms. Pender "may" be a witness when she had already been subpoenaed by the Crown to testify is a breach of the applicant's Charter rights.

84 (iii) I find no October 9th, 1998, violation by Regional Senior Crown Pelletier, Senior Crown Berzins and Crown Cavanagh of the witness exclusion and non-communication orders made by this Court on the continuing voir dire.

85 (iv) I find that the evidence does not establish that lead investigator, Det. Cst. Ball, who has continued to maintain contact with members of the victim's family-Leonard and Pat Foster and Steven Foster - during the trial and continuing through the abuse of process and non-disclosure voir dire up to the present has discussed evidence contrary to the witness exclusion order.

86 (v) I find that the Crown was not complicit with the actions of Det. Insp. Bowmaster, who in the course of complying with an instruction by Crown Cavanagh on September 25th, 1998, to notify witnesses subpoenaed by the applicant's counsel to testify on September 28th, 1998-including Det. Insp. Sweeney, Det. Sgt. Cook, Det. Cst. Alarie and Det. Sgt. Pardy-discussed the anticipated evidence of Det. Cst. Alarie, thereby pre-empting effective cross-examination by defence counsel and causing irreparable prejudice to the applicant's ability to make full answer and defence and to have a fair trial.

87 (vi) I find that the Crown did not instruct Det. Cst. Walker, the O.P.P. witness liaison officer, herself a witness on the non-disclosure voir dire in October, 1998, to have continuing weekly discussions of evidence with members of the victim's family.

(E) Collusion with Immigration Enforcement Officers

88 (i) I find that the conduct of the Crown on August 29th, 1995, in contacting, initiating contact or allowing contact by the Kemptville O.P.P. investigators with federal immigration officers for the purpose of ensuring the continued detention of the applicant in the event that she was ordered released on bail by the Court by the contrivance of an immigration detention or arrest order that was, according to internal Citizenship and Immigration memos in the applicant's file, to be enforced "in case something goes wrong at the bail hearing" is contrary to the applicant's Charter rights.

89 (ii) I find that the continuing conduct of the Crown in October and November, 1997, during a pre-trial Section 11(b) "Askov" application for a stay of proceedings for unreasonable delay, in contacting, initiating contact, or allowing contact by the O.P.P. investigators with federal Immigration authorities so that the applicant would be immediately arrested and detained on a contrived federal Immigration detention Order in the event that this Court granted the applicant's "Askov" application and ordered a stay of criminal proceedings under Section 24(1) of the Charter a breach of the applicant's Charter rights.

90 (iii) I find the continuing conduct of the Crown and O.P.P. in actively maintaining an ongoing liaison and agreement with Citizenship and Immigration officers in Prescott and Ottawa from November, 1997, through until the commencement of the applicant's trial, to contrive an immigration detention order for the sole purpose of keeping the applicant in custody in the event that her release was ordered by this Court a breach of the applicant's Charter rights.

91 (iv) I find the continuation of the abovementioned mala fides conduct by Crown McGarry, based upon his sworn testimony on November 6th, 1998, that following the relocation of the applicant's trial to Ottawa pursuant to the Charter remedies ordered by this Court on March 16th, 1998, he instructed the O.P.P. to notify the Immigration Department of the applicant's renewed stay application brought before the Court in April, 1998, and of the renewed possibility that she might be released out of custody by the Court so that the same contrived process could be put into place to keep the applicant in custody is a breach of the applicant's Charter rights.

92 (v) I find that the directions given to Det. Cst. Walker by the Crown on or before October 21st, 1998 - immediately after they had received verbal notice of a bail application from defence counsel on October 20th, 1998 - to contact Immigration enforcement authorities in Ottawa to determine if any detention and arrest Orders were in effect so that, if necessary, a new Order could be contrived and enforced against the applicant in the event that this Court granted her application for bail a breach of the applicant's Charter rights.

93 (vi) I find that the direction given to Det.Cst. Walker by the Crown on November 1st, 1998 - two days after the Crown was formally notified that the applicant's bail application would be heard on November 4th, 1998 - to re-contact Immigration enforcement officers so that a new detention Order could be contrived and enforced against the applicant and she would remain in custody at the Ottawa-Carleton Detention Centre even if this Court released her on bail on November 4th, 1998, is a breach of the applicant's Charter rights.

(F) Abuse of the Immigration Act

94 (i) I find that the deliberate contrivance on November 2nd, 1998, by federal Immigration enforcement officers, including Mr. Pierre Desloges, under the purportedly legitimate and ostensible authority of the Deputy Minister of Immigration, of a new detention and arrest Order for the sole purpose of depriving the Applicant of her liberty in the event that she was successful in her application for bail before this Court on November 4th, 1998, is a breach of the applicant's Charter rights.

95 (ii) I find that the false or misleading testimony given by Mr. Desloges before this Court on November 6th, 1998, when he stated positively under oath that there was an immigration detention or arrest order in effect for the applicant on October 21st, the date on which Det. Cst. Walker had been directed to contact him by the Crown, and around the time that the applicant's counsel had orally notified the Crown of the bail application and that the order in question was the result of an "ongoing investigation" by his department is a breach of the applicant's Charter rights.

(G) Interference with Bail Application

96 (i) I find that there was no interference by Crown Cavanagh on October 30th, 1998, with the applicant's right to apply for her release on reasonable conditions of bail in contacting her proposed surety, the Executive Director of the Elizabeth Fry Society Fergusson House. The applicant's second request for bail was denied by me on January 12, 1999 (see Reasons -- Appendix "D").

97 (ii) I do not find that the conduct of the Ministry of the Solicitor General and Correctional Services of Ontario in October and November, 1998, in deliberately curtailing public funding to the Elizabeth Fry Society's Fergusson House facility was a punitive response to that organization's agreement to act as a proposed bail surety for the applicant. I observe, though, that it is regrettable that the Elizabeth Fry Society Fergusson House facility services were terminated at this time vis-à-vis women inmates because of the lack of funding.

98 (iii) I do not find that the Superintendent of the Ottawa-Carleton Regional Detention Centre, John Hutton, deliberately withheld the allocation of available beds at the Elizabeth Fry Society's Fergusson House half-way house facility and thereby jeopardized the society's financial means to operate that facility in order to prevent the applicant from being released on bail.

(H) Discrimination and Unequal Treatment

99 (i) I do not find involvement, acquiescence or wilful blindness of the Crown with respect to the discrimination by its own correctional officers against the applicant as alleged.

100 (ii) ...

101 (iii) I do not find that the conduct of Crown Cavanagh in contacting the Executive Director

of the Elizabeth Fry Society and questioning her concerning whether Fergusson House had "any experience with women whose country of origin was not Canada" discriminated against the applicant.

IV. CONTINUING NON-DISCLOSURE

(A) Non-production of O.P.P. Commissioner's Letter and Terms of Reference

102 (i) I find the continuing failure of any Crown in the Ministry of the Attorney General to disclose to defence counsel or this Court either contents of the September 25th, 1998, formal request by O.P.P. Commissioner Boniface to the R.C.M.P. for an "independent investigation" of the Det. Insp. MacCharles misconduct matters, or the terms of reference for that inquiry, or "Memorandum of Understanding" referred to in Commissioner Boniface's written request, thereby occasioned further unnecessary and unreasonable delay in the proceedings and requiring the re-attendance of Det. Supt. Edgar before this Court contrary to the Charter.

(B) Denial of the Existence of Police Officers' Notes

103 (i) I find that the continuing failure or refusal by the trial Crowns, McGarry and Cavanagh, to disclose the notes of O.P.P. investigators - including Det. S. Sgt. Linroy Scobie, Det. Cst. John Windle, retired Sgt. Bill Holmes, and Det. Cst. Michelle Mahoney - for the period from September 28th, 1997, to July 29th, 1998, the date on which such notes were formally requested by the applicant's defence counsel in a written request to Crown McGarry, knowing that non-disclosure of the said notes was an issue before the Court on the continuing abuse of process and non-disclosure voir dire; and that such non-production was contrary to the Crown's past practice in this case of providing continuing disclosure of complete, up-dated copies of police officers' notes to the applicant's defence counsel is a breach of the applicant's Charter rights. The production of officers' notes was in such disarray and disrepute that the Court had to resort to potential contempt proceedings to obtain compliance of production.

104 (ii) I find that the conduct of Crowns McGarry and Cavanagh in denying the existence of the aforementioned police notes, despite recurrent references in the evidence on the voir dire to the involvement of those same officers during the relevant time period in the continuing investigation and prosecution of the applicant's case, in the other disclosures provided to defence counsel by the Crown up to August, 1998, and not least, the direct and continuing involvement of Crown McGarry with those officers during the relevant time period is a breach of the applicant's Charter rights.

105 (iii) ...

106 (iv) ...

(C) Non-Production of Police Notes on the Witness Stand

107 The conduct of police officers on the witness stand, in particular that of Det. Cst. Alarie, necessitated the intervention of the Court to ensure production of various notes: I do not believe the Crowns were able to exert any influence on the officers at this point who seemed determined to adopt their own opinion as to the requirements for note production.

108 (ii) ...

109 (iii) ...

(D) Former Kemptville Police Chief (Now O.P.P. Sgt.) Chris McCurley

110 (i) I am satisfied that Crown Cavanagh only became aware of the loss or destruction by Kemptville Police Chief (now O.P.P. Sgt.) Chris McCurley of all his notes when Sgt. McCurley gave his evidence in court.

(E) Conversation Between Ball and Laderoute on August 24th, 1995

111 (i) I am satisfied that Crown Cavanagh only became aware of the anticipated evidence of Sgt. McCurley concerning his presence at and observation of an "excited" conversation about the victim's licence plate number-301 HOM-between Cst. Laderoute and Det. Cst. Ball on the evening of August 24th when Sgt. McCurley gave this evidence first in answer to a question by the Court on the voir dire.

(F) Conversation Between Laderoute and Holmes on August 18th, 1995

112 (i) I am satisfied that the Crown was unaware of the anticipated evidence of Sgt. McCurley, including the conversation he witnessed directly between Sgt. Holmes, Cst. Laderoute and another O.P.P. officer on August 18th, 1995, in the Kemptville Restaurant immediately following the R.I.D.E. stop of the applicant by Cst. Laderoute and Sgt. Holmes.

(G) MacCharles Aware Laderoute Did Not Record "301 HOM" in his Notes

113 (i) I am satisfied that the Crown was unaware that Det. Insp. MacCharles was himself personally aware that Laderoute did not make a note of the licence plate number "301 HOM" when he stopped the applicant on August 18th, 1995, until Det. Insp. MacCharles made this admission on his evidence on the voir dire in October, 1998.

(H) Threatening Phone Calls to Victim Traced to Facsimile Machine

114 (i) I am satisfied that the Crown was unaware that a number was subsequently re-dialled and determined to have come from a facsimile machine respecting threatening phone calls to the victim's apartment until this was disclosed in the cross-examination of Det. Cst. Ball in October, 1998.

115 (ii) I am satisfied that the anticipated evidence of Cst. Wheeler and Cst. Howard with respect to their involvement in the tracing of the number back to a facsimile machine was first disclosed by Det. Cst. Ball in his cross-examination during the non-disclosure and abuse of process voir dire in October, 1998.

(I) Bell Canada Security and Telephone Records

116 (i) I find that the failure of Crowns Flanagan, Findlay, Ramsay, McGarry or Cavanagh to disclose to defence counsel or the court that telephone numbers sworn to by Det. Cst. John Windle in September, 1995, has having originated from "the address book of Julia Elliott" for the purposes of obtaining a search warrant from Bell Canada to obtain telephone records, were actually compiled from a disparate number of sources, including members of the O.P.P. investigation team - none of which was disclosed to the issuing justice of the peace when the warrant was issued to Det. Cst. Windle is a breach of the applicant's Charter rights.

117 (ii) I am not satisfied that the applicant's Charter rights were breached by the failure of the Crown to disclose that the manager of Bell Canada security, Gilles Gauthier, contacted Det. Cst. Mahoney and also spoke with Crown McNally immediately after being subpoenaed by defence counsel in May, 1998, knowing that his evasion of service was raised before this Court at that time and that the Court had expressed concerns with respect to the conduct of Bell's security staff and legal counsel during the voir dire with respect to their response to duly worn and served subpoenas.

118 (iii) I find that the continuing failure of the Crown to disclose the notes of Det. Cst. John Windle concerning his involvement as the O.P.P. "Intelligence Coordinator" in the swearing of an information to obtain Bell Canada telephone records in September and October, 1995, which information contained knowingly false information sworn to by Windle is a breach of the applicant's Charter rights.

(J) Continuing Material Non-Disclosure Concerning Victim

119 (i) I find that the failure of the Crown to disclose until October 16th, 1998 - three years and two months after an initial and specific request for such disclosure was made by the applicant's defence counsel - the complete medical records and documentation concerning the victim's mental and physical prior to his death in August, 1995, knowing that the said information was material, relevant and necessary to the applicant's ability to make full answer and defence and to have a fair trial and, more particularly, knowing that this Court had already made a ruling admitting certain evidence of the victim's propensity for violence is a breach of the applicant's Charter rights.

120 (ii) ...

(K) Forensic Examination of Kemptville Sewer or Water Works

121 (i) I find that the failure or refusal of the Crown to disclose the fact that Chief McCurley had

engaged the assistance of the local public utilities companies in August or September, 1995, Kemptville to flush out or otherwise inspect the sewer or water works in the vicinity of the victim's residence for possible trace evidence, or to disclose the results, if any, of that operation is a breach of the applicant's Charter rights.

