

SPECIAL MEETING OF THE CANADIAN JUDICIAL COUNCIL

**IN THE MATTER OF SECTION 65 OF THE JUDGES ACT,
R.S., 1985, C. J-1, AND THE INQUIRY COMMITTEE
CONVENED BY THE CANADIAN JUDICIAL COUNCIL TO
REVIEW THE CONDUCT OF THE HONOURABLE PAUL COSGROVE
OF THE ONTARIO SUPERIOR COURT OF JUSTICE.**

HELD BEFORE:

**THE HONOURABLE RICHARD J. SCOTT (CHAIR),
THE HONOURABLE DONALD BRENNER, THE HONOURABLE BEVERLEY
BROWNE, THE HONOURABLE PATRICK D. DOHM, THE HONOURABLE
ERNEST DRAPEAU, THE HONOURABLE ROBERT F. FERGUSON,
THE HONOURABLE CATHERINE A. FRASER,
THE HONOURABLE J. DEREK GREEN, THE HONOURABLE GLEN JOYAL,
THE HONOURABLE JOSEPH P. KENNEDY, THE HONOURABLE JOHN
KLEBUC, THE HONOURABLE ROBERT D. LAING,
THE HONOURABLE MARC M. MONNIN, THE HONOURABLE ROBERT
PIDGEON, THE HONOURABLE GERALD RIP, THE HONOURABLE J.J.
MICHEL ROBERT, THE HONOURABLE FRANCOIS ROLLAND,
HE HONOURABLE EUGENE P. ROSSITER, THE HONOURABLE DAVID D.
SMITH, THE HONOURABLE DEBORAH K. SMITH,
THE HONOURABLE RONALD VEALE, THE HONOURABLE ANDRE WERY**

Held at Ballroom B Meeting Room, InterContinental
Toronto Centre, 225 Front Street West,
Toronto, Ontario, M5V 2X3,
on Friday, March 6, 2009 at 9:30 a.m.

APPEARANCES:

Chris G. Paliare
Richard Stephenson
Robert Centa

For the Hon. Paul Cosgrove

Earl. A. Cherniak
Cynthia Kuehl

Independent Counsel

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1 Toronto, Ontario
2 --- Upon commencing on Friday, March 6, 2009
3 at 9:30 a.m.

4 MR. SABOURIN: I am the Executive
5 Director of the Canadian Judicial Council. Before
6 we begin I want to remind everyone that the use of
7 cameras and recording equipment is not allowed
8 during the proceedings. Also, everyone who is
9 present, I will thank you for turning off any cell
10 phones or pagers that you have or switching them
11 off to silent mode.

12 This meeting of the CJC is public,
13 however there is no opportunity for public
14 intervention other than statements by Justice
15 Cosgrove and counsel. Proceedings are expected to
16 conclude around noon or so and at that time I will
17 be available if there are any questions from the
18 media.

19 I will now turn the meeting over
20 to the chairperson.

21 CHIEF JUSTICE SCOTT: Good
22 morning. My name is Richard Scott, I am the Chief
23 Justice of Manitoba and Vice Chairperson of the
24 Canadian Judicial Council. In accordance with
25 Council's operating procedures I will be chairing

1 this public meeting.

2 With me are 21 other members of
3 the Council, they are designated to hear this
4 matter in accordance with our by-laws and
5 procedures. I take this opportunity to extend a
6 special welcome to the Honourable Glen Joyal,
7 seated to my far left, who was appointed Associate
8 Chief Justice of Manitoba Court of Queen's Bench
9 just six weeks ago. Welcome and thank you for
10 being here.

11 In 2004 the Attorney General of
12 Ontario asked the Canadian Judicial Council to
13 begin an inquiry into the conduct of the Honourable
14 Paul Cosgrove. The Judges Act gives this authority
15 to all Attorneys General, however Justice Cosgrove
16 challenged the provisions of the Act and asked the
17 proceedings be set aside. The process of review by
18 the Courts going all the way to the Supreme Court
19 of Canada took quite a while but the outcome was to
20 validate the inquiry process.

21 The Inquiry Committee held
22 hearings in late 2008 and presented a report to the
23 full Council in which the majority concluded that a
24 recommendation should be made that Justice Cosgrove
25 be removed from office.

1 This meeting of the Council has
2 been convened to hear from Justice Cosgrove and his
3 lawyer and from independent counsel in this case,
4 after which Council members will retire for
5 deliberations.

6 Justice Cosgrove and his counsel
7 will have a maximum of one-and-one-half hours to
8 make oral presentations. Independent counsel will
9 have a maximum of one hour. A further fifteen
10 minutes will be allocated to counsel for Justice
11 Cosgrove to respond as needed. These time limits
12 will be rigorously applied. There will be a
13 three-minute warning at presentations near the
14 maximum amount of time.

15 Council members who have questions
16 will address themselves through the chair, but we
17 will try to keep interruptions to a minimum.

18 We are ready to begin and I would
19 now invite the honourable Justice Cosgrove to make
20 a brief oral statement.

21 ORAL STATEMENT BY JUSTICE COSGROVE:

22 Chief Justice Scott, Justices of
23 the Council, it's a humbling experience to appear
24 before you today. I am acutely aware of the fact
25 that my judicial career hangs in the balance. I

1 made a lengthy statement to the Inquiry Committee
2 and I know you have that. I do not intend to
3 repeat it although I stand by it.

4 I intend return to some of the
5 things contained in that statement and to speak to
6 the reservations about that statement expressed by
7 the Inquiry Committee.

8 For the past 40 years I have
9 dedicated my life to public service. In the late
10 1960s I was a municipal politician in Scarborough,
11 Ontario, which was and is a fast-growing suburban
12 area of Metropolitan Toronto with a population of
13 approximately 600,000 people. Eventually I had the
14 honour of serving several terms as Mayor of
15 Scarborough and as a member of the Metropolitan
16 Toronto Council. In 1980 I was elected to
17 parliament, and I had the privilege of serving in
18 the cabinet. In 1984 I was appointed as a judge in
19 the Eastern Ontario town of Brockville and I have
20 lived there with my family since that time.

21 Being sworn in as a judge was a
22 moment of great pride for me, I felt that it was a
23 great honour to serve as a judge and being a judge
24 has been the focus of my working, community and
25 social life since that time.

1 Some of the letters of support
2 that have been filed with you refer to me as a
3 "judicial workhorse". I didn't plan it that way
4 but it does paint an accurate reflection of my love
5 for the work as a judge.

6 As a municipal and federal elected
7 official I came to understand the heavy
8 responsibilities that come with having a position
9 of power over lives of people in the community. I
10 was a member of the federal cabinet at the time of
11 the patriation of the Constitution of Canada and
12 the passage of Charter of Rights and Freedoms. I
13 had a keen understanding of the significance of
14 these events to the people of Canada.

15 Upon my appointment as a judge, I
16 quickly came to appreciate the unique and important
17 role of judges and the administration of justice in
18 ensuring the maintenance of the rule of law in
19 Canadian society.

20 I understand that judicial
21 independence plays a key role in ensuring the
22 maintenance of the proper administration of justice
23 and that, as a result, the public has the right to
24 expect high ethical standards of members of the
25 bench.

1 For the past 23 years I have run a
2 Community Law Day program in Brockville. This has
3 proved to be an extremely popular and successful
4 program involving high school students with lawyers
5 and police in a mock jury trial which provides them
6 with important lessons respecting the rule of law
7 and the administration of justice.

8 While I have dealt with all sorts
9 of cases and all sorts of lawyers in my years on
10 the bench, nothing prepared me for the experience
11 of sitting on the Elliott trial. It was an
12 extraordinarily difficult experience, like nothing
13 I had seen or I have seen since.

14 I accept it was my responsibility
15 to keep control of the case to ensure that the
16 proper administration of justice was maintained,
17 and I failed in that task.

18 Although I always tried to do the
19 right thing, it's now obvious to me that sometimes
20 I did not. Nevertheless, I acted in good faith at
21 all times. My failures resulted in a number of
22 people being hurt in a variety of ways, that is
23 something I profoundly regret.

24 I knew that my decision in the
25 Elliott case would be an unpopular one in many

1 that from time to time every judge is reversed by
2 the Court of Appeal. But this decision was
3 different. I recognized the harsh criticism of my
4 judgment.

5 I understood, and I accepted that
6 judgement. Nevertheless, I was sustained by my
7 view that notwithstanding the errors I had clearly
8 made, those errors had been made in good faith and
9 what was now obviously a misguided attempt to
10 achieve justice in the case.