(L) Decision to Lay Police Services Act Charges Against MacCharles

122 (i) I find that the failure of any Crown in the Ministry of the Attorney General to disclose to the Applicant's defence counsel that Crowns Cooper and Bair and Det. Cst. Lamarche and Det. Cst. Riddell had actually met and canvassed which Criminal Code charges could be laid against Det. Insp. MacCharles prior to the August 20th, 1998, meeting and decision to refer the allegations against him to the R.C.M.P. for "independent investigation" as to whether criminal charges should be laid against him is a breach of the applicant's Charter rights.

123 (ii) I find that the failure of any Crown to notify or otherwise disclose to the applicant's defence counsel or this Court the date on which a decision was made to lay formal misconduct charges against Det. Insp. MacCharles and his subordinate officers on Project Toy, what the specific disciplinary charges are, when the informations were formally laid is a breach of the applicant's Charter rights.

124 (iii) I find that the issue of criminal charges against retired Det. Insp. MacCharles is still pending and, therefore, premature.

(M) O.P.P. Decision to Promote of Det. Cst. Riddell and Det. Cst. Lamarche

125 (i) ...

(N) Non-Disclosure Concerning Constable Michelle Mahoney

126 (i), (ii), (iii), (iv), (v) and (vi) I find that the complaints in this area-paragraphs (i) - (vi) respecting Cst. Mahoney do not raise issues of Charter violations.

(O) Refusal to Disclose Order of Crown Witnesses at Trial

127 (i) I find that the continuing refusal of Crown McGarry in his August 14th, 1998, letter to defence counsel and subsequently to disclose the names and anticipated order of witnesses that the Crown intends to call at the applicant's trial, knowing that:

(a) there are no fewer than 4 separate Crown "witness lists" of varying lengths, one listing 104 names, a second listing approximately 300 names, a third list given to the RCMP by Det. Insp. Bowmaster, and a fourth list called "Trial Witness List" containing 93 names used by witness liaison officers, Cst. Mahoney and Det. Cst. Walker;
(b) several of the listed Crown witnesses have given evidence on more than

> one prior occasion and will require additional or extra time for preparation because of the necessity of reviewing transcripts and prior statements;

is a breach of the applicant's Charter rights.

(P) Non-Disclosure Concerning Reluctant and Unavailable Witnesses

128 (i) I find that the complaint respecting the refusal of the Crown to disclose which of its proposed witnesses are unavailable, missing or reluctant to testify is premature.

129 (ii) ...

130 (iii) I find that the Crown's failure or refusal to disclose to defence counsel or the Court that the O.P.P. investigators - including Det. S. Sgt. Scobie, Det. Cst. Ball, Det. Cst. Churchill and Cst. Mahoney - had to engage the assistance of the Metro Toronto public housing authorities to locate Crown witness, Tammy Boles, that she was placed under 24-hour surveillance and virtual detention in February of 1998 to compel her attendance in Court in Brockville to testify against the applicant, and that her mother had written a letter on her behalf asking that the subpoena against her daughter be cancelled because she was suffering from emotional and physical problems is a breach of the applicant's Charter rights.

131 (iv) I find no breach with respect to the Crown's failure to disclose that Crown Findlay had induced Tammy Boles to testify in Court by offering her paid, "same-day" return transportation to and from Court in Brockville.

132 (v) I find no breach with respect to the Crown's failure to disclose that Crown Findlay gave his personal assurance to boles that he would "speak to the local media" in Brockville about not disclosing her name in the press.

133 (vi) I find that the complaint respecting the failure of the Crown to disclose in January, 1998, that its "key witness" in Barbados, Gillian Lowe, had gone into hiding and could not be located by Barbados police is premature.

134 (vii) I find no breach in the statement of Crown McGarry in his first appearance as trial Crown on the case on April 8th, 1998, when he advised the Court that one Crown witness - whose name he would not disclose - "would only agree to testify by arrangement through their consulate".

135 (ix) ...

V. TUNNEL VISION

(A) Wilful Blindness to Charter Rulings of this Court

136 (i) I find that O.P.P. investigators were aware of the extant Charter rulings made by this

Court in its decisions of March 16th and May 27th, 1998, at the time of Crown briefings. No breach attaches.

137 (ii) ...

138 (iii) I find that the repeated expressions of personal opinion as to the guilt of the applicant made to this Court by crown McGarry during the renewal of the abuse of process voir dire and, specifically, his comment on September 10th, 1998, that he would not be prosecuting the applicant if he didn't "believe she was guilty of murder", is a violation of the applicant's right to be presumed innocent until proven guilty under Section 11(d) of the Charter, and of his duties as a Crown prosecutor, as enunciated by the Supreme Court of Canada in the Boucher decision, not to secure a conviction at any cost but to see that justice is done.

139 (iv) While the comments made by Crown Bair in her opening address to the Project Toy-Cumberland jury on October 8th, 1998, concerning the nature and extent of the misconduct and criminal actions of Det. Insp. MacCharles as reported by the Ottawa Sun on October 9th, 1998, at page 5, as follows:

> "I acknowledge that this single incident of police wrongdoing is unsettling", lead prosecutor Vicki Bair told the jury, when the first degree murder trial opened this week ... "I cannot as yet say whether it was criminal activity", Bair said, "because that decision has not been made and it is a decision which rests with people entirely unconnected this case."

... are potentially prejudicial to the jury panel, this is a matter which can be the subject of challenge for cause in jury selection. No breach attaches.

(B) Re-Interviewing Barbados Witnesses to Obtain "K.G.B. Statements"

140 (i), (ii), (iii), (iv), (v), (vi) and (vii) I find no basis for complaint of a Charter breach respecting the re-interviewing of Barbados witnesses to obtain K.G.B. statements.

(C) Further Request for Assistance from Barbados Authorities

141 (i), (ii), (iii), (iv), (v) and (vi) The applicant has withdrawn this as a grounds of her application.

(D) Wilful Blindness to Momy "Alibi Witnesses

142 (i) I find that the complaint that Crown McGarry failed to follow-up and review all of the videotaped interviews conducted of the so-called "alibi" witnesses - Sharon Rosselina Boyce, Serge Berube and Guy Beauregard - premature at this stage of the proceedings. No breach attaches.

143 (ii) ...

144 (iii) ...

145 (iv) I find that the evidence of Crown McGarry on November 6th, 1998, that the further impeachment of the purported Momy "alibi" in the August, 1998, "re-interviews" of Boyce, Beauregard and Berube, and the initial interview of Gour was of no significance to the Crown, notwithstanding that it further implicated the already impugned conduct of Det. Sgt. Cook, Det. Cst. Connors, Det. Cst. Ball and Det. Cst. Churchill is evidence of tunnel vision and an impediment to the prospects of the applicant receiving a fair trial. A breach of the applicant's Charter rights attaches.

VI. LOSS AND DESTRUCTION OF EVIDENCE

(A) Concealment and Destruction of CPIC and Related Information on Victim

146 (i) and (ii) I find that the apparent deliberate destruction by unknown O.P.P. officers on November 10th, 1997, of computerized records pertaining to criminal charges, peace bonds and other information about the victim, Lawrence Foster, following service of a defence subpoena duces tecum on the Kemptville O.P.P. on November 10th, 1997, requiring production of that information before this Court on November 12th, 1997, is a breach of the applicant's Charter rights.

147 (iii) ...

(B) Loss or Destruction of Kemptville Police Chief's Notes

148 (i) I find the loss or unsatisfactorily explained destruction by Sgt. Chris McCurley of his notes and related material pertaining to the involvement of the Kemptville Police Services in the investigation from 1995 to the present, which were destroyed, stolen or lost when he vacated the former office of the Kemptville Police Service in May, 1998, as a result of an employment dispute with the Kemptville municipal authorities is a breach of the applicant's Charter rights.

(C) Loss or Destruction of O.P.P. Response to Defence Complaint

149 (i) I find no breach in the loss of destruction of Det. Sgt. Cook of the September 1995 draft letter that he wrote in response to a complaint by defence counsel to the solicitor General.

(D) Loss or Destruction of Det. Insp. Sweeney's Notes

150 (i) I accept the evidence that Det. Insp. Sweeney lost his computer records of his notes because of a computer crash in June, 1998.

(E) Loss or Destruction of Leonard Foster's Original Witness Statement

151 (i) I find that the loss of destruction of the original witness statement of the victim's brother, Leonard Foster, as disclosed in the notes of Cst. Mahoney, the witness liaison officer, has not been

satisfactorily accounted for, resulting in a breach of the applicant's Charter rights.

VII. PERJURED, FALSE OR MISLEADING EVIDENCE

(A) Detective Superintendent Larry Edgar

152 (i) I find that the giving of false and misleading evidence to this Court on October 5th, 1998, by Det. Supt. Larry Edgar, Director of Major Cases in the Criminal Investigation Bureau of the O.P.P., with respect to his sworn evidence on that date that he did not discuss the August 20th, 1998, decision to refer the Det. Insp. MacCharles allegations to the R.C.M.P. with Crown McGarry, when he knew that to be untrue is a breach of the applicant's Charter rights. Det. Supt. Larry Edgar had a protracted involvement with complaints respecting former Det. Insp. MacCharles. He was alerted (as a result of an adjournment to permit him to consult counsel) to the importance of his answers in this area of his evidence before completing his testimony.

153 (ii) ...

154 (iii) ...

(B) Det. Insp. Lyle MacCharles

155 (i) ...

156 (ii) I find that Det. Insp. MacCharles' testimony under oath to this Court on October 23rd and 26th, 1998, that he had returned to "light duties" in December 1997 or January 1998, when he had previously testified under oath on March 12th, 1998, that he had resumed "full time duties" on "January 1st or 2nd" of 1998 and when, in fact, his own duty notebook indicates that he worked successive 11 to 12-hour shifts on at least 60 out of 63 available working days between his actual return to duty on December 15th, 1997, and the date of his appearance before this Court on March 12th, 1998 in Brockville is a breach of the applicant's Charter rights.

157 (iii) I find that Det. Insp. MacCharles' deliberate false or misleading evidence to this Court on October 27th, 1998, that he was never advised by the Crown or other O.P.P. investigators of the fact that he was being sought as a witness by the applicant's counsel to testify on a defence Charter motion that was before the Court from November to December, 1997, when he had previously testified under oath before this Court on March 12th, 1998, that he "was aware that somebody was looking for [him]" is a breach of the applicant's Charter rights.

158 (iv) I find that the giving of false and misleading evidence by Det. Insp. MacCharles when he testified under oath that he had "come forward" to admit his wrongdoing in the Project Toy-Cumberland homicide "handgun incident", knowing when he gave that evidence under oath that he had actually been caught by the O.P.P. investigators as a result of the statements and documentary evidence provided by his subordinate officers, Det. Cst. Dougherty and Det. Cst.

Snider, and knowing that he continued to lie to the O.P.P. investigators - including Det. Supt. Edgar, Det. Insp. Grasman and Det. Insp. Bowmaster - when he gave his inculpatory statement on August 11th, 1998, is a breach of the applicant's Charter rights.

159 (v) I find that the giving by Det. Insp. MacCharles of deliberately false and misleading evidence before this Court during his cross-examination by defence counsel on October 26th and 27th, 1998, when he stated positively under oath that he had never admitted to being a party to welfare fraud in the Project Toy case during his sworn testimony in that case before Mr. Justice McWilliam on October 13th, 1998, knowing that he had already testified on October 13th that he knew he was committing a fraud is a breach of the applicant's Charter rights.

160 (vi) I find that the giving by Det. Insp. MacCharles on November 6th, 1998, of knowingly false evidence under oath when he stated under cross-examination by Crown Cavanagh that he took no part in the collection of physical evidence during the Foster homicide investigation in August 1995 is a breach of the applicant's Charter rights.

(C) Detective Inspector Leo Sweeney

161 (i) I find that it has not been established that Det. Insp. Leo Sweeney acted improperly or was not candid when he explained that his notes had "crashed" on his computer and that subsequently he located and produced written notes. However his involvement in the case is characterized, his notes have been produced.

162 (ii) ...

163 (iii) ...

164 (iv) ...

(D) Detective Inspector Glen Bowmaster

165 (i) ...

166 (ii) I find that Det. Insp. Bowmaster's deliberately false or misleading evidence on August 18th, 1998, in which he actively misled the Court into believing that a decision to refer allegations of misconduct against his predecessor, Det. Insp. MacCharles, to the R.C.M.P. for "independent investigation" had not yet been reached or even discussed and would not be considered until the completion of a "report" by the assigned O.P.P. investigator, Det. Insp. Grasman, at least one week or more from that date, when he knew at that time that a decision had been reached and a meeting scheduled for August 20th, 1998, with Det. Supt. Edgar and Regional Senior Crown Pelletier and Senior Crown Berzins is a breach of the applicant's Charter rights.

167 (iii) I find that Det. Insp. Bowmaster's deliberately false and misleading evidence to this Court on August 18th, September 8th and October 7th, 1998, when he actively misled the court into

believing that he had no prior involvement or knowledge concerning the case until he met with Crown McGarry on August 11th, 1998, when he knew that evidence was untrue and was aware at the time he gave it that he had previously discussed particulars of the case - including the specific findings of this Court with respect to the fabrication of a notebook entry by Cst. Ron Laderoute - with Det. Insp. Leo Sweeney in his office at O.P.P. Eastern Regional Headquarters in March of 1998 is a breach of the applicant's Charter rights.

168 (iv) I find that the giving by Det. Insp. Bowmaster of deliberately false or misleading evidence to this Court when he stated under oath on August 18th, 1998, that he did not have any conversation about the case with Det. Cst. Ball, the lead investigator, when they both attended at Crown McGarry's office for an initial meeting on August 11th, 1998, is a breach of the applicant's Charter rights.

169 (v) I find that the giving by Det. Insp. Bowmaster of deliberately false or misleading evidence to this Court under oath on August 18th, September 8th and October 7th, 1998, when he failed to disclose that he had formed an opinion as to the guilt of the applicant - i.e., "She's guilty" - before the commencement of his initial meeting and briefing with Crown McGarry on August 11th, 1998, is a breach of the applicant's Charter rights.

170 (vi) I find that the deliberately false or misleading evidence given before this Court under oath by Det. Insp. Bowmaster on September 8th, 1998, when in response to a direct and specific question by the applicant's defence counsel as to whether he had any other notebook entries for August 20th, 1998, other than his entry for "1500 hours", he stated unequivocally that he did not, knowing that his notebook contained an immediately following entry for "1600 hours" which contained a detailed reference to his meeting with Crowns McGarry and Cavanagh, and Det. Supt. Edgar and Grasman in McGarry's office at which Crowns McGarry and Cavanagh were advised of the decision to refer the MacCharles allegations to the R.C.M.P. that had been confirmed that morning in the meeting in Regional Senior Crown Pelletier's office is a breach of the applicant's Charter rights.

171 (vii) I find that the giving by Det. Insp. Bowmaster of deliberately false and misleading evidence under oath to this Court on October 7th, 1998, when he positively affirmed in his sworn testimony that an approved trip to Barbados by Det. S. Sgt. Scobie and himself - planned with Crown McGarry initially in July and August, 1998 and then postponed to September 12th, 1998 - had been "put on hold" or cancelled, knowing that while he was giving that evidence, Det. S. Sgt. Scobie was waiting for him outside the Court with the air tickets for their scheduled departure to Barbados at 9:20 a.m. the following day, October 8th, is a breach of the applicant's Charter rights.

172 (viii) I find that the deliberately misleading evidence given by Det. Insp. Bowmaster under oath on October 7th, 1998, when - in response to a direct question by the applicant's counsel during cross-examination as to whether Det. S. Sgt. Scobie was outside the Courtroom at that time - Det. Insp. Bowmaster responded by stating, "I don't think he's out there right now", when he knew that

Scobie was present with air tickets and waiting for Bowmaster to conclude his evidence so they could immediately leave together for Barbados is a breach of the applicant's Charter rights.

(E) Det. S. Sgt. Linroy Scobie

173 (i) I find that the deliberately false and misleading testimony given to this Court by Det. S. Sgt. Linroy Scobie on October 22nd and 23rd, 1998, in which he positively and repeatedly testified with respect to his initial non-disclosure of 60 pages of his duty notes - that they contained nothing of an "investigative" nature about the applicant's case, knowing that statement to be untruthful and misleading to the Court is a breach of the applicant's Charter rights.

174 (ii) I find that the false and misleading evidence given by Det. S. Sgt. Scobie about his reason for failing to disclose his notes for October 17th, 1997, of his investigation on that date on the instructions of Crown Flanagan of a defence-commissioned survey firm in Toronto, and the immediate complaint made by the applicant's counsel to the Solicitor General of Ontario, the Commissioner of the O.P.P., the Regional Senior Crown, and Crown Flanagan on that date which resulted in Scobie being ordered to immediately cease further investigation is a breach of the applicant's Charter rights.

175 (iii) I find no breach in respect to the evidence given by Det. S. Sgt. Scobie under oath as to the nature of his relationship with the Crown's "key witness" in Barbados, Gillian Lowe.

176 (iv) I find no breach in respect to the evidence by Det. S. Sgt. Scobie when he stated that he was accompanied by a Barbados police officer, St. Barker, when attended at Gillian Lowe's residence for two-and-a-half hours on the evening of September 20th, 1995.

177 (v) ...

(F) Det. Cst. George Ball

178 (i) I find no breach in the evidence of the lead investigator, Det. Cst. Ball, in his sworn testimony on the voir dire on October 21st, 1998, that he had no contact or communication concerning the case or the evidence before the Court for the preceding twelve months with members of the victim's family, including his "friend", Leonard Foster, and the victim's sister and brother-in-law, and other members of the Foster family, knowing when he gave that sworn evidence that he ad actually contacted Leonard Foster and Violet Pender on or after July 10th, 1998, as part of a "to do" assignment he undertook following a July 10th, 1998, meeting with Crown McGarry.

179 (ii) I find that the false and misleading evidence of Det. Cst. Ball on October 21st, 1998, when he stated under oath in his cross-examination that he could not recall having a discussion concerning the victim's vehicle plate number, "301 HOM", with Cst. Laderoute in the Kemptville O.P.P. detachment's coffee room on August 24th, 1998, is a breach of the applicant's Charter rights.

180 (iii) I find no breach respecting the evidence given by Det. Cst. Ball concerning his explanation as to why he did not record a note of his April 2nd, 1998, meeting with Det. Insp. MacCharles and Cst. Mahoney during an O.P.P. training session held at Renfrew, Ontario, on that date.

181 (iv) I find that the false and misleading evidence of Det. Cst. Ball on October 19th and 20th, 1998, that he was acting in good faith when he swore in the August 26th, 1995, search warrant informations before the Honourable Judge Masse in Brockville that he had been personally informed "by Constable Laderoute" that that officer had recorded the vehicle plate number "301 HOM" on August 18th, 1995, knowing that he, Ball, had proofread the said informations twice before swearing their contents to be true before Judge Masse in order to obtain the said warrants is a breach of the applicant's Charter rights.

182 (v) ...

(G) Det. Cst. Paul Alarie

183 (i) I find that the false and misleading evidence of Det. Cst. Paul Alarie given by him under oath before this Court on September 28th and 29th, 1998, in which he stated in response to direct and specific questioning by the applicant's defence counsel that his relationship with Det. Insp. MacCharles was "strictly professional" is a breach of the applicant's Charter rights.

184 (ii) I find that the false and misleading evidence given by Det. Cst. Alarie that he did not socialize very much with Det. Insp. MacCharles, when he knew that the issue of his relationship with Det. Insp. MacCharles was an issue before the Court and that his evidence in that regard was untruthful and misleading to the Court and that he had a close personal relationship with Det. Insp. MacCharles prior to being personally selected by Det. Insp. MacCharles as a purportedly "independent officer" to obtain "witness statements" from Violet and Christopher Pender on April 6th, 1998, is a breach of the applicant's Charter rights.

185 (iii) I find that the false and misleading evidence given by Det. Cst. Alarie on September 28th, 1998, concerning his September 28th, 1998, weekend trip to Niagara Falls with Det. Insp. MacCharles, Det. Cst. Robins, Det. Cst. Teeple and Cst. Sluytman in an O.P.P. when he stated that the trip was not only to attend the funeral of Robins' father but that while there he had also conducted interviewed with project Jericho witnesses at a correctional facility in St. Catharines, knowing that his evidence was false and misleading to the Court and that he had, in fact, done no such interviews on that weekend is a breach of the applicant's Charter rights.

186 (iv) I find that the deliberately false and misleading evidence given by Det. Cst. Alarie with respect to that trip to Niagara Falls with Det. Insp. MacCharles in September 1995 when he stated that MacCharles had not driven down with him in the same O.P.P. vehicle but had met them down in Niagara Falls, knowing that evidence was false and misleading to the court is a breach of the applicant's Charter rights.

VIII. PRECLUDING FULL ANSWER AND DEFENCE

(A) Conflicting Ulterior Theories: "Financial" Motive

187 (i) I find that the issue of conflicting ulterior Crown theories is a matter for the judge at trial and is, therefore, premature.

188 (ii) ...

(B) Conflicting Ulterior Theories: Motive Based on Sexual Orientation

189 (i) I find that the issue of motive based on sexual orientation is a matter for the judge at trial and is, therefore, premature.

190 (ii) ...

191 (iii) ...

(C) Conflicting Ulterior Theories: Applicant's Bad Character

192 (i) The Crown concedes that the statements in Det. Insp. MacCharles' memorandum of August 28th, 1995, that the applicant "undoubtedly is a prostitute" are not admissible. Det. Insp. MacCharles testified that he had no evidence to support this opinion. No breach is established.

193 (ii) The Crown concedes that introduction of the statement by the victim's sister, Violet Pender, respecting the "massage parlour" in Barbados would invite objections to its admissibility. No breach is established.

(D) Ongoing Revision of the Crown Theory of the Case

194 (i) I find no breach as a result of the Crown's modification of its theory or theories of the case in response to new evidence.

195 (ii) ...

IX. TRIAL WITHIN A REASONABLE TIME

(A) Unreasonable Delay Caused By Continuing Non-Disclosure

196 (i) I find that the period from the date of swearing of the initial information by Det. Cst. Ball on August 26th, 1995, charging the applicant as an Accessory After the Fact to Jean-Yves Momy to the date of the anticipated completion of the trial on March 30, 2000, being a period of four years and six months - is a prima facie unreasonable delay in violation of the applicant's right to be tried within a reasonable period of time, as guaranteed by Section 11(b) of the Charter.

197 (ii) I find that the period from the date of swearing of the initial information by Det. Cst. Ball on august 26th, 1995, charging the applicant as an Accessory After the Fact to Jean-Yves Momy to the present date - being a period of three years and five months - is a prima facie unreasonable delay in violation of the applicant's right to be tried within a reasonable period of time, as guaranteed by Section 11(b) of the Charter.

198 (iii) I find that there has been an additional delay of fourteen months from the date of commencement of the applicant's initial pre-trial motion for non-disclosure brought on November 2nd, 1997, to the present date of this renewed Application for a stay of proceedings, that is entirely caused by and attributable to the actions of the Crown.

199 (iv) I find that there has been additional irreparable and irrevocable prejudice to the applicant by reason of the continuing breaches by the Crown and police of their duty to make full and meaningful disclosure to defence counsel, including the most rudimentary types of disclosure - including, the order of the Crown's anticipated witnesses at trial, police officers' notes, forensic reports, witness statements and medical reports - resulting in breaches of the applicant's Charter rights.

(B) Other Unreasonable Crown-Caused Delay

200 (i) I find that the further reasons for the additional fourteen months of unreasonable delay from November 2nd, 1997, to the present, as set out in the foregoing grounds for this application and enumerated below, establishes that the entire fourteen-month additional delay is entirely Crown-caused delay and is unreasonable delay within the meaning of Section 11(b) of the Charter:

(i) the Crown's failure to disclose the return to active duty of Det. Insp. MacCharles in December, 1997, resulting in postponement of his evidence until October and November 1998;
(ii) the Crown's failure to ensure that "independent counsel" was available to take over carriage of the prosecution of the applicant beginning in February, 1998, despite repeated notice by the Court;
(iii) the continuing failure of Crowns McGarry and Cavanagh from September 8th up to the date of the testimony of Det. Insp. Bowmaster on October 7th, 1998, to notify the Court or defence counsel that they had, in fact, been advised of the August 20th, 1998, decision to refer the Det. Insp. MacCharles allegations to the R.C.M.P. on the same day that the decision was made, August 20th, 1998;
(iv) the continuing failure or refusal of the Crown to make full and meaningful disclosure of the updated police investigators' notes that were requested by defence counsel on July 29th, 1998, but some of which remain undisclosed.

201 (ii) ...

(C) Effect of Delay on Leading Mind of Investigation

202 (i) I find that the effect of the continuing Crown-caused delay upon the memory and powers of recall of important witnesses, including Det. Insp. MacCharles, the "leading mind" of the O.P.P. investigation, who had important, relevant and material evidence to provide with respect to virtually every aspect of the O.P.P. investigation, including the issue of whether the applicant was given her rights to counsel under Section 10(b) of the Charter, but whose ability to recall and recount events accurately has been diminished as a result of the continuing delay in proceedings since August, 1995, is a breach of the applicant's Charter rights.

203 (ii) ...

X. INTERFERENCE WITH SOLICITOR-CLIENT RELATIONSHIP

(A) O.P.P. Use of Jailhouse Informants

204 (i) I find no evidence of the Crown's knowledge of the lodging of Cherrylle Dell in the female dormitory of the Ottawa-Carleton Regional Detention Centre or of the interview of the applicant by Det. Cst. Leppert respecting the Dell homicide. No breach attaches.

205 (ii) ...

206 (iii) ...

(B) Collusion Between O.P.P. and Correctional Services

207 (i) I find no evidence of the Crown's knowledge of the attendance of O.P.P. investigators in the Dell case at the Detention Centre to question the applicant on September 11th, 1998. No breach attaches.

208 (ii) As a result of court intervention, the Superintendent of the Ottawa-Carleton Detention Centre has already responded to complaints by the applicant. Complaints respecting the conduct of police and jail authorities prior to the applicant's transfer to O.C.D.C. have been previously considered with a finding that no breach attaches therefrom. The Court's questions and the Superintendent's answers are Appendix E to these Reasons.

209 (iii) ...

(C) "Cage Rattling" By Jail Authorities

210 (i), (ii), (iii), (iv), (v) and (vi) These are considered in (B)(i) above but see Appendix E, questions by Court and reply by Superintendent Hutton.

(D) Derogatory comments About Defence Counsel in Accused's Presence

211 (i) There is no record or evidentiary basis for the complained of Crown remarks. No breach attaches.

(E) Verbal and Physical Harassment of Defence Counsel

212 (a) There is no evidence of Crown encouragement, acquiescence or wilful blindness towards the conduct of the victim's son, Steven Foster, on May 20th when he approached applicant's defence counsel in the cafeteria. The Court has responded to the complaint admonishing Mr. Foster: although no fault/responsibility attaches to the Crown or police, I view this as an unwarranted interference with defence counsel and, as such, a detraction from his client's right to a fair trial.