11 For the next five months I
12 continued on as I had before, working hard hearing
13 cases. As before, no party ever raised any issue
14 with me hearing their case.

15 In April 2004, I received a copy
16 of the Attorney General of Ontario's complaint to
17 the CJC. I was shocked to receive it. Frankly, I
18 could not understand why the complaint would be
19 filed more than six years after many of the events
20 in question and more than four-and-a-half years
21 after my judgment.

22 While it was hurtful to see my
23 conduct characterized in the way that it did, I
24 recognize now that by this time I had become
25 somewhat desensitized to criticism of me over the

1 case which I had come to consider as something long
2 past.

3 I obtained legal advice as to how
4 to respond to the complaint and commence the
5 challenge to the constitutionality of section 63(1)
6 which His Honour has referred to.

7 I considered it an important issue
8 of principle which affected every superior court
9 judge in Canada, and I thought it was an argument
10 that had considerable weight. Indeed, I was
11 supported in this Constitutional challenge by the
12 Canadian Superior Court Judges Association, by the
13 Criminal Lawyers Association of Ontario and the
14 Canadian Counsel of Criminal Defence lawyers.

15 I was also gratified that when my
16 challenge succeeded in the Federal Court of Canada
17 initially in October 2005, one important side
18 effect of the decision was that I obtained the
19 agreement of my Chief Justice and my Senior
20 Regional Justice to resume a number of active
21 judicial duties including civil, family law and
22 estates pretrial and mediation as well as motions
23 in writing.

24 Over the next several years I
25 obtained great satisfaction from being able, again,

1 the right thing to do and I stand by my statement.

2 Upon reading the report of the
3 Inquiry Committee, it's apparent that the majority
4 had two concerns with my statement, and I want to
5 address those squarely.

6 First, they were concerned that my
7 statement did not constitute an unqualified
8 recognition of the errors I had made or an
9 unqualified apology to those affected by my
10 actions. Let me say here that it was my intention
11 to make an unqualified recognition of my judicial
12 misconduct and an unqualified apology. If my words
13 did not convey that meaning, that was my error and
14 I regret that. I don't propose to repeat in its
15 entirety the apology, I made my statement, you have
16 that statement.

17 Nevertheless, I do want to
18 reaffirm to you the strengths and the sincerity of
19 my apology to the Ministry of the Attorney General,
20 its counsel and senior representatives, the police
21 officers and civilian witnesses that came before me
22 in this case and to the public generally.

23 Moreover, I would like the
24 apologize, again, to the family of the victim of
25 the crime who, as a result of my errors, have

1 experienced a significant delay in achieving the
2 closure arrived at by having the criminal
3 prosecution reach its substantive conclusion.

4 Secondly, the Inquiry Committee
5 expressed concern over the timing of my statement
6 and apology. In my statement itself I attempted to
7 address that issue, obviously without success. The
8 simple matter is that I have been fortified for
9 many years by my unflinching view that right or
10 wrong I always conducted myself in good faith. I
11 felt this was the ultimate obligation of a judge
12 and a judge's ultimate protection. I now realize
13 this is too simple a perspective.

14 Within the context of this
15 proceeding I was, for the first time, able to shift
16 my perspective and examine how my conduct had such
17 serious adverse affect on others. That realization
18 came later in the day that others may prefer, but
19 it did come.

20 Once it came, I made my decision
21 to give a statement. I did so without any
22 assurance from the Committee that it would have any
23 impact upon their deliberations. I did it because
24 it was the right thing to do and it was an
25 important step in ensuring the confidence in the

1 administration of justice is maintained.

2 I am 74 years of age and I have
3 been a judge close to a quarter of a century, I
4 think four months off. Being a judge allows me to
5 continue to contribute to the community in the best
6 way I know how. I wish to be permitted the
7 opportunity to serve out the balance of my time as
8 a judge until I retire in December of this year.
9 The last thing that I would hope for would be to
10 bring disrespect to this office. I realize that by
11 my actions and my judicial misconduct, I may have
12 done that. I deeply and acutely regret the
13 prospect that my actions may have done damage to
14 this office.

15 The Elliott trial was a very
16 unpleasant experience for me. At one time I tried
17 to forget about it and to put it behind me. The
18 experience of this proceeding has caused me to
19 realize that that was the wrong approach. I have
20 been forced to examine what I did, how I did it,
21 how my conduct did not meet the high standards that
22 the public expects. Moreover, I have been forced
23 to consider the consequences that my actions had
24 upon others. I understand I must learn from them
25 and to become a better judge as a result; I believe

1 I have done that.

2 I am not proud of my role in the
3 Elliott trial, however, I do take satisfaction in
4 my overall work as a judge performed both before
5 and after the Elliott trial.

6 When you are assessing the
7 recommendation that you will make, I respectfully
8 ask that you consider my entire judicial career.
9 Others have spoken of my character and my
10 integrity, I will speak of my dedication. In this
11 case my dedication is to the task of ensuring that
12 the public's respect and confidence for the
13 judicial office is maintained. If I am allowed the
14 opportunity, I will ensure that my remaining months
15 as a judge are dedicated to that task. Thank you
16 very much.

17 CHIEF JUSTICE SCOTT: Thank you,
18 Justice Cosgrove. Mr. Paliare, are you ready to
19 proceed with your submission this morning?

20 SUBMISSIONS BY MR. PALIARE:

21 I am, Chief Justice. I, first of
22 all, would like to introduce my partners, Richard
23 Stephenson and Rob Centa, both of whom have
24 assisted me throughout in the matter.

25 Chief Justice and members of the

1 Council, it is my privilege to appear before you
2 today on behalf of Justice Cosgrove.

3 We submit that the Canadian
4 Judicial Council should not recommend to the
5 Minister of Justice that Justice Cosgrove be
6 removed from the bench by virtue of having become
7 incapacitated or disabled from the due execution of
8 his office.

9 We do dispute the Inquiry
10 Committee findings -- we do not dispute the
11 judicial committee findings of judicial misconduct,
12 however, we submit that when this Council is
13 undertaking the second stage of its analysis, it
14 must consider all of the relevant facts and
15 circumstances including four specific matters:

16 First, the character letters filed
17 on behalf of Justice Cosgrove; secondly, the
18 opinion expressed by independent counsel that
19 removal was not an appropriate sanction on the
20 whole of the evidence; third, the evidence that
21 Justice Cosgrove sat for more than four-and-a-half
22 years after the events in question without any
23 complaint, and; fourth, his statement to the
24 Inquiry Committee and his remarks here today which
25 demonstrated the utmost regret for his conduct and

1 his determination to exhibit and promote
2 respectively the high standards of judicial conduct
3 so as to reinforce public confidence in himself and
4 the administration of justice.

5 We submit that when this Council
6 has considered all of these facts and circumstances
7 it will be satisfied that public confidence in
8 Justice Cosgrove has not been sufficiently
9 undermined so as to render him incapable of
10 executing the judicial office. As a result, no
11 recommendation for removal is warranted.

12 We have filed with the Council an
13 extensive brief in support of justice Cosgrove's
14 position. In my oral remarks, I simply wish to
15 highlight for you what we consider to be the key
16 issues that the Council will need to review in
17 dealing with this matter.

18 In particular, I would like to
19 review the following six issues with you:

20 First, the test to be applied by
21 the Council in making its recommendation; second,
22 the significance of the letters of support for
23 Justice Cosgrove provided to the Inquiry Committee;
24 third, the significance of the views expressed by
25 independent counsel; fourth, the significance of

1 other evidence when applying a prospective analysis
2 to the determination of the appropriate sanction to
3 be imposed; fifth, the significance of Justice
4 Cosgrove's statement to the Inquiry Committee and
5 to you, and; sixth, on the basis of consistency
6 that has been a hallmark of the Council, how the
7 present case compares to other cases where the CJC
8 has considered a recommendation for removal.

9 In dealing with those six points I
10 ask you to keep in mind two critical facts. The
11 events in question are now between nine and eleven
12 years old, and, second, as Justice Cosgrove pointed
13 out, he has been a judge for over 24 years, nearly
14 a quarter of a century.

15 Let me begin with the test to be
16 applied by the Council. I will be brief on this as
17 it is set out in our material. We deal with this
18 issue at paragraphs 88 to 90 of our written
19 submission.