213 (b) There is no evidence of encouragement, acquiescence or wilful blindness of the Crown towards the assaultive behaviour and verbal abuse directed towards defence counsel by the lead investigator, Det. Cst. Ball, at the cafeteria of the Regional Municipality of Ottawa-Carleton headquarters on November 4th, 1998. This matter as well was dealt with by the Court at the time: a citation for contempt is still pending on the issue of the "intent" or mental element prompting Det. Cst. Ball's actions complained of. I view this was a direct interference with defence counsel's ability to represent his client, the applicant, and as a result is a breach of the applicant's right to a fair trial.

2. RENEWED NOTICE OF APPLICATION -- January 5, 1999

214 I have summarized my findings with respect to the matters raised in this Supplementary Notice of Application as follows:

> I find that Crown Pelletier knew or ought to have known that the publication and dissemination of comments in the media respecting the retainer of Messrs. Humphrey, Strosberg and former Justice of Appeal Robins might cause further prejudice to the applicant's right to have a fair trial before the Jury and give the false impression that the delays referred to in the report were-as alleged by Crowns Berzins, McGarry and Cavanagh-part of and attributable to a "defence tactic" by the applicant's counsel to delay the applicant's trial. However, the risk of contamination of the jury was an issue which could be addressed by challenge for cause during jury selection. No breach attaches as a result. [The Court had numbered this text paragraph 215. QL has removed the number.]

3. RENEWED NOTICE OF APPLICATION -- January 15, 1999 (BOX)

I. NON-DISCLOSURE CONCERNING FORENSIC TESTING

(A) Failure to Disclose Case submission Sheets and Untested Exhibits

216 (i) Although the Crown admits the case submission sheets were missing from the original Crown disclosure brief, because these were subsequently made available prior to trial I find no

breach attaches.

217 (ii) ...

(B) Results of "Wound-Weapon" Analysis

218 (i) Although the Crown failed to disclose that physical evidence - namely, suspected murder weapons seized by the O.P.P. during their investigation in 1995 - was submitted at their request to a forensic expert, Dr. Wood, for "weapon-wound" analysis in early 1996, the matter is now moot as it has been disclosed that no analysis was conducted. No breach attaches.

219 (ii) ...

220 (iii) ...

(C) Suppression of June 25th, 1996, Soil Comparison Report

221 (i) Disclosure of the soil comparisons were made known during the preliminary inquiry June 25th and, as such, no breach attaches.

222 (ii) ...

223 (iii) ...

(D) Decision to Forego Further Soil Testing

224 (i) I find that the failure of Crown prosecutors to disclose that a pair of soil-stained boots seized from the trunk of the victim's vehicle - and which were tested for traces of blood - were never subjected to a soil comparison or analysis by the Centre of Forensic Sciences because of a decision by Sgt. McIver and Ms. Johnston that they were of little forensic value is a breach of the applicant's Charter rights.

225 (ii) I find that the failure of the Crown to disclose that a breach of the security of the Muldoon Road boat launch crime scene had occurred when a gravel truck belonging to the local authorities was permitted to dump a load of crushed gravel on the areas from which soil samples had been taken is a breach of the applicant's Charter rights.

(E) Possible Contamination of Evidence in the Victim's Vehicle

226 (i) I find that the negligence or deliberate failure of the O.P.P. identification officers and of the personnel at the Centre of Forensic Sciences to conduct any thorough or careful forensic examination of the exterior of the victim's vehicle, after it had been seized and "sealed" by police in August, 1995, outside the victim's residence in Kemptville and transported to the Centre in Toronto in a sealed transport truck is a breach of the applicant's Charter rights in view of the potential

connection to blood spattering on the bridge introduced at the January, 1997 trial opening.

227 (ii) I find that the failure of the Crown to disclose that Sgt. McIver had expressed concern directly to the DNA expert, Ms. Johnston, in 1995 about possible contamination by him of biological evidence located in the victim's vehicle, that Johnston raised McIver's concern with her superior, Ms. Newell, but that they decided not to further investigate that issue because they both assumed that McIver was an experienced identification officer and that the chances of his having contaminated the evidence in the vehicle was, therefore, too remote to warrant further investigation is a breach of the applicant's Charter rights.

228 (iii) I find that the failure of the O.P.P. investigators to notify or advise the Centre of Forensic Sciences that the purportedly "sealed" vehicle - which they transported to the Centre from Kemptville on August 29th, 1995, within a sealed truck - had actually been entered by one or more individuals between August 24th and 29th, 1995, including a forced entry under the supervision of Sgt. McIver by a Crown witness using a car door lock-opening device is a breach of the applicant's Charter rights.

(F) Decision to Forego Botanical Testing

229 (i) I find that the failure or refusal of Crown prosecutors to disclose that William Graves, an expert in the chemistry section of the Centre of Forensic Sciences, was asked by the O.P.P. investigators to conduct a forensic comparison of "botanical" or plant material found at the various crime scenes near Kemptville with samples obtained from the victim's vehicle is a breach of the applicant's Charter rights.

230 (ii) I find that the continuing failure or refusal of Crown prosecutors to disclose that the abovementioned request for forensic investigation of botanical or plant material was vetoed by Ms. Pamela Newell, the head of the Biology Section of the Centre of Forensic Sciences or the reasons for that veto, namely, that there was already DNA evidence is a breach of the applicant's Charter rights.

231 (iii) ...

(G) Decision to Forego Additional DNA Testing

232 (i) I find that the failure of Crown prosecutors to disclose that the Centre of Forensic Sciences - and specifically, Ms. Newell - denied authorization for further DNA testing of evidence submitted to the Centre in 1995-96 for budget or "resource" reasons, knowing that the issue of "non-testing" of evidence by the Centre had arisen as an issue at trial with respect to a used condom and a necklace seized by O.P.P. investigators is a breach of the applicant's Charter rights.

(H) Failure to Provide Adequate Institutional Resources for Forensic Testing

233 (i) I find that the failure of Crown prosecutors to disclose the circumstances mentioned in (F) above knowing they were directly relevant to the issue of lack of institutional resources raised before the Court during the applicant's section 11(b) Charter motion in October 1997 and that the delay caused to the proceedings by the Centre had been the subject of extensive argument and written submissions by the Crown and defence upon that motion is a breach of the applicant's Charter rights.

234 (ii) ...

235 (iii) I find that the failure or refusal of the Ministry of the Solicitor General and Ministry of the Attorney General to ensure that adequate resources were made available to the Centre of Forensic Sciences in 1995 and 1996 to ensure that all required scientific testing could be carried out adequately and within a reasonable period of time, so as to prevent unnecessary and unreasonable delay in the investigation and prosecution of the applicant's case is a breach of the applicant's Charter rights.

(I) Absence of Inventory or Cataloguing System for Forensic Evidence

236 (i) ...

237 (ii) I find that the negligence and substandard conduct of the Ministry of the Solicitor General and its Centre of Forensic Sciences in failing to maintain an adequate system for the cataloguing and storage of physical evidence pertaining to this and other serious criminal cases, knowing that the said physical evidence was to be relied upon by the Crown to prosecute the applicant and to seek her conviction on the said criminal charges is a breach of the applicant's Charter rights.

(J) Recovery of the "Missing Condom"

238 (i) I find that the failure of Crown prosecutors to disclose to defence counsel that the Centre of Forensic Sciences had conducted two separate searches, at the behest of Ms. Kimberley Johnston, Assistant Head of its Biology Section, during the Spring and latter half of 1997, knowing that the loss of the condom was a live issue before this Court, and specifically knowing that the said evidence had been discovered missing initially in December 1996 but was not disclosed as missing until the Crown sought to tender an empty bag in its place before the Jury in February 1998 after the commencement of the trial is a breach of the applicant's Charter rights.

239 (ii) I find that the continuing failure for seven months of the Centre of Forensic Sciences to promptly notify or otherwise advise the Crown prosecutors that the "missing condom" had, in fact, been found somewhere in the DNA laboratory after a further search in the Spring of 1998 and had returned to Ms. Johnston on May 18th, 1998, is a breach of the applicant's Charter rights.

240 (iii) I find that the failure of either Sgt. McIver, the officer responsible for the physical

exhibits, or Det. Cst. Ball, the lead investigator, to notify or otherwise disclose to the Crown prosecutors that the missing condom had been found by the Centre, despite the fact that Sgt. McIver was aware himself of the significance of the "missing condom" and was notified of its recovery at the Centre by Ms. Johnston on December 2nd, 1998, and despite their understanding that he was to have Ball advise the Crown is a breach of the applicant's Charter rights. The Crown has admitted that prompt disclosure ought to have been made.

(K) Submission for DNA Testing of Exhibit 175

241 (i) I find that the failure or refusal of Crown prosecutors to disclose that the "used condom", Exhibit 175 on the Crown's list of physical exhibits, had actually been submitted for DNA testing of its contents and that such testing was specifically requested by the submitting O.P.P. investigator, Sgt. McIver; and recorded on the case submission sheet completed by McIver when the said exhibit was delivered by him to the Centre on November 10th, 1995, knowing that the issue of the non-testing of the condom had been raised in front of the Jury during the cross-examination of Sgt. McIver by defence counsel on February 5th, 1998, in a breach of the applicant's Charter rights.

242 (ii) I find that the failure or refusal of Crown prosecutors to disclose that subsequent to submitting the used condom to the Centre for DNA analysis of its contents, Sgt. McIver personally advised Ms. Johnston, the Centre's DNA expert, that it was found "quite a ways" from a shower curtain containing other physical evidence linked to the victim's residence and that she decided on that basis that the condom was of little forensic significance is a breach of the applicant's Charter rights.

243 (iii) I find no breach attaches as a result of Crown Flanagan's February 5th, 1998, telephone interview with a representative of the Trojan Brand condom manufacturer.

244 (iv) I find no breach attaches as no follow-up request was made respecting Sgt. McIver's undertaking and, in any event, compliance has been promised.

(L) Introduction of More Advanced DNA Typing

245 (i) Information by the Centre of Forensic Sciences respecting new methods of DNA typing was only recently made available and, accordingly, no breach attaches.

(M) Integrity and Continuity of Physical Exhibits

246 (i) I find that the failure of Crown prosecutors to disclose to the applicant's defence counsel that there was, in the words of its own DNA expert, Ms. Johnston, an "absolute certainty" that there had been cross-contamination of the numerous physical items contained in the shower curtain found near the Muldoon and Pratt Roads as a result of their being bundled together and that, accordingly, the blood or DNA-bearing material contained on some of those items had come into direct physical contact with other items within the shower curtain, including the "Bugs Bunny t-shirt", women's

panties, and the carpeting found therein is a breach of the applicant's Charter rights.

247 (ii) The process of exhibit identification was adequately explained in the evidence by Ms. Johnston and, as such, no breach attaches.

(N) Reliability and Trustworthiness of Centre of Forensic Sciences

248 (i) While this startling inconsistency in the expert's evidence respecting examination of the interior of the victim's vehicle by Sgt. McIver raised reliability concerns, I do not categorize this as a breach of the applicant's Charter rights.

249 (ii) My observations respecting the reliability of this witness in (i) apply and no breach attaches.

250 (iii) The issue of the connection between the new and old DNA testing methods is a matter for experts and, accordingly, no breach attaches.

(O) Crown Ignored Legitimate Concerns About Forensic Testing

251 (i) ...

252 (ii) I find that Crown Flanagan did speak to a scientist at the Forensic Centre respecting the status of the evidence in this case and, accordingly, no breach attaches.

II. MALA FIDES

(A) Court Misled By Crown About Completion Date of Forensic Testing

253 (i) I find that Crown Flanagan qualified his information to the court as an "estimate" and, accordingly, no breach attaches.

254 (ii) I find that the "opinion" by Crown Flanagan respecting alleged defence tactics of delay constitute just that - "opinion" - and, accordingly, no breach attaches.

255 (iii) ...

(B) Continuing Revision and Repudiation of Crown's Case

256 (i) The Crown's decision possibly to re-test (DNA) the Bugs Bunny t-shirt in my view does not constitute a repudiation of Crown McGarry's letter of June 30th, 1998, respecting the Crown theory. No breach attaches.

257 (ii) My comments in (i) above apply to the silver necklace. No breach attaches.

(C) Subterfuge Concerning O.P.P. Telephone Records Search Warrants

258 (i) I find that the failure of the Crown to disclose all 18-pages of the "master telephone list" kept by Det. Cst. Connors - only four pages of which were disclosed in the Crown disclosure brief - concerning the O.P.P. phone record search warrants, knowing that an issue had arisen in May 1997 with respect to the stated grounds for the warrants, and specifically, the truthfulness of an October 5th, 1995 search warrant information sworn to be Det. Cst. Windle is a breach of the applicant's Charter rights.

259 (ii) I find that the representations made by Crown Flanagan in his January 14th, 1998, letter to defence counsel in which he stated that it was "due to inadvertence" that Windle had sworn before a justice on October 5th, 1995, that the telephone numbers in question came from the applicant's "telephone address book" that was found "on her" at the time of her arrest, and that "according to Det.Cst. Windle", the numbers were provided to him by Det. Cst. Connors who, in turn, provided them to Det. Sgt. Cook were either deliberately misleading or wilfully blind. A breach attaches.

260 (iii) I find that Crown Flanagan was himself aware that the numbers originated from at least six separate sources, that not all of the numbers were accounted for at the time of his letter of January 14th, 1998, and that Det. Csts. Connors, Ball, Churchill and Cst. Mahoney had all been summoned to the Crown's office in December 1997 and January 1998 to go through the numbers in Windle's information to account for their true origin.

261 (iv) I find that Crown Flanagan's January 14th, 1998, letter denying the allegation on the basis of Windle's "inadvertence" was not a Crown refusal to investigate possible criminal conduct by the O.P.P., but an attempt to smooth unintelligible police activities on this issue.

262 (v) ...