20 As the Matlow report tells us,
21 this Council is not sitting in appeal or judicial
22 review from the report of the Inquiry Committee.
23 As a result, there is no issue of deference to the
24 Inquiry Committee's ultimate recommendation,
25 although it may be appropriate to defer to the

1 Committee's findings of fact. In this case,
2 however, there is no controversy with respect to
3 the facts so this issue does not arise.

4 As a result, the recommendation of
5 the Inquiry Committee is only persuasive to the
6 extent that this Council in its deliberations finds
7 it to be persuasive. It is our submission that for
8 a variety of reasons you should reach a different
9 conclusion with respect to sanction that should be
10 imposed.

11 The recent decision of this
12 Council in the Matlow report is of substantial
13 assistance, in our respectful view, of clarifying
14 the analytical approach to be used in cases such as
15 this. In particular, the Matlow report, at
16 paragraph 166, makes it clear that the CJC is to
17 undertake a two-step approach in determining
18 whether a recommendation of removal is warranted.
19 That two-step approach is as follows: First,
20 determine whether the judge has engaged in
21 sanctionable conduct in accordance with the
22 criteria set out in section 65(2) of the Judges
23 Act.

24 It is not disputed that some of
25 Justice Cosgrove's conduct in this matter

1 constituted sanctionable conduct; so this step is
2 not in issue before you.

3 The second step in the analysis is
4 if sanctionable conduct is found, whether that
5 conduct satisfies the Marshall test. I don't want
6 to test your patience, but it is important to set
7 out the test so that we are all looking at the same
8 issue.

9 The test is: Is the conduct
10 alleged so manifestly and profoundly destructive of
11 the concept of the impartiality, integrity and
12 independence of the judicial role that public
13 confidence would be sufficiently undermined to
14 render the judge incapable of executing the
15 judicial office?

16 In undertaking the second stage
17 analysis, Council must take into account two
18 matters. First, consider the affect of the
19 sanctionable conduct in light of all other relevant
20 evidence. And, second, recognize that the analysis
21 is intrinsically prospective or forward looking in
22 the sense that it is seeking to assess the
23 likelihood that the sanctionable conduct will
24 undermine the public's confidence in the ability of
25 the judge to execute his or her judicial duties in

1 the future so as to necessitate his removal from
2 the bench. That's all set out at paragraph 166 of
3 the Matlow report. In our respectful view it's
4 something which the inquiry panel failed to do.

5 In addition, we submit that in
6 undertaking this second-stage analysis, the Council
7 must be mindful of the obvious fact that removal is
8 the ultimate sanction, it is capital punishment for
9 a judge.

10 While the Council must consider
11 that sanction in a proper case, it must also
12 consider whether the public interests can be
13 fulfilled and the public confidence in the judge
14 and the judiciary as a whole can be maintained by a
15 lesser sanction. Only if the Council is convinced
16 that nothing less than removal will fulfil the
17 public interest should a recommendation of removal
18 be made.

19 It's clear from paragraphs 181 and
20 182 of the Matlow report that the CJC is required
21 to take into account all relevant facts and
22 circumstances regarding the judge's situation in
23 coming to its recommendation.

24 In our submission in the
25 proceedings before the Inquiry Committee, a single

1 issue, specifically the effect of Justice
2 Cosgrove's statement, appears to have taken on a
3 pre-eminent significance to the exclusion of all
4 other relevant considerations.

5 I do want to address the issue of
6 the effect of Justice Cosgrove's statement before
7 the Inquiry Committee, because it is clearly an
8 issue of significance. However, there are a number
9 of other factors which, from our perspective, are
10 equally critical to the Council's consideration and
11 I want to address some of those first.

12 Let me begin with the second point
13 that I wanted to address you on and that is the
14 significance of the letters of support for Justice
15 Cosgrove provided to the Inquiry Committee.

16 We tendered to the Inquiry
17 Committee 32 letters which speak to Justice
18 Cosgrove's character, honesty, integrity,
19 conscientious, commitment to his role as a judicial
20 officer and to the administration of justice. All
21 of those are part and parcel of what we have put
22 before you in the two binders.

23 The Inquiry Committee concluded
24 that the letters were irrelevant to the
25 consideration and gave them no weight. They

1 accepted the letters when we introduced them but
2 never said to us that they were going to disregard
3 them. In our submission it is clear the Inquiry
4 Committee erred in principle in failing to consider
5 and to give any weight to the letters.

6 The Inquiry Committee's handling
7 of the character letters reflect its
8 misapprehension of the two-stage approach that the
9 CJC has determined in the Matlow report as being
10 appropriate in these kinds of cases.

11 The Inquiry Committee said that it
12 disregarded the character letters because the
13 letters did not address the events which gave rise
14 to the allegations of misconduct. We don't dispute
15 that fact, but we specifically refrained from
16 asking the authors of the letters to comment on any
17 of the facts of Regina versus Elliott. My
18 respectful view, perhaps I was wrong but I don't
19 think I am, it would have been improper to do so.

20 The character letters were not
21 tendered to speak to the first stage of the
22 analysis nor did we ever assert that that was the
23 case. Rather, they were tendered to address the
24 second stage where the focus of the CJC is much
25 broader. This is the very issue that the CJC dealt

1 with in paragraphs 149 to 150 of the Matlow report
2 where they said this:

3 "The reasons of Inquiry
4 Committee indicate that it
5 viewed this evidence..."

6 That is character letters
7 submitted on behalf of Justice Matlow

8 "...as partisan and, in any
9 event, as representative of a
10 small segment of the public
11 only. We do not disagree
12 with this assessment. But we
13 also find the evidence to be
14 relevant. Positing the
15 opposite question, what if
16 there were a deluge of
17 letters from the local
18 community, including Justice
19 Matlow's peers and lawyers,
20 to the effect that he was
21 unfit to hold office? Would
22 that be relevant as part of
23 our deliberations? We think
24 it may properly be. So too,
25 are the support letters which

1 have been accepted as
2 evidence."[as read]

3 I particularly focus on paragraph
4 150 of the Matlow report.

5 "Character is certainly
6 relevant to the assessment of
7 a judge's attributes. The
8 letters deal with various
9 aspects of Justice Matlow's
10 character, that is his
11 integrity, honesty,
12 conscientious work ethic and
13 commitment. While these
14 letters are not relevant to
15 whether the conduct
16 complained of occurred, they
17 may be relevant to why the
18 acts occurred, the context of
19 the acts and whether the acts
20 were committed without malice
21 and without bad faith.
22 Character is also highly
23 relevant to the issue of what
24 recommendations should flow
25 from a finding of judicial

1 conduct himself or make decisions in bad faith.

2 I add that the Inquiry Committee
3 itself found, with respect to the very conduct
4 under review in the Elliott case, that Justice
5 Matlow did not act in bad faith. I refer you to
6 paragraphs 133 and 157 of the Inquiry Committee
7 decision where that specific finding of fact is
8 made by the Inquiry Committee.

9 The second critical point from
10 paragraph 150 of the Matlow report is that
11 character letters are highly relevant to the issue
12 of sanction.

13 The third point is it's an error
14 in principle to ignore the character letters.

15 Yet at paragraph 38 of the reasons
16 of the inquiry panel in Justice Cosgrove's matter,
17 the panel expressly says they are not giving weight
18 to the letters submitted on behalf of Justice
19 Cosgrove. I submit to you, given what you have
20 said in the Matlow report, that that is an error in
21 principle.

22 For the reasons recognized in the
23 Matlow report, we submit at paragraphs 142 to 147
24 of our written submissions that the character
25 letters filed by Justice Cosgrove are important

1 evidence that this Council can rely upon in its
2 task of assessing on a prospective basis whether
3 removing Justice Cosgrove from the bench is
4 essential to the maintenance of the public
5 confidence in the judiciary. These letters assist
6 the Council because they speak to the high regard
7 that a varied cross section of the bench, the bar
8 and the public have for the integrity and character
9 of Justice Cosgrove. Their insight, in my
10 respectful view, will assist you in assessing how
11 Justice Cosgrove will conduct himself in the event
12 he is permitted to remain on the bench.

13 I add that in the Matlow inquiry
14 report it was said that the letters that were
15 submitted on behalf of Justice Matlow were from a
16 small segment of the public. My respectful view,
17 that isn't the case here. I have pointed out in
18 the written submissions to you that we have letters
19 from senior regional justices, I believe four of
20 them; we have letters from fellow judges; we have
21 letters from judges who had appeared before Justice
22 Cosgrove as counsel before their appointment; we
23 have letters from lawyers who have appeared before
24 Justice Cosgrove; and we have six or seven letters
25 from the community itself. In my respectful view

1 it's a broad cross section setting out their views
2 of Justice Cosgrove over the last 24 to 25 years as
3 a judge.