263 (vi) I find that the failure of Det. Cst. Windle to keep notes of his involvement in the investigation from September 29th, 1997, to the present and his seemingly uninformed answers and professed ignorance of the events in which he was involved in cross-examination by applicant's counsel was a patent attempt at dissembling. A breach attaches.

(D) Additional Notes of Det. S. Sgt. Scobie

264 (i) and (ii) I find that the conduct of Crown Cavanagh on November 2nd, 1998, in making disclosure of the additional notes of Det. S. Sgt. Scobie by leaving them in an envelope in the general disclosure cabinet located outside the Crown's office - without verbal or written notice to the applicant's counsel that the notes had been left there - knowing that this medium of disclosure was a departure from Crown Cavanagh's own previous and consistent practice of faxing or hand-delivering such disclosure directly to counsel, often during the proceedings, thereby depriving defence counsel of the opportunity to make use of them in his cross-examination of witnesses, including Crowns Cavanagh and McGarry, on the non-disclosure and abuse of process voir dire is a breach of the applicant's Charter rights.

265 (iii) ...

(E) Contempt of Court Order by Det. Cst. Walker

266 (i) I find that Det. Cst. Walker did not discuss the matter of Det. Supt. Edgar's alleged perjury with Det. Insp. Bowmaster and no breach attaches.

(F) Retainer of Private Counsel by Crown

267 (i), (ii), (iii), (iv) and (v) I find that any clarification required because of complained of confusion respecting the retainer of Messrs. Humphrey, Strosberg and The Honourable Sydney Robins was satisfied by Mr. Strosberg's submission in court on December 23rd, 1998.

(G) Arrogation of the Trial Judge's Jurisdiction

268 (i) Although submissions from both counsel are premised on the heading ARROGATION, I assume the context and complaint is rather against ABROGATION.

269 (ii) I find that the retainer of private counsel by the Crown in the middle of a continuing murder trial is without constitutional, statutory or common law basis or precedent and has created further unreasonable delay in the proceedings, and is a breach of the applicant's Charter rights.

270 (iii) I find that the retainer of private counsel at this stage of the trial for the stated purpose (inter alia) of advising the Crown as to whether there is a "reasonable likelihood of conviction" to assist in its inherent prosecutorial duty to weigh such considerations at all stages of a criminal prosecution is not, by itself, objectionable provided it does not otherwise interfere with the applicant's Charter rights (such as unreasonable further delay).

271 (iv) ...

(H) Further Crown Delay of Proceedings

272 (i) I find that the failure or refusal of the Ministry of the Attorney General - despite repeated notices and warnings by the Court to the acting Crowns at every stage of the continuing abuse of motion voir dire - to appoint Crown prosecutors capable of arguing not only the instant abuse of process motion but also, if necessary, to continue with the carriage of the trial and instead ignoring those directions and consistently appointing Crown prosecutors who were only available on a temporary and limited basis, thereby causing further unreasonable delay and prejudice to the applicant, who has remained in custody since August 26th, 1995, is a breach of the applicant's Charter rights. For example, Crown Hoffman, who represented the Crown during the "evidence" stage of the renewed application and who was familiar with the issues and background on the Stay Application himself was replaced by Messrs. Humphrey, Strosberg and The Honourable Robins, who then requested a three-month adjournment in order to prepare for argument!

273 (ii) I find that the continuation by the Ministry of the Attorney General of the conduct referred to in (i) above with the retainer of Messrs. Strosberg, Humphrey and The Honourable Robins, none of whom will maintain carriage of the prosecution for the Crown if the case resumes before the Jury, and as a result of which further delay in the proceedings will be caused is the cause of further unreasonable delay.

274 (iii) I find no breach in the position of the Crown that Crown Cavanagh should be permitted to continue as a trial crown, notwithstanding that the Crown did not request the same recognition of Crowns Flanagan and Findlay.

(I) Continuing Crown Breach of Witness Exclusion Orders

275 (i) I find no breach of the Court's witness exclusion order by Crown Hoffman on December 17th, 1998, when he met with Det. Cst. Walker and advised her that it was acceptable for her to tell members of the victim's family that they should "be careful talking about evidence" with Crowns McGarry and Cavanagh because they "may be asked in court about their conversations", as I interpret this instruction that there should be "no discussion of evidence" which, in fact, was how this advice was acted upon by Det. Cst. Walker.

276 (ii) ...

277 (iii) ...

III. FURTHER BREACHES OF PROSECUTORIAL DUTY

(A) Police Services Act Charges Against Lyle MacCharles

278 (i) I find that there is no evidentiary basis that the delay in laying Police Services Act charges against former Det. Insp. MacCharles was unreasonable or that Crown Hoffman was aware of the police decision to withdraw these charges because of Det. Insp. MacCharles' retirement in November, 1998.

279 (ii) ...

(B) Failure to Lay Criminal Charges Against Lyle MacCharles

280 (i) The issue of pending criminal charges against retired Det. Insp. MacCharles is still under review with the result that no breach attaches.

281 (ii) ...

(C) Non-Disclosure Concerning Crown Witness Joan Summers

282 (i) The complaint of non-production of a "will-say" statement of the witness, Joan Summers,

is mitigated by the fact of her evidence and cross-examination thereon at the preliminary inquiry.

283 (ii) ...

(D) Continuing Failure to Protect the Applicant's Right to a Fair Trial

284 (i) While potential contempt proceedings were discontinued against the Ottawa Sun and the Brockville Recorder and Times in respect of the interview with Acting Regional Senior Crown Pelletier, this does not diminish the court's expressed concern that his comments had potential to influence members of the jury panel. In any event, the recourse available is the procedure of Challenge for Cause. No breach attaches.

285 (ii) ...

286 (iii) ...

4. RENEWED NOTICE OF APPLICATION -- March 29, 1999

I. CONTINUING NON-DISCLOSURE BY CROWN

(A) Summary of "Incidents of Bias" by Justice Cosgrove

287 (i) I have ruled on this matter directing disclosure of the case summary.

288 (ii) ...

289 (iii) ...

(B) Withdrawal of Crown Counsel During the Proceedings

290 (i) The non-appearance of Crowns Strosberg and Kelly has been explained to the Court.

(C) Crown Cooper's Request for Independent Investigation

291 (i) I have ordered production of a letter signed by Crown Cooper which has been entered as an exhibit.

(D) Non-Disclosure Concerning R.C.M.P. "Independent Investigation"

292 (i) I find that the contact between Insp. Nugent of the R.C.M.P. during his investigation with various named O.P.P. officers and Crown prosecutors was for the purpose of gathering information made available in the Report by the R.C.M.P. of its investigation: Release of this information before the final report potentially could detract from the investigation. No breach attaches on this particular ground.

(E) October 28th, 1998 Decision to Suspend "Independent Investigation"

293 (i) The action by the Crown not to notify or otherwise disclose to the Court or the applicant's defence counsel the fact of the decision made on October 28th, 1998, to suspend further "independent investigation" by the R.C.M.P. of retired O.P.P. Det. Insp. Lyle MacCharles related to an interim decision by the R.C.M.P.: its disclosure awaited a final report. No breach attaches. This reasoning applies to (ii), (iii), (iv) and (v) hereof.

(F) Decision Not to Call Crown Witnesses at Applicant's Trial

294 (i), (ii), (iii), (iv) and (v) The Crown has indicated no decision has been made in respect of these witnesses as to whether they will or will not be called at the trial. No breach attaches.

(G) Consultation with Defence Counsel on Project Toy

295 (i) This action by Crown prosecutors not to disclose to defence counsel that the "independent" R.C.M.P. investigation had, following a consultation with Regional Crown Pelletier in December, 1998, met with the defence counsel, Susan Mulligan, in the Project Toy-Cumberland case, to seek her input and advice with respect to various aspects of the R.C.M.P. investigation of Lyle MacCharles was an interim decision and disclosure awaited a final report by the R.C.M.P. No breach attaches. This reasoning applies to (H)(i) and (I)(i) below.

(H) Consultation with Crowns Bair and Cooper on November 26th, 1998

(I) Daily Morning Briefings at Kemptville O.P.P. in August, 1995

II. DELIBERATELY MISLEADING THE COURT

(A) Deception by Ministry of the Attorney General

296 (i), (ii) and (iii) I find no breach attaches in respect of (A)(i), (ii) and (iii) but see my ruling under (B)(i).

(B) October 28th, 1998 Meeting Regional Crown Pelletier's Office

297 (i) I have concluded that the R.C.M.P. investigation as it relates to this trial was co-opted by the O.P.P. officers and Crown prosecutors and that it lacks the basic characteristics of an "independent" investigation - free from any influence by the Crown and O.P.P. The so-called independence of the investigators was undermined by the following:

(a) reliance by the R.C.M.P. investigators upon legal advice and opinions sought by them and provided to them by the aforementioned Crown Attorneys in the Ontario Ministry of the Attorney General, including legal

advice from Regional Senior Crown Pelletier which led to the decision of R.C.M.P. investigators to suspend their investigation in late October 1998 after only two weeks;

(b) an actual formal meeting between R.C.M.P. investigators and senior O.P.P. officers in the office of Regional Senior Crown Pelletier on October 28th, 1998, at which a "brainstorming" session was conducted and a decision reached to suspend the R.C.M.P. investigation;

(c) continuing correspondence by way of "updated" progress reports from the R.C.M.P. investigators to the O.P.P. throughout the course of the investigation;

(d) the sudden revival and drastic expansion of the "suspended" Elliott Homicide aspect of the "independent investigation" almost immediately following the appearance and cross-examination of the senior R.C.M.P. investigator, Insp. Nugent, in April 1999;

(e) the advice given by Senior Crown Pelletier respecting the suspension of the investigation in late October 1998 was buttressed by similar opinions and advice offered by Crown Hoffman and O.P.P. General Counsel Mark Sandler.

(f) The false and misleading statement by the assistant lead investigator, Det. Cst. Churchill on October 20th, 1998, to R.C.M.P. Insp. Nugent that "the notes that [Cst.] Laderoute wrote pertaining to the traffic stop of Julia Elliott do not make or break this case since there are a number of civilian witnesses who without a vested interest in the investigation provided us the same information and actually allowed us to better qualify the time factor of the accused on the night I believe that Lawrence Foster was murdered", together with the advice that witnesses were ordered by the court not to speak to R.C.M.P. Insp. Nugent - both of which were incorrect - resulted in the decision to suspend the Elliott investigation.

I had invited the R.C.M.P. to obtain legal advice in respect of the witness non-communication order. I remain puzzled why they sought opinions from Ontario Crown officers who themselves were witnesses!

I have concluded, on the balance of probabilities, that the professed reluctance of O.P.P. officers to be interviewed by the R.C.M.P. was a sham and an attempt to delay or detract from the worth of the investigation. In this context, Det. Cst. Churchill, who I find misled Insp. Nugent, volunteered his statement notwithstanding the non-communication order - as did Crown Pelletier who also was himself a witness.

It was apparent in the evidence of Insp. Nugent in his first appearance in April, 1999, that he had no grasp of the significance of the evidence of Cst. Laderoute's notes respecting licence plate number 301 HOM or of the allegation respecting their origin. The value of his opinion or the reliability of his investigative work to that point was completely shattered by his cross-examination so that it is apparent, as a result, a rushed and expanded investigation was mandated with five additional officers being assigned to do witness interviews. Nor do I believe it was coincidental that at that point interim updates by the R.C.M.P. to the O.P.P. ended when, during the cross-examination, the so-called "independence" of the investigation was the subject of pointed cross-examination of Insp. Nugent by applicant's counsel.

Similarly, it was only after the cross-examination of Insp. Nugent in April, 1999, that a request was made by the R.C.M.P. for release of Cst. Laderoute's notebook for forensic testing (which was done twice resulting in an inconclusive opinion as to the timing of the entry of the notes). This, in part, leads me to the conclusion that it was only at that point (April, 1999) that the R.C.M.P. realized that they had been co-opted by the O.P.P. respecting the Elliott portion of the investigation and they then proceeded with steps that should have been taken in October of 1998.

As a result of the above, I find that the conduct of the Ministry of the Attorney General in meeting with and conferring with the R.C.M.P. "independent investigator" on numerous occasions from its commencement on October 13th, 1998, to its "suspension" two weeks later and thereafter - including at the meeting held in Regional Crown Pelletier's office on October 28th, 1998, at which a decision was reached to suspend the investigation of the applicant's case - despite prior representations to the Court that the investigation would be "independent" and free from any influence by the Crown and O.P.P. is a breach of the applicant's Charter rights.

III. FULL ANSWER AND DEFENCE AND FAIR TRIAL

(A) "Tainted Evidence" - Erin and Michael Francis

298 (i) I find that the conduct of the assistant lead investigator, Det. Cst. Cary Churchill, in making a statement to the R.C.M.P. "independent investigator", Insp. Dan Nugent, on October 20th, 1998, that "the notes that [Cst.] Laderoute wrote pertaining to the traffic stop of Julia Elliott do not make or break this case since there are a number of civilian witnesses who, without a vested interest in the investigation, provided us the same information and actually allowed us to better qualify the

time factor of the accused on the night I believe that Lawrence Foster was murdered", when he knew or ought to have known that statement was false and would have the effect of misleading the R.C.M.P. investigators concerning the significance of Cst. Laderoute's evidence concerning "301 HOM" is a breach of the applicant's Charter rights.

299 (ii) No decision has been made by the Crown with respect to calling "the couple who saw 301 HOM" at the trial. No breach attaches.

(B) "Tainted Evidence" - Ann Blaine

300 (i) No decision has been made by the Crown whether Anne Blaine or Gloria Davidson will be called at the trial. No breach attaches.

(C) Decision Not to Call Gloria Davidson

301 (i) ...

5. RENEWED NOTICE OF APPLICATION -- July 14, 1999

I. CONTINUING NON-DISCLOSURE BY CROWN

(A) Crown Witness Teryl Dold

302 (i) ...

303 (ii) and (iii) I find that the deliberate failure or refusal of Crown prosecutors to disclose that, in eliciting a written witness statement from Teryl Dold on September 5th, 1995, Det. Cst. Churchill, the assistant lead investigator for the O.P.P., pressured Ms. Dold into stating that the victim, Lawrence Foster, "had nothing to lose" and may have been thinking of filing for bankruptcy when she did not, in fact, make such a statement to Det. Cst. Churchill and did not, in fact, believe that the words attributed to her were true or accurate and that the continuing failure or refusal of Crown prosecutors to disclose that Ms. Dold had expressed her concerns about that misstatement and misrepresentation by Det. Cst. Churchill of her evidence to the Crown prosecutors during "witness preparation" meetings held with them in Brockville and Ottawa up to and including a meeting with Crown Cavanagh in September, 1998, is a breach of the applicant's Charter rights.

304 (iv) ...

(B) Det. Insp. Leo Sweeney

305 (i) I find that the Crown's failure to disclose copies of the notes of Det. Insp. Leo Sweeney for the period from October, 1998, to May 13th, 1999 - including his contacts with R.C.M.P. Insp. Nugent during the Project Audition "independent investigation" in October, 1998 - despite a written request by defence counsel to Crown Walsh on May 13th, 1999, and repeated written assurances

from Crown Walsh to defence counsel on May 27th, June 7th, 24th and 30th, 1999, that such disclosure would be provided is "delayed" disclosure and no breach attaches.

(C) Summary of Case and Incidents of Bias Prepared for "New Crowns"

306 (i) I have already ruled on the issue of the case summary prepared by Crown Cavanagh.

(D) Cst. Cathy Nooyen

307 (i) I find that the evidence of Cst. Cathy Nooyen that she met and spoke to then Det. Insp. MacCharles at the Kemptville O.P.P. Detachment on August 26th, 1995, before her overnight interrogation of the applicant untruthful and unreliable and given with the intent to protect Det. Insp. MacCharles, the case, and to mislead the R.C.M.P. and the Court. This statement to the R.C.M.P. was the first time it had been made and was contrary to her previous court testimony. Cst. Nooyen was unable to sustain this statement under cross-examination. A breach attaches.

(E) Retired S. Sgt. Cliff Pellett

308 (i) I find no breach in the failure of the Crown to disclose that O.P.P. Det. Insp. MacCharles had originally assigned Staff Sergeant (now retired) Cliff Pellett of the Technical Identification Services Unit (T.I.S.U.) to be the second or "back-up" identification officer.

309 (ii) The Crown has undertaken to produce the "Anticipated Evidence" statement or duty notes of S. Sgt. Pellett which he provided to Det. Insp. Lyle MacCharles at the completion of his involvement in the investigation and no breach attaches.

(F) Dan McAlinden

310 (i) I find that the statement by Dan McAlinden to the Crown or police prior to his being called to the witness stand at the applicant's trial in January, 1998, that he was "not 100 per cent sure of the times" of the observations recorded in his witness statement is ambiguous and no breach attaches.

(G) Leslie Scharfe

311 (i) I find that although the complaints in (G)(i) and (ii), (H)(i) and (ii), (I)(i), (ii) and (iii), and (J)(i), although technically correct are of such small significance that I would not prima facie characterize them as breaches of the applicant's Charter rights.

II. DELIBERATELY MISLEADING THE COURT

(A) Cst. Ron Laderoute

312 (i) I have already held that the giving of deliberately false and misleading evidence under

oath by Cst. Ron Laderoute of the Ontario provincial Police concerning his involvement in the August 18th, 1995 "R.I.D.E. stop" of the applicant in Kemptville, Ontario, at the preliminary inquiry before His Honour Judge Anderson on June 27th, 1996, before this Court and the Jury at the applicant's trial on February 11th and 12th, 1998, and as a reply witness for the Crown on March 12th, 1998, is a breach of the applicant's Charter rights.

313 (ii) ...

314 (iii) I find that the continuing conduct of Cst. Laderoute in misleading R.C.M.P. "Project Audition" investigators in May 1999 when he told them that he had copied the information contained in his purported August 18th, 1995, note from the applicant's passport on that date and not on august 24th, 1995, as he admitted to in cross-examination before the Jury in February 1998 is a breach of the applicant's Charter rights.

(B) Cst. Mitch Anderson

315 (i) I find that the giving of misleading evidence under oath by Cst. Mitch Anderson during the Section 10(b) Charter and voluntariness voir dire before this Court in November 1997 concerning his involvement in and the conduct of the O.P.P. homicide investigation in Kemptville in August 1995 is a breach of the applicant's Charter rights.

316 (ii) ...

317 (iii) ...

(C) Cst. Cathy Nooyen

318 (i) I have already found that the statement given by Cst. Cathy Nooyen to the R.C.M.P. respecting her meeting and speaking to then Det. Insp. MacCharles on August 26th, 1995, before her interviews with the applicant (which she did not claim to have done in her evidence on the preliminary inquiry or in the voir dire in December of 1997) is untrue and designed to support retired Det. Insp. MacCharles, the case, and to mislead the R.C.M.P. and the Court.

319 (ii) ...

320 (iii) ...

(D) Det. Cst. George Ball

321 (i), (ii) and (iii) I find that the conduct of Det. Cst. George Ball, the lead investigator for the O.P.P., in deliberately misleading the Court concerning the true circumstances and content of the written "witness statement" given to him by Crown witness, Octave Deschamps, on October 3rd, 1995, is a breach of the applicant's Charter rights.

322 (iv) I find that Det. Cst. Ball's evidence was that he did not improperly change or revise any statements or reports. No breach attaches.

(E) Det. S. Sgt. Linroy Scobie

323 (i) and (ii) I find that the sworn testimony given by Det. S. Sgt. Scobie in October 1998 before this Court to the effect that he was acting merely as one of the team of investigators when, in fact, according to his statements to R.C.M.P. "Project Audition" investigators in May 1999 at one point he had actually assumed responsibility as case manager for Det. Insp. MacCharles during the latter's illness in 1997 was an attempt to mislead the Court and is a breach of the applicant's Charter rights.

324 (iii) I find no breach attaches from Det. S. Sgt. Scobie's statement to the R.C.M.P. that "I know more than you think I do".

325 (iv) I find that the sworn evidence given by Det. S. Sgt. Scobie concerning whether he had any contact or conversation with Det. Insp. MacCharles prior to giving evidence on the voir dire in October 1998 was not the whole truth and is a breach of the applicant's Charter rights.

FULL ANSWER AND DEFENCE AND FAIR TRIAL

(A) Conduct of the R.C.M.P. "Independent Investigation"

326 (i) I find that the conduct of the R.C.M.P. "Project Audition" investigators in advising Crown witnesses during their "structured interviews" in April, May and June 1999 that the R.C.M.P.'s "independent investigation" had been brought about as a result of "allegations raised by defence counsel" during the applicant's trial created the inaccurate, misleading and prejudicial impression on the witnesses that the applicant's defence counsel was unnecessarily and improperly protracting the court proceedings in order to delay the applicant's trial; I find a breach of the applicant's Charter rights attaches.

(B) Further Unreasonable Delay

327 (i) I find that the Crown's conduct in referring the applicant's case for a purportedly "independent investigation" on august 20th, 1998, has resulted in further unreasonable delay in the proceedings through no fault of the applicant or her defence counsel, of nearly six months while the court awaited completion of the R.C.M.P. investigation and disclosure arising from that investigation, including the results of the R.C.M.P. interviews with 70 Crown witnesses in April, May and June 1999. A breach attaches.

(C) Lost or Missing Evidence from R.C.M.P. Investigation

328 (i) I find that the failure of the R.C.M.P. to ensure that the unsworn interviews conducted by the R.C.M.P. "Project Audition" investigators with various Crown witnesses in April and May of

1999, including Cst. Laderoute, were properly and accurately recorded by audio or videotape means so as to ensure that recordings of those interviews could be made available to the applicant's defence counsel has diminished the effectiveness of applicant's counsel in testing this evidence. This failure cannot, though, be attributed to the Crown or O.P.P. who did not control the day-to-day conduct of the investigation. No breach attaches.

329 (ii) I find that the refusal by O.P.P. Cst. Laderoute, on the advice of counsel from the Ontario Provincial Police Association, to allow his interview with the R.C.M.P. "Project Audition" investigators to be taped is not a breach of the applicant's Charter rights.

330 (iii) ...

331 As a result of my FINDINGS on this renewed Application, the total number of breaches of the applicant's Charter rights from the date of her arrest on August 24th, 1995, to date is over one hundred and fifty: this takes into account the breaches identified in my March 16, 1998, and May 27th Reasons for Decision.

332 In my Reasons for Decision of December 23, 1997 (a copy of which is attached as Appendix F to this decision) I ruled that only one statement given by the accused to the police at the time of her arrest on August 25th, 1995, was admissible as a result of breaches of her Charter rights. I concluded that the statements by the accused which were excluded by my Decision were obtained without the accused appreciating that she had the right to speak to counsel before giving these statements. The accused, who was visiting from the Barbados, had only been in Canada for a few weeks and was unfamiliar with her surroundings, including the legal process. The evidence indicated she was distraught and cried virtually during the complete time of her interrogation. I permitted the accused's statement to Cst. Nooyen after the accused spoke to duty counsel who advised her not to make a statement.

333 As regards my Reasons in my December 23rd Decision respecting the validity of the Search Warrant for the YMCA/YWCA in Ottawa, had I known of the evidence received by the court since that time on the voir dire, I am not confident that I would have found no Charter violation. For example, I refer to my findings regarding the misinformation by Officers Ball and Windle used to obtain the warrant. On the other hand, I agree with submissions by Crown counsel that it is likely that the police would have had alternate information sources which would have resulted in the discovery of the evidence belonging to the accused found at this location.

334 Of the one hundred and fifty Charter breaches confirmed by me, the majority of these are Crown related and occurred after the trial began in September, 1997, although some breaches were pre-trial. The breaches by the police (approximately two-thirds as many as those related to Crown actions) were almost evenly divided between the period during the investigation before trial and during the trial itself.

335 I invited Mr. Humphrey during his oral submission on the Application to make comment on

the issue of my finding at Page 15 in my March 16, 1998, Reasons that "I am satisfied on the balance of probabilities that the record of the licence plate to which I've just referred, on the note to which I've referred, was not recorded by Constable Laderoute on the night of August 18, '95. I have come to that conclusion after considering the contradictions and implausibility of the evidence of the officer with respect to the date of the reporting of this note, but in particular that part of the note which sets out the licence plate, as given by the officer, considering his evidence dealing with the way in which the note originally came about and, as well, the manner in which that note was disclosed to the O.P.P. investigative team. All of that undermines the officer's testimony on this point." This issue was identified as the first matter to be investigated by the R.C.M.P. as regards the FOSTER homicide in the Terms of Reference of October 19th, 1998, between the O.P.P. and the R.C.M.P.

336 As part of its investigation into this issue (the investigation was code-named Project "Audition" by the R.C.M.P.), the notebook entries by Cst. Laderoute were the subject of two scientific examinations at the R.C.M.P. Forensic Laboratory to discover if an analysis of the ink used in the entries could shed any light on the likely dates that the various entries were recorded. The results of both testings were inconclusive in establishing the dates the notes were made.

337 The R.C.M.P. Investigation Report dated June 22, 1999, did, however, offer an opinion on the issue of the notebook entries by Cst. Laderoute as a result of a statement by Cst. Nooyen to the R.C.M.P. investigators. In her statement, Cst. Nooyen told the investigators that she had been told by then Det.Insp. MacCharles prior to her interview and statement recording of the accused on August 24, 1995, to "make good notes" or words to that effect. The authors of the report concluded on the basis of this statement that it was likely that because this seemed to parallel Det.Insp. MacCharles' comments to Cst. Laderoute (as testified to by him) on the same day, this tended to confirm the innocent, natural direction of a superior officer and, therefore, was support for the evidence of Cst. Laderoute that he had made the entry dated August 18, 1995, on that date.

338 Under these circumstances, I felt obliged to review this area of evidence and my ruling of March 16, 1999. For this reason, I invited submissions from counsel on the issue.

339 After reviewing the testimony of Officers Laderoute and Nooyen given previously with their recent evidence on the voir dire and, in particular, their evidence under cross-examination concerning their recent statements to the R.C.M.P. investigators, I remain of the conclusion that the entry made under date of August 18, 1995, by Cst. Laderoute recording licence plate 301 HOM at the back of his notebook was, in fact, made on August 24th after he realized the significance of his RIDE stop of the accused on the night of August 18, 1995. I have previously in my findings found that the statements by both Officers Laderoute and Nooyen to the R.C.M.P. investigators were contrived by the officers to protect Det. Insp. MacCharles and the case.

340 Both Officers Laderoute and Nooyen in cross-examination respecting their recent statements to the R.C.M.P. investigators introduced for the first time new versions of events which had not

been given previously in their evidence on the voir dire or at the preliminary inquiry. Both were unable, logically or in any credible manner, to explain the change in their evidence. Each appeared flustered and confused when confronted in cross-examination by defence counsel on the contradictions in their evidence. Cst. Laderoute, in particular, was unintelligible in his attempt to explain his previous admission during the trial evidence before the Jury in 1998 that he had contrived the entries as alleged by defence counsel.