4 In addition, from our perspective,
5 it is worth noting comments made by independent
6 counsel to the Inquiry Committee regarding the
7 impact of the character letters at the time they
8 were introduced.

9 In particular, as set out in
10 paragraph 145 of our written submissions,
11 independent counsel noted that while he formed his
12 opinion that this was not an appropriate case for a
13 recommendation of removal, he did so before he
14 received the 32 letters of character evidence. But
15 he went on to say his opinion that this was not an
16 appropriate case for removal was and I quote
17 "reinforced" by the content of those letters.

18 Put differently, these letters are
19 an additional factor which is relevant in
20 determining the appropriate recommendation to be
21 made with respect to sanction.

22 I am not going to take you,
23 because of time, to the letters. I have set out in
24 our written submissions a number of quotes from
25 those letters. I particularly refer you to

1 paragraphs 120 to 140 of our written submissions.

2 If I could, though, there is one
3 paragraph that I did want to take you to and that
4 is paragraph 121.

5 Paragraph 121 of our submissions
6 say this, that a number of themes run through the
7 letters and, that is, that Justice Cosgrove:

8 Is a committed jurist;

9 He has a strong and abiding belief
10 in the need for people who come before the Courts
11 to be treated fairly;

12 He is a person of great integrity;

13 He is, as he described to you this
14 morning, it's a phrase that's used time and again
15 in the letters a "judicial workhorse" who would
16 take whatever assignments were given to him by his
17 regional senior judges and regularly gave up
18 non-sitting weeks and vacation weeks to pitch in
19 and help where there was a need;

20 He is courteous and thoughtful and
21 recognized as a very good judge, if not an
22 excellent judge, in the area of family law in
23 particular;

24 Very respectful and helpful to
25 unrepresented litigants. Again, you will see that

1 theme in the letters;

2 And he has a strong commitment to
3 the community, including the restoration of the
4 Brockville Courthouse, which I am advised is a
5 gorgeous courthouse really through his efforts.

6 And what I didn't mention in the
7 themes were, what he mentioned to you, that he was
8 the founder of the law day in the community whereby
9 students from the school would come and do a moot
10 court, and he was active in that.

11 So you will see all of that in the
12 letters, and I ask you and I hope that you will
13 read all of the character letters that have been
14 filed on his behalf.

15 But by failing to consider the
16 letters, we do not have the benefit of knowing what
17 the Inquiry Committee recommendation would have
18 been if it had done as we submit it should have and
19 as this CJC has said is an error in principle.

20 We do note, however, that Justice
21 Wachowich, in dissent, recommended against removal
22 even without the benefit of considering the
23 character letters.

24 I should note that the decision of
25 the Inquiry Committee in the instant case was

1 released after the decision of the CJC in the
2 Matlow case and there is no mention in the Inquiry
3 Committee decision about the CJC's review of the
4 appropriate use of character letters or that it
5 would be an error in principle not to consider them
6 at the second stage. I just need to make this
7 point, not only was there no explanation of it, but
8 there is just -- it is just completely silent on
9 it.

10 But if you look at the date of the
11 release of the Matlow report and the date on the
12 report of the Inquiry Committee, you might think
13 that I have misled you. Because the date on the
14 inquiry panel for Justice Cosgrove is something
15 like November the 27th, and the decision of the CJC
16 in Justice Matlow's was on December the 3rd. But I
17 can assure you that none of us received the report
18 of the inquiry panel until December the 4th. That
19 is, we didn't get the Inquiry Committee decision
20 until after the release of the Matlow report.

21 But, in any event, you can see
22 that they were all being discussed at the same time
23 and that those who were on the panel of the Inquiry
24 Committee with respect to Justice Cosgrove
25 participated in the decision in the Matlow report

1 and so would have been aware of this fundamental
2 and important principle that character letters can
3 and should be considered at the second stage.

4 We urge you to consider those and
5 give them weight when you determine what the
6 appropriate sanction should be.

7 My third point that I wanted to
8 deal with is the significance of the views
9 expressed by independent counsel.

10 As set out in more detail at
11 paragraphs 50 to 52 and 115 of our written
12 submissions, following Mr. Justice Cosgrove's
13 statement to the Inquiry Committee, Mr. Cherniak,
14 independent counsel, indicated that based on
15 Justice Cosgrove's statement that the record was no
16 longer capable of supporting a recommendation that
17 Justice Cosgrove be removed from office. Rather,
18 independent counsel stated it was his view that on
19 a full review of the record coupled with Justice
20 Cosgrove's statement, that the record was capable
21 of supporting a recommendation for a strong
22 admonition but not removal.

23 Needless to say, no one suggests
24 that either the Inquiry Committee or this Council
25 is in any way bound by the views of independent

1 counsel as to the appropriate recommendation to be
2 made. However, in this case, not only did the
3 Inquiry Committee not accept the opinion of
4 independent counsel, but also the Inquiry Committee
5 failed to express any reasons for rejecting that
6 opinion.

7 We submit that the views and
8 recommendations expressed by the independent
9 counsel should be accorded significant weight, both
10 by the inquiry panel and, more importantly, by this
11 council. If there is some reason to not accept the
12 views of independent counsel, in my respectful
13 view, it is an error in principle not to at least
14 set out why it is you are not accepting those
15 views.

16 We say that those views should
17 have been accorded strong consideration for five
18 reasons. And those five reasons are as follows:

19 First, independent counsel is
20 charged with a duty to present the case to the
21 committee;

22 Second, independent counsel is
23 required to act impartially;

24 Third, independent counsel have
25 reviewed every one of the more than 20,000 pages of

1 transcript from the lengthy Elliott trial and
2 examined the exhibits from the trial;

3 Fourth, independent counsel
4 interviewed numerous people involved in or affected
5 by the Elliott trial well beyond the four that gave
6 evidence before the inquiry panel, and;

7 Fifth, independent counsel
8 represents the public interest, which features so
9 prominently in the analysis of whether or not a
10 recommendation for removal is appropriate.

11 We make more detailed submissions
12 on this issue at paragraph 118 of our written
13 submissions.

14 In addition, though, it is
15 submitted that there is a significant institutional
16 interest both from the perspective of the CJC and
17 the effected judge to have early resolutions of
18 inquiries in circumstances where that is
19 appropriate and possible.

20 In the Boilard matter, for
21 example, the CJC specifically endorsed the
22 appropriateness of independent counsel taking an
23 active role to bring an inquiry to an early
24 conclusion in circumstances where the independent
25 counsel was satisfied that the case did not warrant

1 a recommendation for removal.

2 While the situation is slightly
3 different here, it is submitted that similar
4 considerations apply. The CJC should foster a
5 climate where a judge that is subject to an inquiry
6 is encouraged to work together with independent
7 counsel to explore all ways to determine whether
8 steps can be taken to shorten the inquiry process
9 including the possibility of early resolution.

10 While the ultimate conclusions
11 must always reside with the Inquiry Committee and
12 the Council as a whole, affording proper respect to
13 the role of independent counsel can and should
14 facilitate a more expeditious and co-operative
15 resolution of cases. Totally ignoring the opinion
16 of independent counsel is antithetical to his role
17 of acting in a public interest and undermines the
18 pivotal role that independent counsel play and
19 diminishes the potential for early resolution.

20 That outcome, in my respectful
21 view, is not in the interest of the judge, it's not
22 in the interest of the CJC and it's not in the
23 interest of the public as a whole.

24 My fourth point is the
25 significance of other evidence on the Council's

1 analysis about a prospective determination of the
2 appropriate sanction.

3 As recognized in the Matlow
4 report, the task of this Council in the second
5 stage of its analysis is essentially a prospective
6 one. In effect, the Council is required to attempt
7 to ascertain whether past events have rendered the
8 judge incapable of maintaining public confidence in
9 his ability to discharge his judicial duties in the
10 future. Typically there will be little or no
11 direct evidence with respect to these future
12 events, so the Council will required to make
13 inferences based on the evidence they do have.

14 However, the present case is
15 somewhat unique in that you actually do have direct
16 evidence as to the impact of the events of the
17 Elliott trial on the ability of Justice Cosgrove to
18 maintain the public confidence in discharging his
19 judicial duties.

20 Specifically, and as set out at
21 paragraphs 19 to 21 of our written submissions,
22 Justice Cosgrove's decision in the Elliott case was
23 delivered in September of 1999. The decision of
24 the Court of Appeal was in December of 2003. The
25 Attorney General's complaint was delivered in April

1 of 2004. As Justice Cosgrove has pointed out,
2 during those four-and-a-half years Justice Cosgrove
3 exercised the full range of his judicial duties in
4 dozens of cases, both civil and criminal, at no
5 time did any party make any complaint with him
6 sitting or raise any suggestion that he should
7 recuse himself from their case. This included many
8 cases involving representatives of the Attorney
9 General of Ontario, including some of the same
10 Crown attorneys that appeared before him in the
11 Elliott matter.

12 It does not appear that the
13 Inquiry Committee gave any consideration to these
14 facts upon which we relied at the hearing. We
15 submit you should. In our submission, this is
16 powerful direct evidence of the very matter you
17 must determine at the second stage of your
18 analysis. It demonstrates that Justice Cosgrove
19 can continue to discharge effectively the duties of
20 his office and public confidence has not been
21 undermined. This is critical to your ultimate
22 determination.

23 My fifth point, the significance
24 of Justice Cosgrove's statement to the inquiry
25 today. On the seventh day of the proceedings

1 "extremely humbling and
2 chastening" for him. He
3 states "to be clear, I made
4 many mistakes in that
5 trial... I at times lost my
6 way. ...I now realize that I
7 made a series of significant
8 errors that affected that
9 proceeding". Justice
10 Cosgrove outlines that he
11 read the Court of Appeal
12 decision carefully and was
13 humbled. He states that "the
14 Court of Appeal found that I
15 had made many errors in my
16 findings of fact and I had
17 misapplied the law on
18 numerous occasions. I accept
19 their reasons without
20 reservation". Justice
21 Cosgrove notes that he
22 reflected upon the Court of
23 Appeal's decision for the
24 past five years and he then
25 states the following: "The

1 Court of Appeal's reasons for
2 decision have affected me
3 greatly. I have no doubt
4 they have made, and will make
5 me, a better trial judge. I
6 fully appreciate my duties
7 and responsibilities as a
8 judge. I have changed, and
9 will continue to change, my
10 approach to judicial
11 decisions based upon the
12 insights I have obtained from
13 the reasons of the Court of
14 Appeal." Justice Cosgrove
15 also explains that he has
16 "spent many hours reflecting
17 carefully on the Notice
18 provided to me by independent
19 counsel." [as read]

20 He goes on at paragraph 196 and
21 disagrees with the majority of the Committee with
22 respect to the way in which they, it's my word,
23 parsed the statement by Justice Cosgrove. Justice
24 Wachowich says:

25 "The majority of the

1 Committee notes that Justice
2 Cosgrove's statement may not
3 necessarily be viewed as an
4 unqualified apology and the
5 Committee then outlines
6 portions of the statement
7 that raise such a concern. I
8 respectfully disagree,
9 however, that the phrase
10 "counsel for both parties
11 aggressively represented
12 their client's interests" can
13 be interpreted, as suggested
14 by the Committee, to mean
15 that Justice Cosgrove still
16 holds the Crown partly
17 responsible for his
18 difficulties throughout the
19 trial. Nor do I agree that
20 utilizing the word "may" in
21 the regret expressed for "any
22 intemperate, denigrating or
23 unfair language that I may
24 have used" is to be construed
25 unfavourably towards Justice

1 Cosgrove's statement in its
2 entirety. Rather, Justice
3 Cosgrove realizes that his
4 conduct during the trial was
5 not above reproach in the
6 view of reasonable, fair
7 minded and informed persons.
8 He admits,
9 "with hindsight, my attempts
10 met with only modest success,
11 ...it is certainly not
12 typical of my conduct in the
13 courtroom, and I have and
14 will continue to ensure that
15 I always conduct myself in
16 the best traditions of the
17 judiciary."[as read]

18 We submit that Justice Cosgrove's
19 statement to the Inquiry Committee and his remarks
20 here today are important to ensuring that the
21 public's confidence in the judiciary as a whole and
22 Justice Cosgrove is maintained.

23 First, Justice Cosgrove has
24 provided a full, complete, sincere apology to the
25 various persons who were effected by his actions.

1 At least three important aspects
2 of his apology are apparent:

3 First, providing apologies where
4 they are appropriate, in our view, provides strong
5 evidence of the self awareness that he did not
6 maintain a proper standard of conduct.

7 Secondly, apologies also
8 demonstrate an awareness of the real consequences
9 visited upon real people by his past actions.

10 And, thirdly, apologies provide
11 evidence of a desire and attempt to put things
12 right to the extent that he is able.

13 Justice Cosgrove hopes that his
14 apology can provide a degree of comfort to those
15 who he mistreated in the past.

16 Secondly, in addition to the
17 apologies, his statement contains a complete and
18 sincere acknowledgement of his misconduct. His
19 statement itemizes the ways that his conduct fell
20 below the required standard. For example, one, the
21 statement reveals Justice Cosgrove's self awareness
22 of his individual errors and failures. Secondly,
23 the statement reveals Justice Cosgrove's sincere
24 pledge to ensure that his errors and failures are
25 not repeated. Third, the statement reveals Justice

1 Cosgrove has learned and will continue to learn
2 from the CJC's own publications, and elsewhere, to
3 uphold the highest standards of the judiciary.

4 Justice Cosgrove's statement to
5 the Inquiry Committee and his remarks here today
6 reveal two truths. First, this experience has
7 taught Justice Cosgrove a very hard lesson. And,
8 secondly, Justice Cosgrove is resolute in his
9 commitment to ensure that nothing of this nature
10 occurs again.

11 My sixth point. How the present
12 case compares to other cases where the CJC has
13 considered recommendation for removal. Justice
14 Cosgrove submits that prior decisions of the CJC do
15 not compel that the CJC should recommend his
16 removal from the bench. In contrast, we submit
17 that prior CJC past decisions support that a strong
18 admonition would be more than sufficient.

19 Justice Cosgrove submits for the
20 reasons set out in paragraphs 149 to 152 of our
21 written submissions that his case is
22 distinguishable from that of Justice Bienvenue.
23 The Inquiry Committee concerning the Honourable
24 Justice Bienvenue concluded that he misused the
25 office of judge when he used it to express his

1 personal beliefs about women, Holocaust victims and
2 suicidal persons and as well to criticize jurors in
3 a criminal case of Regina v. Theberge.

4 The Bienvenue Inquiry Committee
5 noted that the breaches of ethics were serious and
6 had not been retracted by the judge. The Bienvenue
7 Inquiry Committee recommended Judge Bienvenue be
8 removed from office and wrote:

9 "We particularly took account
10 of Mr. Justice Bienvenue's
11 testimony during the trial.
12 We found that the judge has
13 shown an aggravating lack of
14 sensitivity to the
15 communities and individuals
16 offended by his remarks or
17 conduct. In addition, the
18 evidence could not be
19 clearer, Mr. Justice
20 Bienvenue does not intend to
21 change his behaviour in any
22 way." [as read]

23 When the CJC considered the report
24 of the Bienvenue Inquiry Committee it emphasized
25 the fact that Justice Bienvenue had demonstrated no

1 intention of changing his ways. CJC wrote:

2 "No attempt has been made by
3 Mr. Justice Bienvenue since
4 the delivery of the report of
5 the Inquiry Committee to
6 indicate any intention on his
7 part to, in fact, change his
8 behaviour." [as read]

9 Justice Cosgrove submits that in
10 the Bienvenue case the CJC placed significant
11 weight on the evidence and position of the judge in
12 question. In particular, it focussed on whether or
13 not Justice Bienvenue recognized and understood how
14 he fell into error and whether he would provide an
15 assurance that the conduct would not happen again.
16 Justice Bienvenue failed to do that.

17 Justice Cosgrove submits for the
18 reasons set out in our brief that his statement,
19 unlike Justice Bienvenue's steadfast refusal to
20 acknowledge wrongdoing, demonstrated his
21 understanding of his errors, contained a strong
22 assurance that such errors would not be repeated.
23 For this important reason, Justice Cosgrove submits
24 that his case is distinguishable from Justice
25 Bienvenue's situation.

1 We further submit that the
2 situation before you is more analogous to that of
3 Justice Flynn. These submissions are found at
4 paragraphs 153 to 156 of our written submissions.
5 The CJC appointed the Inquiry Committee concerning
6 Justice Flynn as a result of a request from the
7 Quebec Attorney General to enquire into his conduct
8 with respect to statements he had made to a
9 newspaper relating to a property transaction
10 involving his wife.