341 My review of the actual notebook entries by Cst. Laderoute in addition confirmed my original findings of March 16, 1998. I have concluded after this review that, on a balance of probability, the entry by Cst. Laderoute at the rear of his notebook (where he testified he made jottings or incidental entries) as follows:

> LINDA LINTON
> A11 140 GEORGE ST
> 258-5397
>
> Spoke to Mr. FOSTER
> ON LAST THURS OR FRIDAY
>
> --BRAIN SCAN
>
> --Dina BEKING #9

... was, in fact, a jotting made after he had spoken to Linda Linton when he was present at 140 George St. with the deceased's son on August 24, 1995. This jotting is then reproduced in his formal, larger notes beginning at Page 66 of his notebook which recite in detail his contact with the victim's son at 140 George St. which occupies eighteen pages of notes. The reference to Linda Linton appears in this narrative again at Page 71 - after Cst. Laderoute's discussion with Det. Insp. MacCharles and lead investigator Det. Cst. Ball and after Cst. Laderoute realized that his notes were deficient.

342 I found it significant that the entry at the rear of his notebook beginning August 18, 1995, and including licence plate 301 HOM is the only entry in the notebook that occupies by itself a single page. All other so-called "jotting" entries out of sequence or with no sequence identified at the rear of his notebook have multiple entries on one page, including the reference to the witness Linda Linton above. I find it significant as well that the entry under date of August 18, 1995, is the most legible of all entries in the notebook which I was unable to reconcile with the evidence of both Officers Laderoute and Holmes who testified and gave statements to the R.C.M.P. investigators respecting the circumstances under which the purported entry was made at the scene of the RIDE stop on the evening of August 18, 1995.

343 The admission by retired Det. Insp. MacCharles in his evidence on the voir dire in October, 1998, that he was aware that Cst. Laderoute had not made a note on August 18, 1995, of the licence number 301 HOM, together with the evidence by Sgt. McCurley in his evidence that he happened in the coffee room of the Kemptville O.P.P. Detachment on the evening of August 25, 1995, and observed Cst. Laderoute with notebook in hand in an excited conversation with Det. Cst. Ball respecting licence number 301 HOM, confirms my decision of March 18, 1998, on this issue: it also raises the spectre that both retired Det. Insp. MacCharles and Det. Cst. Ball were aware that Cst. Laderoute had re-constructed notes for the inclusion of licence number 301 HOM in his notes dated August 18, 1995, and that he had misled the Court in his evidence on that point before the trial jury in Brockville in February, 1998.

344 After conclusion of oral argument by all counsel on Thursday, August 5, 1999, on this Stay Application and voir dire, I made an interim ruling respecting the disclosure by the Crown of memoranda which had been prepared by Crown Cavanagh at the direction of Assistant Deputy Segal in December of 1998. I ruled that although this material was "work product", that it was in these exceptional circumstances required to be disclosed. My ruling is attached as Appendix G to these Reasons. Crown counsel advised it was seeking leave to appeal my ruling under the Supreme Court Act, R.S.C. 1985, and sought a stay of this application in the interim before Chadwick J., Senior Regional Justice for the East Region. In Reasons for Decision of August 13, 1999 (a copy of which is attached as Appendix H to these Reasons), Justice Chadwick refused the stay stating in part:

> There is more than a competing interest between the Crown and the accused. This case also involves public interest. The public have a right to know and expect prosecution will be conducted in a proper and timely fashion and the accused will be brought to trial as soon as possible. The Crown's irreparable harm is slight compared to the possible harm to the accused and the public. In my view, the balance of convenience favours the accused.

345 The material which was the subject of my ruling of August 5th was disclosed and delivered to defence counsel on August 23rd, 1999. At the same time, Mr. Humphrey, counsel for the Crown, made additional oral disclosures respecting the material. As a result of these disclosures, defence counsel made additional oral submissions, claiming additional breaches of the applicant's Charter rights and I directed that they be prepared, exchanged and filed with the Court before August 27th, 1999.

6. APPLICANT'S FURTHER WRITTEN SUBMISSIONS ON CROWN'S ADMISSIONS OF AUGUST 23rd, 1999

III. SUBMISSIONS BY APPLICANT'S COUNSEL

(a) Continuing Non-Disclosure By Crown

346 75., 76. and 77. I find that Crown Humphrey's failure to check, confirm, or otherwise disclose that he and Crown Strosberg - the so-called "new Crowns" - were, in fact, provided with and in possession of the document prepared by Crown Cavanagh detailing so-called "incidents of bias" by the Court does not amount to continuing material non-disclosure by the Crown in breach of the applicant's rights as initially alleged in January 1999 by the applicant's counsel. Rather, I accept that, considering that the documents in issue bore no authorship and were with numerous volumes of transcripts, it is not reasonable to expect that their authorship would be suspect by the "new" Crowns.

347 78. Because of my finding above, I conclude that the submissions made to the Court by Crown Strosberg on December 23rd, 1998 concerning the purported "independent review" and "fresh approach" which he claimed were the underlying bases of his retainer - and that of the "new Crowns" were not misleading.

348 79., 80. and 81. I find no mala fides in respect of the additional submission by Mr. Strosberg to the Court at the time of his initial appearance before the Court. Nor do I find that the "new" Crowns were engaged in stonewalling.

349 82., 83., 84. and 85. Crown counsel concedes (through the oral submissions by Mr. Humphrey to the Court on August 23rd and 24th, 1999) that the "new" Crowns were provided with some summaries prepared by Crown Cavanagh at the request of Crown Segal (Exhibit 5-W) which included a five-page recusal summary of alleged incidents of bias of the Court towards the Crown in the proceedings. Authorship was not identified on the two summaries seen by Mr. Humphrey.

349a Crown Strosberg emphasized in his remarks to the Court (and counsel has reminded of these remarks in his submissions) that because the "new" counsel were not regularly employed by the Attorney General, they were truly independent, free from prior influences and, in effect, a "new broom".

349b The issue of independence of counsel and the effect of the Court's order of non-communication had been the subject of a number of exchanges between counsel and the Court. The "new" Crowns obviously were aware of the non-communication order because Mr. Strosberg requested that an exception be granted permitting the "new" Crowns to communicate with Crown Cavanagh which, for recorded reasons, I declined.

349c In fact, unknown to them they had already perused case summaries including the recusal summary prepared by Mr. Cavanagh before they made their request. In my view, the summaries which were read by Mr. Humphrey were not simple records of proceedings as are transcripts; these were the result of choices and judgment decisions, culling what Crown Cavanagh considered to be irrelevant from the relevant (in his opinion) on the issue of recusal.

349d I am not in a position on the material before me to judge if this material had any influence on the "new Crowns. I do find, however, that there is the potential for influence (enunciated in R. v.

Deslauriers (1992), 77 C.C.C. (3d) 229 (Man. C.A.).

349e I find that Crown Segal or Crown officers subject to his authority (other than the "new" Crowns) knew or ought to have known that the transfer of these summaries prepared by Crown Cavanagh was contrary to the non-communication order and ought not to have been provided to the "new" Crowns. From its context, the non-communication order prohibited "indirect" contact as well as "direct" contact. The device of employing the Crown Law Office as a conduit for contact clearly breached the intent of this order.

349f The non-communication order of the Court was designed in part to attempt to ensure candid testimony of witnesses where issues of credibility were at the fore; in short, it was a procedure ordered in an attempt to ensure the fairness of the trial. The breach of this order by the release of the Crown Cavanagh summaries to the "new" Crowns detracted from the fairness of the trial and I find it a breach of the applicant's Charter rights.

[Paragraph numbers 349a to 349f were assigned by QL.]

ANALYSIS AND LAW

350 Counsel have agreed that the relevant tests to be applied on a Stay Application are correctly summarized in my March 16th and May 27th, 1999, Reasons. Reference is made to the excerpt from R. v. O'Connor (1995) 103 C.C.C. (3d) at p. 468:

> ... a stay of proceedings is only appropriate "in the clearest of cases" where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

351 In addition, reference was made to the decision of Glithero J. in R. v. Court, 36 O.R. (3d) 263 where at p. 301 he states:

> Lastly I am to consider in determining whether prejudice to the integrity of the judicial system is remediable, that effect be given to societal interests in a determination on the merits, which increases commensurately with the seriousness of the charge. These charges are at the most serious end of the spectrum. In my earlier ruling, I indicated that "in my assessment, a fair-minded and reasonable member of the community, fully apprised of all the circumstances of this case, would be offended and dismayed by the conduct of the case, but would want the case to proceed to trial as long as the trial can be a fair one".

352 These cases and the tests outlined were considered by Cacchione J. in the recent decision of The Queen and Dany Kane [1998], N.S.J. No. 558 C.R. 141404, with judgment delivered December 18, 1998. The judgment similarly was in response to a request for a stay of proceedings on a charge of First Degree Murder because of breaches to s. 7 and 11(d) of the Charter through abuse of

process. A stay was granted because it was found the Court was misled by an identification witness and further police evidence on the voir dire was found to be fabricated. Justice Cacchione found that the fairness of the trial was adversely affected: he found on the evidence that the case was one of the "clearest of cases" affecting the integrity of the trial and the trial process. He concluded that interest in the prosecution of the case was outweighed by the gravity of the affront by the misleading evidence of the police to decency and fair play.

353 Treating of the test to be applied on an Application for a Stay, Cacchione J. states at [para42]:

> One of the issues which arose in Canada (Minister of Citizenship and Immigration) v. Tobiass (1997), 118 C.C.C. (3d) 443 was the appropriateness of a stay of proceedings as a remedy. The Supreme Court of Canada noted that a stay of proceedings is a discretionary remedy and that generally stays are sought to remedy some unfairness to an individual that has resulted from state misconduct. The Court also noted that there is a residual category of cases in which a stay may be warranted. This residual category addresses cases where the unfairness or vexatiousness is of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. The Court outlined the required criteria for a stay of proceedings by saying as follows at p. 471:
>
> "If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
> (2) no other remedy is reasonably capable of removing that prejudice.
>
> The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future ... For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category ... The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a

> stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well - society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare."

354 He continues in [para43]

> In considering the first of these two criterion the Court noted that there are exceptions by stating at page 473:
>
> "... Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptional manner, would be unfair. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, the continued pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system."

355 He concludes at [para51] as follows:

> The annals of criminal justice are replete with instances of wrongful convictions. These miscarriages of justice have usually occurred when witnesses have given false evidence. In this case the false testimony goes to the very core of the Crown's case, the issue of identification. The fabrication of this evidence has damaged the integrity of the judicial system and may well undermine the publics' confidence in the administration of justice. To allow this case to proceed even with the exclusion of the identification evidence would not be fair to the accused, nor would it be fair to the community. I have no doubt that the community's conscience would be shocked to know that persons whose sworn duty it is to maintain the law would attempt to subvert the course of justice by misleading the Court. It goes without saying that misleading the court is detrimental to the administration of justice.

356 In applying the tests for a stay to which I have referred, I opted in my initial March 16, 1998, ruling to remedy the Charter breaches identified by directing a mistrial, granting a change in venue and ordering additional disclosure, together with directing examinations of certain key witnesses in a continuation of the voir dire. In my May 27th ruling on a renewal of the Stay Application, although I identified additional and continuing breaches of the applicant's Charter rights I opted to reserve on a determination of their impact on the fairness of the process until the Crown's case had been completed. As a result of the number and seriousness and persistence of the additional breaches identified in these Reasons, I intend to consider the impact and effect of these breaches which involves me in a consideration of the cumulative effect of more than one hundred and fifty breaches on the fair trial prospects of the accused.

357 In my March 16, 1998, Reasons I observed that obviously some breaches were more significant than others: on the other hand, because the Crown has admitted that the Crown's case is circumstantial, no breach can be ignored. In assessing complained of events I have already, in a sense, applied the test by rejecting some complaints as so insignificant that they do not constitute a breach of the applicant's Charter rights. I have concluded in the circumstances of this case any act of the Crown or police which interferes with, reduces, detracts from or limits the legitimate role of defence counsel in providing an adequate and proper defence for his client is a breach of the accused's right to a fair trial.

358 Of the more than one hundred and fifty breaches found by me, the majority of these were related to Crown counsel and the majority of those breaches arose after the trial started. The breaches attributed to the police, comprising approximately two-thirds of the number by Crown counsel, were evenly divided into the investigative stage and the trial itself. A review of these breaches by Crown counsel and the police indicate that scant attention was given to the accused's rights guaranteed under the Charter from the time of her arrest on August 25, 1995, and this misconduct has continued to the present time.

359 An analysis of the nature of the breaches identified by me demonstrates that many are related to the issue of disclosure by the police and Crown counsel. The contradictory and wildly divergent opinions of the individual officers as to the nature of disclosure requirements prompted me to investigate the jural basis for this process. In the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions 1993 (the Martin Report), Recommendation #42 at p. 264 is as follows:

> 42. The Committee recommends that the Solicitor General co-ordinate with federal authorities and that both issue such directives as are necessary requiring all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's Directive on Disclosure in their relations with Crown prosecutors. These directives should also make clear that the police and other investigators

(a) are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused;

(b) are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel may discharge the duty to make full disclosure; and that

(c) a failure to disclose all relevant information as required is a disciplinary offence.