11 The Flynn Inquiry Committee
12 concluded that Justice Flynn should have refrained
13 from making comments to the media, which they
14 characterized as inappropriate and unacceptable.
15 The Flynn Inquiry Committee held that Justice Flynn
16 had spoken out on matters of a controversial nature
17 which were likely to come before the superior court
18 of which he was a member and that he had failed in
19 the due execution of his office given the duty to
20 act in a reserved manner.

21 However, it went on to say that
22 given Justice Flynn's irreproachable career, the
23 isolated nature of the incident complained of, the
24 unlikelihood of a similar incident reoccurring, and
25 the judge's acknowledgement of having made a

1 mistake in speaking to the journalist, the Flynn
2 Inquiry Committee concluded that Justice Flynn was
3 not disabled from the due execution of his office,
4 ie., prospectively, and that there was no
5 recommendation that he be removed from office.

6 I particularly commend you the
7 Flynn Inquiry Committee report at paragraph 77.
8 The CJC in its report to the Minister agreed with
9 the Flynn Inquiry Committee's conclusion.

10 At paragraph 33 of Mr. Cherniak's
11 brief, he attempts to distinguish the Flynn case by
12 saying that Justice Cosgrove's misconduct extended
13 over the course of two years and was repetitive in
14 nature, unlike Justice Flynn.

15 With respect, we disagree with Mr.
16 Cherniak's characterization and conclusion. Justice
17 Cosgrove's conduct in Regina v. Elliott was in the
18 context of one case. It did extend over about a
19 year-and-a-half, he repeated the same errors on a
20 number of occasions within the context of that one
21 case; but he did not do so in bad faith. He now
22 recognizes he erred, he recognizes that fact, he
23 apologizes for those errors and he is truly
24 repentant. He did so in the context of what he
25 described as a very difficult case, one that he had

1 never encountered in his career either before or
2 since.

3 But if it was not done in bad
4 faith, I suggest to you that the conclusion, of
5 course, is that whatever he did he did in good
6 faith. It is consistent with what occurred and the
7 conclusion in the Flynn matter.

8 Moreover, the evidence before you
9 demonstrates Justice Cosgrove's own irreproachable
10 career. Twenty-four years as a judge, probably
11 closer to 40 years in public service. The
12 unlikelihood of a similar incident recurring and
13 his acknowledgement of his errors and acts of
14 judicial misconduct.

15 Those factors make it akin to the
16 Flynn case, in my respectful view, and are not the
17 factors that one should take into account if you
18 are considering removal.

19 Similarly, as set out at
20 paragraphs 156 to 158 of the written submissions,
21 Justice Cosgrove submits that his situation is
22 similar to that of Justice Matlow.

23 The Matlow Inquiry Committee
24 recommended that he be removed from the bench,
25 however the CJC did not recommend to the Minister

1 that he be removed from the bench. Rather, the
2 Matlow report, at paragraph 178, said the
3 following:

4 "Moreover, we have explained
5 why it is appropriate to
6 place on the sanction scale
7 the character evidence
8 letters Justice Matlow
9 submitted to the Inquiry
10 Committee, these letters
11 speak to public support and
12 confidence in Justice Matlow
13 albeit from the certain part
14 of the local community
15 only."[as read]

16 And in a part of paragraph 179,
17 the report says:

18 "He..."

19 Justice Matlow.

20 "...acknowledged that he made
21 errors and engaged in various
22 forms of inappropriate
23 conduct. He apologized
24 without reservation for
25 errors of judgment and

1 inappropriate conduct."[as
2 read]

3 Justice Matlow also concluded --
4 the inquiry concluded and said this:

5 "The Inquiry Committee
6 expressed concern that I
7 would repeat the conduct that
8 led them to recommend that I
9 be removed from the bench.
10 In response to that concern I
11 promise you today in the most
12 binding way that I can
13 conceive that if I am
14 permitted to remain in office
15 as a judge I will never
16 repeat conduct similar in any
17 way to the conduct that might
18 be found offensive by you. I
19 will, without exception,
20 conform to your views."[as
21 read]

22 At 180 he said:

23 "We are satisfied that in
24 making these comments, and
25 offering the acknowledgement

1 of errors of judgment that he
2 did that Justice Matlow was
3 -- and is -- sincere about
4 his expressions of regret and
5 we are also satisfied that
6 those expressions of regret
7 before us extended beyond
8 those acknowledged to the
9 Inquiry Committee."[as read]

10 In this case we say that the
11 expressions of regret are consistent both between
12 the Inquiry Committee and here, and he has simply
13 reaffirmed it in case there was any
14 misunderstanding.

15 At paragraph 182 of the Matlow
16 report, it was said:

17 "In doing so, it is important
18 to place Justice Matlow's
19 conduct in the context of his
20 judicial career. Justice
21 Matlow has served on the
22 bench for 27 years. During
23 that time, apart from this
24 case, there is no evidence
25 before us of any improper or

1 inappropriate behavior on his
2 part on or off the bench."[as
3 read]

4 We say that that is the case, as
5 well, before you. We submit that the reasoning of
6 this CJC in the Matlow report is equally applicable
7 to the matter before you.

8 I would like to conclude in the
9 following way. We submit that the Canadian
10 Judicial Council should not recommend to the
11 Minister of Justice that Justice Cosgrove be
12 removed from the bench by virtue of having become
13 incapacitated or disabled from the due execution of
14 his office.

15 We do not dispute the Inquiry
16 Committee findings of judicial misconduct, however,
17 we submit that when this Council is undertaking the
18 second stage of its analysis, it must consider all
19 of the relevant facts and circumstances including:

20 First, the character letters filed
21 on behalf of Justice Cosgrove, you have already
22 said a failure to do so an error in principle;

23 Secondly, the opinion expressed by
24 independent counsel, again, a failure to explain
25 why the opinion of independent counsel acting in

1 the public interest was rejected is, in our view,
2 an error in principle;

3 Thirdly, the evidence that Justice
4 Cosgrove sat for more than four-and-a-half years
5 after the events in question without complaint.

6 And then, I might add, he -- I am
7 sure you have figured this out by the math -- he
8 sat for another four months after the decision was
9 released by the Court of Appeal and before the
10 Attorney General for Ontario wrote his letter of
11 complaint.

12 Now someone might say, 'oh, well,
13 perhaps they were waiting for the appeal process to
14 end'. Well, the appeal process ended in December
15 of 2003. The letter wasn't filed until April of
16 2004.

17 Then one might say 'well, perhaps
18 they were waiting the 60 days for leave to appeal
19 to run its course'. What I say to you is, if you
20 look at the Bienvenue decision, which is in our
21 material at Volume 2, Tab 11. The conduct of
22 Justice Bienvenue that was found to be offensive
23 occurred on December the 7th, 1995. You will see a
24 transcript of what he said that was offensive. The
25 letter of complaint of the Attorney General for

1 Quebec was dated December the 11th, 1995. Less
2 than a week after the concern and -- a week after
3 the inappropriate conduct and the concern of the
4 Attorney General. It is an unusual case because in
5 addition to the letter from the AG from Quebec, the
6 Minister of Justice, Allan Rock, also wrote a
7 letter of complaint. That's in the material and
8 that, I think, was also within a two-week time
9 frame of the misconduct.

10 So if, in fact, there was a
11 concern by the Attorney General about whether or
12 not public confidence could be maintained with
13 respect to Justice Cosgrove sitting, in my
14 respectful view, there was no reason for him not to
15 have written that letter sooner. These two
16 processes could have gone on in parallel, and I
17 simply put that forward to you as yet another
18 factor which demonstrates clearly that Justice
19 Cosgrove can and does have the confidence of the
20 public to continue to sit as a judge.

21 The fourth item I ask you to take
22 into account is his statement to the Inquiry
23 Committee and his remarks here today, which
24 demonstrated the utmost regret for his conduct and
25 his determination to exhibit and promote the high

1 standards of judicial conduct so as to reinforce
2 public confidence in the judiciary as a whole, in
3 himself and the administration of justice.

4 We submit that when this Council
5 has considered all of these facts and circumstances
6 and put them into what was described as the
7 "sanction scales" in the Matlow report, it will be
8 satisfied that public confidence in Justice
9 Cosgrove has not been sufficiently undermined so as
10 to render him incapable of executing the judicial
11 office, and we submit that there should be no
12 recommendation for removal and that, as independent
13 counsel had suggested, a strong admonition would be
14 most appropriate.

15 If I could just have one moment.

16 Those are our submissions, I think
17 I came in well under my hour-and-a-half.

18 CHIEF JUSTICE SCOTT: You did
19 indeed, Mr. Paliare.

20 MR. PALIARE: Thank you, Chief
21 Justice Scott.

22 CHIEF JUSTICE SCOTT: We will take
23 a very short break at this point in time.

24 --- Upon recess at 10:45 a.m.

25 --- Upon resuming at 10:55 a.m.

1 CHIEF JUSTICE SCOTT: Mr.
2 Cherniak, are you ready?

3 MR. CHERNIAK: I am in, indeed,
4 Chief Justice.

5 --- Comments from unidentified person in the
6 audience

7 CHIEF JUSTICE SCOTT: I think we
8 can now proceed.

9 SUBMISSIONS BY MR. CHERNIAK:

10 Chief Justice, may I start by
11 introducing my partner, Cynthia Kuehl, who has been
12 involved with me in my work as independent council
13 since my appointment as independent council in
14 2004. She has been an invaluable part of the work
15 of independent counsel.

16 I would like to start in this way:
17 The removal of a Superior Court Judge from office
18 is a matter of, in my view at least, the highest
19 constitutional and public importance and
20 significance requiring, as it does, a joint address
21 of both houses of parliament, something that has
22 never happened in our history.

23 And before it even gets to the
24 houses of parliament, it requires the view of this
25 body, the Canadian Judicial Council and the

1 Minister of Justice.

2 While the constitutional
3 responsibility for recommending removal is
4 ultimately in the Minister of Justice of Canada
5 pursuant to section 69(3) of the Judges Act, in
6 practice the recommendation of this body, the
7 Canadian Judicial Council, is crucial.

8 Given the quality of the superior
9 court judiciary in Canada and the constitutional
10 imperative of the independence of the judiciary,
11 it's not surprising that there have been so few
12 instances. Since the current process under the
13 Judges Act came into being in 1971, where such a
14 recommendation was made, nor is it surprising that
15 even in those few cases there has never been a case
16 where it was necessary for a minister of parliament
17 to act since no judge subject to such a
18 recommendation has ever required that the matter go
19 that far.

20 The necessary corollary of
21 judicial independence is judicial accountability.
22 It is with the recognition of the essential
23 importance of the judicial independence and the
24 gravity concerning what was at stake that
25 independent counsel approached the task mandated to

1 me -- and to her in the general case, but to me in
2 the case -- by the statutory framework in the
3 Judges Act and the by-laws of the Canadian Judicial
4 Council.

5 I think it is important that for
6 the purpose of these submissions that the Canadian
7 Judicial Council understand my view of the role of
8 independent counsel, which I have been privileged
9 to hold for almost now five years.

10 The position of independent
11 counsel, under the scheme of the Judges Act and the
12 by-laws, is truly sui generis, he or she has no
13 client. I must say it has been quite a unique
14 experience in my many years of practice not to have
15 a client to report to. It is quite unique.

16 The duty is to act in the public
17 interest, to investigate complaints that are
18 assigned to him or her, determine if there is a
19 case that could support a finding of judicial
20 misconduct and/or a recommendation for removal, and
21 if the independent counsel concludes that there is
22 a case, to present fairly and impartially to the
23 Inquiry Committee in the first instance and then to
24 this body following the recommendation of the
25 Inquiry Committee, irrespective of what the

1 important in this case as you will see my argument
2 to develop. Independent counsel's role is to
3 investigate the complaint made that led to the
4 inquiry. In this case by the Attorney General of
5 Ontario with respect to the conduct of Justice
6 Cosgrove in the Elliott trial.

7 It is that case, based on that
8 complaint, that was put before the Inquiry
9 Committee in the case that I presented.

10 The inquiry, as I say, is to be as
11 to the complaint made and it is not a wide-ranging
12 royal commission into the life and conduct of a
13 judge against whom the complaint is made.

14 Now I am going to enlarge on this
15 to some extent when I come to the usefulness and
16 relevance of the letters of support for Justice
17 Cosgrove because I take a very different view of
18 the relevance and importance of those letters than
19 does counsel for Justice Cosgrove.

20 The role of independent counsel in
21 the inquiry process that I have outlined flows from
22 what I understand to be the overriding importance
23 of the judicial accountability, the corollary of
24 the principle of judicial independence. That it is
25 for the judiciary itself, in the person of the

1 Canadian Judicial Council, to make the
2 determination as to whether or not a judge's
3 conduct amounts to judicial misconduct and whether
4 that misconduct results -- should result in a
5 recommendation for removal.

6 In my view, and I expressed this
7 to the Inquiry Committee as well, it's for the
8 judiciary alone and not for the bar, not for
9 independent counsel, not for the state or, indeed,
10 for the public to do so. That is the way, in my
11 view at least, that the corollary of judicial
12 accountability works and should work and
13 constitutionally in Canada is meant to work, in
14 this country, is meant to work with respect to the
15 process.

16 It's for this reason that I have
17 been careful throughout this entire process to
18 characterize my advice to the Inquiry Committee as
19 my opinion as to whether the conduct of Justice
20 Cosgrove, as revealed by my investigation and the
21 evidence, was capable of amounting to judicial
22 misconduct within the meaning of the Judges Act and
23 whether it was capable of supporting a
24 recommendation for removal, but leaving it entirely
25 to the Inquiry Committee and now to the Canadian

1 Judicial Council to determine whether the conduct
2 does or does not rise to that level on both
3 branches of the test.

4 So unlike most of what counsel
5 like me do, I have no case to prove. I simply have
6 my role, the case to put forward and my role as I
7 understand it.

8 Now just so there be no doubt
9 about it, the view that I have expressed about the
10 role of independent counsel in the inquiry process
11 is in contrary distinction to the role that I took
12 on the constitutional challenge where I conceived
13 it as my duty to come to my own independent view as
14 to whether the constitutional challenge had merit
15 and, having concluded that it did not, to put
16 forward and defend that opinion before the Inquiry
17 Committee and the Courts.

18 So that brings me to the
19 circumstances of this case. Once Ms. Kuehl and I
20 reviewed the transcripts -- 20,000 pages -- and
21 drafted the particulars, I had no doubt that my
22 opinion would be that there was a case to present
23 that would support a finding of judicial misconduct
24 and a recommendation for removal, and the later
25 interviews with the various people that we

1 interviewed, some of whom were called to give
2 evidence that confirmed that view.

3 The evidence, the 20,000 pages was
4 voluminous, and Ms. Kuehl and I prepared a
5 four-volume, four-large-volume set, double sided,
6 of excerpts from the transcript divided under the
7 various headings and the extensive particulars that
8 we delivered to Justice Cosgrove. The salient
9 parts of those four volumes were read to the
10 Inquiry Committee during the first six days of the
11 hearing. So the Inquiry Committee heard that
12 evidence, you may read it, starting about 9:30 in
13 the morning and going to about 4:00 in the
14 afternoon.

15 That is what occurred prior to the
16 apology -- statement from Justice Cosgrove.

17 Ms. Kuehl and did our best when
18 preparing that -- those books and the notice to
19 sift out the reversible legal and factual
20 discretionary errors that were dealt with by the
21 Court of Appeal. So that the particulars that we
22 delivered to Justice Cosgrove and put before the
23 Inquiry Committee dealt only with conduct that
24 could amount, in our view, to judicial misconduct
25 using a test similar to that recently put forward

1 by the Canadian Judicial Council in the Matlow
2 report at paragraph 131. In other words, where
3 discretionary rulings rose to the level of the kind
4 of judicial misconduct actually found here and
5 notwithstanding that they might also be reversible
6 errors they could also amount to judicial
7 misconduct.

8 None of this evidence was disputed
9 at the hearing and the finding of judicial
10 misconduct capable -- sorry, the finding of
11 judicial misconduct made by the Inquiry Committee
12 is not disputed. While not every particular
13 forward was found to rise to that level, the
14 Inquiry Committee did find several, indeed most, of
15 the particulars of misconduct as evidencing either
16 a lack of restraint, an abuse of judicial
17 independence or an abuse of judicial powers.

18 Those findings, in my submission
19 and, as I say, is not disputed are amply justified
20 by a reading of the evidence that was before the
21 Inquiry Committee from the Elliott transcript and
22 by the evidence of the witnesses. When one reads
23 the report of the Inquiry Committee and some of the
24 underlying evidence, some of the conduct was
25 really, truly, quite remarkable.