360 The Report of the Criminal Justice Review Committee (February, 1999) with Co-Chairs Justice Hugh Locke, Senior Judge John D. Evans and Murray Segal, Assistant Deputy Attorney General, references the above-noted Recommendation #42 at p. 38 of their report as follows:

> Recommendation 42 of the Martin Committee Report called upon the provincial Solicitor General, in cooperation with federal authorities, to issue a directive or standing order requiring all police forces operating within the province of Ontario to comply with the Attorney General's directive on disclosure in their relations with Crown prosecutors. The Committee also recommended that the directive make clear that police and other investigators are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused.
>
> The authority of the Solicitor General to issue such a directive or standing order flows from the Police Services Act, which states that the powers and duties of the Solicitor General under the Act include:
>
> * The development and promotion of programs to enhance professional police practices, standards, and training;
> * The issuing of directives and guidelines respecting policy matters; and
> * The monitoring of police forces to ensure that they comply with prescribed standards of service.
>
> Recommendation 42 of the Martin Committee Report has not been fully implemented. We have been advised that the Ministry of the Solicitor General is reluctant to issue a disclosure directive or guideline under the Police Services Act

> as the Ministry is of the view that directives relating to police operations are more effective if they are issued through the police chain of command. With due respect for the Ministry's position, we are nevertheless of the view that it is imperative that the duties and responsibilities of police officers with respect to disclosure be clearly articulated in a binding directive or standing order. It is the responsibility of the Ministry of the Solicitor General to ensure that "adequate and effective police services are provided at the municipal and provincial levels" and, in the view of the committee, this includes ensuring that the police fulfill their disclosure obligations. While individual police officers are accountable to the internal chain of police command, police forces, whether federal or provincial, are accountable to the public through the relevant Solicitor General. The issuing of a directive or standing order concerning disclosure will help to ensure the seamless provision of disclosure in Ontario, by clearly placing the police obligation to disclose to Crown counsel on an equal footing with Crown counsel's duty to disclosure to an accused person.

361 The Report itself established the following recommendation at p. 40:

5.1

> The Criminal Justice Review Committee recognizes that full and timely Crown disclosure is an essential component of an efficient criminal justice system. To ensure that efficient disclosure practices are instituted and maintained across the province, police and prosecution co-operation and co-ordination must improve. We recommend that the Attorney General and Solicitor General of Ontario, in co-ordination with federal policing and prosecution authorities, establish a permanent disclosure co-ordinating committee to:
>
> (a) develop a joint directive or standing order comprehensively setting out the disclosure responsibilities of the police and prosecutors, to be issued by the Solicitor General and the Attorney General of Ontario and relevant federal authorities; and
> (b) examine, on an ongoing basis, disclosure issues and to make recommendations as to how these issues might best be resolved.

362 After researching the Martin Report on the issue of police disclosure practices, I inquired of Crown McGarry in May, 1998, whether the recommendations of the Martin Report had been adopted by the Solicitor General: I suggested a phone call to Ministry officials might provide an answer to my query. I repeated my request a number of times over the following months, but apart from providing the Court with some police training manuals, Crown counsel could not answer my inquiry. I remain perplexed why the information contained in the Report of the Criminal Justice Review Committee on this issue to which I have referred was not made available to Crown counsel or the Court. The Committee at that time was in the process of gathering information for its report

which obviously had to be compiled in order to allow release of a final report in February of 1999.

363 The chaotic and divergent views and practices of the police witnesses and the reaction of Crown counsel to them in this trial strongly attest to the observations of the Review Committee at p. 37 of their report as follows:

> Following the release of the Martin Committee Report, the Attorney General issued a new directive on disclosure, based on the principles and recommendations outlined in the report. While this new directive and judicial decisions interpreting the Crown disclosure obligation have settled most of the outstanding legal issues concerning the required content of Crown disclosure, numerous implementation and logistical problems remain unresolved. As a result, there continue to be cases in Ontario where issues relating to Crown disclosure significantly delay the commencement of trial proceedings or result in adjournments, stays of proceedings, or mistrials.

364 The deception by the police of Crown counsel and the Court, identified in the breaches of the applicant's Charter rights in my FINDINGS, is repugnant to a sense of fairness or the expectation of a just determination of trial issues. It is significant that these breaches which occurred early in the investigation continue to the present time and most of the officers who have "hands on" evidence to provide at trial have been implicated in some aspect of deception. Although a third supervising Detective Inspector replacing Det. Insp. Bowmaster has been appointed to take charge of the case from without the East region of the province, what expectation of fairness is realistic, for example, in light of the most recent Charter breaches involving the investigating officers who recently misled the R.C.M.P. in their investigation of retired Det. Insp. MacCharles?

365 In The Queen and Kane judgment by Cacchione J. to which I have referred, there was a parallel situation involving police testimony both as regards the findings by him of deceit by police witnesses and the issue of the future impact of such deceit. Justice Cacchione states at [para30] the following:

> I am satisfied based on all the evidence heard on this application that Constable Blinn's purported positive identification of the accused made in the presence of the jury was false and misleading. Constable Blinn identified no one, yet on three separate occasions he testified under oath that the accused was the person he identified from photographs. I am also satisfied that Corporal Townsend's evidence on this voir dire was a further attempt to mislead the Court into believing that a positive identification of the accused had been made. I am satisfied that Corporal Townsend was not mistaken when he previously testified that Constable Blinn had not positively identified anyone. I accept as credible the evidence of Constable MacPherson as it relates to showing Constable Blinn a photograph of the accused after Constable Blinn had been unable to identify the

accused from a photo line-up.

366 He continues with respect to the implication of his findings in paragraphs 35, 36 and 37:

> [para35] There is no doubt that the informant's credibility would have been greatly enhanced by the evidence of Constable Blinn and Auxiliary Constable Hutley, particularly since these officers were not involved in the investigation and their stopping of the informant's vehicle was simply a matter of being in the right place at the right time. It is not unreasonable to believe that jurors would place a great deal of faith in the evidence of these police officers. This evidence would certainly be viewed by the triers of fact as compelling, corroborating evidence. The problem is however that this evidence is not the truth.
>
> [para36] The justice system is dependent on witnesses telling the truth. The police are allowed to enter a person's home and conduct a search provided they have a warrant. The police are allowed to intercept private communications provided they have a warrant. The police are allowed to take samples of bodily substances provided they have a warrant. All warrants are granted on the basis of evidence given under oath. The oath is one of the pillars of our criminal justice system. It is a form of attestation by which a person signifies that he or she is bound by conscience to perform an act faithfully and truthfully. The oath allows judicial officers to accept as truthful what is being alleged and to rely on it for the issuance of warrants. Without evidence under oath, how could a judicial officer be confident that what is alleged is truthful?
>
> [para37] The fact that police officers were prepared to tailor their evidence under oath strikes at the root of our justice system. If a court cannot rely on evidence given under oath as being truthful, then our system of justice breaks down. The present situation calls into question the integrity of our system of justice and the integrity of this particular trial. It is clear that certain officers were prepared to change their testimony as the need arose. This casts into doubt the integrity of this trial and the integrity of the evidence presented against this accused. This disrespect for the truth by some officers has the unfortunate effect of calling into question the veracity of other officers who have testified in this case. One is led to question whether other police testimony has also been adjusted in an attempt to secure a conviction.

367 The misgivings expressed by Cacchione J. are misgivings which arise per force in this Application. While the evidence which was challenged in The Queen and Kane decision pertained to the critical and narrowly focused issue of identification, the litany of police deceptions, important

individually and collectively in the context of a "circumstantial case" in this case in my view attract the same analysis. The impugned actions and testimony of the officers identified unfortunately connote the self-admitted misguided approach of retired Det. Insp. MacCharles in his statement of August 14, 1998, when he uses phrases such as "... it didn't happen"; "... we have to stand firm in our original story"; "... to protect the case but if threatened I would not have allowed it to happen".

368 The misdeeds and deceit of the police which have been identified in these Reasons placed the Crown officers in this trial in an invidious position. On the one hand, Crown counsel rely upon the evidence and conduct of the police to present the case to the jury and the Court; at the same time their responsibility as officers of the court and as "ministers of Justice" charged with the duty to disclose all relevant information, whether helpful or harmful to the Crown's case outlined in R. v. Stinchcombe [1991], 68 C.C.C. (3d) 1, introduces a very difficult tension. This may explain in part, but not justify, the impugned Crown breaches of the accused's Charter rights which are identified in my FINDINGS.

369 The impugned Crown breaches of the accused's Charter right to a fair trial involving both ministry Crown officers and the regional and trial Crown officers reveal an exaggerated adversarial approach and practice rejected by the Supreme Court in R. v. Stinchcombe, above. For example, while I appreciate that the Crown office and Crown counsel who have testified, honestly believed that inter-Crown communication were protected by "work product" privilege, they were required because of this position to hedge on their answers respecting the history of the Crown's knowledge or involvement in the investigation of the reliability or credibility of retired Det. Insp. MacCharles.

370 While I appreciate that absent a directive or standing order referred to in the Martin Report and Criminal Justice Review Committee that each police officer has his or her own interpretation of disclosure requirements, Crown counsel has a responsibility to ensure that reasonable steps are taken to comply with these requirements. Obviously, that did not occur in these proceedings where flagrant reliance by officers upon the sham of the distinction between "investigative" and "administrative" notes was used to frustrate the legitimate and orderly process of cross-examination.

CONCLUSIONS

371 When the police take the law into their own hands as in this case, experience shows, and this case proves, that the truth and fairness get trampled under foot.

372 When the Crown officers employ an exaggerated adversarial stance, as in this case, the trial process becomes so unbalanced that the guaranteed Charter right to a fair trial is undermined.

373 Actions such as these by the police and Crown officers, as in this case, exhibit a misunderstanding and basic lack of confidence in the role of the judge and jury in the trial process. In so doing, their actions threaten to jettison the long tradition of impartiality of judges, guaranteed by the independence of life appointment and the strength and impartiality of the jury whose members are chosen at random from the greater community.

374 I have found that police officers were prepared to tailor their evidence under oath and to change their testimony as the need arose. I adopt as my own conclusions those of Cacchione J. in The Queen and Dany Kane where he states at [para37]:

> The fact that police officers were prepared to tailor their evidence under oath strikes at the root of our justice system. If a court cannot rely on evidence given under oath as being truthful, then our system of justice breaks down. The present situation calls into question the integrity of our system of justice and the integrity of this particular trial. It is clear that certain officers were prepared to change their testimony as the need arose. This casts into doubt the integrity of this trial and the integrity of the evidence presented against this accused. This disrespect for the truth by some officers has the unfortunate effect of calling into question the veracity of other officers who have testified in this case. One is led to question whether other police testimony has also been adjusted in an attempt to secure a conviction.

375 In this case, the fabrication of evidence touches on numerous issues, including identification.

376 I have concluded, considering the cumulative effect of the breaches by the police and Crown officers of the accused's Charter right to a fair trial detailed in these Reasons that the obvious prejudice caused thereby will, in the words of the Supreme Court, "be manifested, perpetuated or aggravated through the conduct of the trial" and that considering the history of these proceedings no other remedy is reasonably capable of removing that prejudice.

377 In considering whether prejudice to the integrity of the judicial system is remediable, I have returned to the comments of Glithero J. in R. v. Court where he observed, "in my assessment, a fair-minded and reasonable member of the community, fully apprised of all the circumstances of this case, would be offended and dismayed by the conduct of the case, but would want the case to proceed to trial as long as the trial can be a fair one".

378 As a result of my FINDINGS and ANALYSIS herein, I have concluded that a fair-minded and reasonable member of the community, fully apprised of all the circumstances of the case would conclude that a fair trial was not now possible and would not want the case to proceed to trial.

379 Having observed these proceedings from the outset, how could the accused, Julia Elliott, believe she would receive a fair trial?

380 I conclude under the circumstances (in a paraphrase of Cacchione J. at [para47] of the decision in The Queen and Kane) that the proceedings are contrary to the interests of justice. The interests of justice demand a search for the truth. Where the truth is deliberately put aside for expediency's sake, the proceedings become unfair. The standard of proof must be the same, for every accused person irrespective of her or his race, national or ethnic origin, colour, religion, age or sex.

381 I have concluded as well that the accused's Charter right to a fair trial has been negated by the delay in the prosecution caused by the Crown. It is agreed by counsel that the overall period of the delay from the arrest and laying of charges against the accused to the estimated date for completion of the trial - i.e., mid-January, 2000, will be four years and six months. Counsel have disagreed on the portion of the four years and six months delay that is attributable to the Crown.

382 Crown counsel in submissions has argued that because the issue of delay was canvassed by me in Rulings of November 3, 1997, March 27 and May 27, 1998, wherein I concluded that the delay complained of therein was not unreasonable, that those time periods ought not to be relitigated. With respect, I believe this overlooks the critical consideration that in the process of characterizing the nature of the delay and the prejudice or impact upon the accused, it is the total or cumulative effect of the delay that is significant to the Court and the context in which it occurs.

383 None of the delay in the voir dire or the prolonged renewed Stay Application since I observed last in my May 28th, 1998, Ruling that the trial was proceeding "haltingly" is attributable to the accused. Since May 28, 1998, the delay has resulted from the lack of institutional resources to assemble the jury panel and all of the complications arising from the Crown disclosure of the removal of Det. Insp. MacCharles in August, 1998 including the bizarre decisions by the Crown to parse responsibility for conduct of the voir dire to a series of different Crown counsel.

384 I have been mindful in reaching my conclusions that the quest for justice by the family of the victim, Lawrence Foster, his friends and the larger community has been negatively impacted by the impugned conduct of the police and Crowns and by their delay in this prosecution. Nonetheless, I have concluded for the reasons given that the facts of this case dictate that a Stay of proceedings is warranted with the result that a Stay of these proceedings is hereby ordered.

385 In their written submission, counsel canvassed the issue of costs. Counsel for the applicant/accused requested an order requiring an award of costs against the Crown. Crown counsel argued that costs against the Crown should only be awarded in criminal case which is rare or unique. In my view, I have demonstrated in these Reasons that this is such a case and that because of the impugned conduct of the police and Crown officers and their delay in this prosecution that costs should be awarded against the Crown. I am, therefore, directing that the legal costs of these proceedings from initial contact by the accused with counsel be assessed under the Legal Aid Plan but that the Crown pay the full amount thus established. In my view, the Legal Aid Plan should not be required to reduce its budget allocation for other needy persons because of the Crown-generated expense of the accused's legal representation.

COSGROVE J.

cp/d/ln/rsm