1 So it was and it remains my
2 opinion that the evidence presented to the Inquiry
3 Committee was capable not only of supporting a
4 finding of judicial misconduct but, as well, a
5 recommendation for removal.

6 If that had been the only evidence
7 before the Inquiry Committee, my view was that a
8 recommendation for removal was open on the evidence
9 to the Inquiry Committee.

10 But the issue for the Inquiry
11 Committee, and now for the Canadian Judicial
12 Council, is whether the statement, the apology and
13 the letters of support were capable of ameliorating
14 the effect of the case presented up to that point
15 such that the recommendation should be for a strong
16 admonition -- which is the word I use but the
17 Canadian Judicial Council might have a different
18 word for it -- rather than removal. And, if they
19 are so capable, should they be given that effect.

20 My opinion to the Inquiry
21 Committee that the evidence read with the statement
22 was no longer capable of supporting a
23 recommendation for the removal, was based on a
24 number of factors. The first was my view of the
25 completeness and the sincerity of the apology

1 contained within the recognition of the misconduct
2 and the statement -- and the apologies contained
3 within.

4 Secondly, my review of the
5 jurisprudence, some of which my friend has
6 reviewed, and the previous cases brought before the
7 Canadian Judicial Council given the importance
8 attached to a sincere apology. I must say that my
9 opinion wasn't based on the facts of those cases,
10 but in the Flynn case, for instance, the facts were
11 very different, vastly different than the facts
12 here. But, rather, on the proposition that the
13 presence or absence of a sincere apology was a
14 highly relevant factor.

15 Thirdly, on the fact that it is
16 significant that as bad as the misconduct put
17 forward in this case was, it did not involve moral
18 turpitude.

19 Fourthly, my view was that the
20 lateness of the apology did not detract from its
21 sincerity and given the lateness could be, in part,
22 explained by the right of Justice Cosgrove to
23 exercise the legal avenues open to him. I will
24 come back to that in a moment based on submissions
25 that my friend made.

1 Lastly, that the jurisprudence of
2 the Canadian Judicial Council has recently
3 confirmed in the Matlow decision that an important
4 consideration at the sanction stage as to whether
5 the test for removal is made is, in part, certainly
6 not in whole, but, in part, prospective. The issue
7 of what can be expected to be the judge's conduct
8 in the future based on the facts and the statements
9 made.

10 I want to deal with my friend's
11 comparison of this case to certain other cases on
12 the basis that the suggestion is that Justice
13 Cosgrove made his statement at the earliest time.

14 My submission that is not the case
15 here. The statement was made after six full days
16 of evidence, after the bulk of the evidence. There
17 would have been one more day of certain evidence
18 being read to the panel. So it was made after six
19 days of hearing.

20 The letter, the complaint of the
21 Attorney General of Ontario. Was delivered in
22 April 2003, the decision of the Court of Appeal in
23 the Elliott case was in December -- I am sorry
24 April 2004. The decision of the Elliott case was
25 in December 2003. The 60 days within which Ms.

1 Elliott had to appeal would have expired sometime
2 in February, I guess, 2004 and the Attorney
3 General's letter was delivered in April.

4 In the period 1997 to 2003, the
5 appeal was pending before the Ontario Court of
6 Appeal. It was quite a remarkable appeal, in my
7 experience. The evidence amounted to 20,000 pages,
8 the appellant's factum, the Crown's factum in that
9 case amounted to, 1,600 pages. I am sure all of
10 you who sit on courts of appeal have rarely, if
11 ever, had to deal with a case with 1,600 pages of
12 factum on one side and the factum on the other side
13 was about as long.

14 That case did take a remarkable
15 time to wind its way through the Courts.

16 It is not surprising that while
17 that matter was under appeal, no attempt was made
18 by the Attorney General to require Justice Cosgrove
19 to recuse himself. Whatever reason, this panel can
20 draw its own conclusions, that did not happen.

21 But Justice Cosgrove could have
22 made his statement and apology at any time. He
23 certainly could have made it once he had the notice
24 of particulars that was delivered in March -- I am
25 sorry near the end of February 2008.

1 Justice Cosgrove did not do that,
2 rather, Justice Cosgrove took the position right up
3 to and through the hearing -- and you have the
4 proceedings outlined in the reasons of the Inquiry
5 Committee. Justice Cosgrove took the position that
6 the particulars did not raise a case that Justice
7 Cosgrove had to meet on either judicial misconduct
8 or the test for removal.

9 That was ultimately -- that
10 position was never ultimately put forward but that
11 was the position right up until the start of the
12 hearing.

13 As I say, it was not until six
14 days of evidence had been put before the committee,
15 the Inquiry Committee, that the statement and
16 apology was made. So it certainly cannot be said
17 that the statement was given at an early stage or
18 as early a stage as it could have been given. But
19 I have given you my reasons why it did affect the
20 view that I put before the Inquiry Committee.

21 Now, I gave virtually no weight in
22 the opinion I express, the position I took to the
23 Inquiry Committee to the letters, and I came the
24 conclusion I did without the benefit of the letters
25 but they were not inconsistent with my view. They

1 say what they say. You know, I am going to return
2 to the issue of the letters shortly because I have
3 somewhat modified my views in this case at least as
4 to how the letters of support should be treated
5 based on certain views I have with respect to what
6 the Canadian Judicial Council in the Matlow inquiry
7 said.

8 The majority of the Inquiry
9 Committee did not agree with the view that I
10 expressed to them of the apology, as was their
11 right and, indeed, their duty. It was their view
12 that counted at that stage, and it was their view
13 -- and for the reasons that I outlined earlier,
14 because of my view of where the responsibility for
15 determining judicial accountability and how it
16 should be applied in a particular case in respect
17 of a judge lies.

18 The differing views of the Inquiry
19 Committee on the apology and its effect on the
20 recommendation to be made is amply set out in the
21 two sets of reasons by the majority and by Chief
22 Justice Wachowich in the minority, and I won't
23 expand on it because I don't think I can do any
24 better than is set out in those two sets of
25 reasons.

1 Both of those views, in my view,
2 -- both of those conclusions, in my view, were open
3 on the evidence depending on the view that members
4 of Council took in this case of the force and
5 effect and timing of the apology.

6 My opinion, the recommendation I
7 would make remains the same for the reasons I
8 outlined earlier with a slight qualification that I
9 will come to in a moment. But I reiterate that
10 because of the nature of the issue and the
11 constitution imperative of judicial independence
12 and where the responsibility for dealing with it
13 lies, that the decision is one that is uniquely for
14 the judiciary itself and not for me or anybody
15 else.

16 My view, such as it is, is only
17 one factor that should go into the mix to be
18 weighed along with all the others that this body
19 sees fit.

20 In particular, I do not see any
21 error in principle in any of the views expressed by
22 the members of the Inquiry Committee. They simply
23 had different views of the effect and sincerity and
24 completeness and timing of the statement and
25 apology.

1 But I do want to make a submission
2 on the weight that should be given to the letters
3 of support.

4 On further reflection, I am of the
5 view that in the circumstances of this case at
6 least, they should be given no or little weight.
7 As respectfully as I can, I must disagree, at least
8 for the purposes of this case, with the majority
9 reasons of the Canadian Judicial Council in Matlow
10 expressed at paragraphs 147 to 149 of the Matlow
11 decision. In particular, where the majority
12 reasons state as follows paragraph 149:

13 "The reasons of the Inquiry
14 Committee indicate that it
15 viewed this evidence as
16 partisan and, in any event,
17 as a representative of a
18 small segment of the public
19 only. We do not disagree with
20 this assessment. But we also
21 find the evidence to be
22 relevant..."[as read]

23 And this is the next passage that
24 I respectfully take some issue with, at least in
25 this case.

1 "...posited in the opposite
2 question, what if there were
3 a deluge of letters from the
4 local community, including
5 Justice Matlow's peers and
6 lawyers, to the effect that
7 he was unfit to hold office?
8 Would that be relevant as a
9 part of our deliberations?
10 We think it may be properly
11 be so. So too, are the
12 support letters which have
13 been accepted as
14 evidence."[as read]

15 My view that is not an error, was
16 not an error in the Inquiry Committee. I believe
17 they were unanimous on this point to disregard. My
18 reasoning for that statement and my disagreement,
19 respectfully, with the Canadian Judicial Council in
20 the paragraph that I read is this:

21 The case that I investigated and
22 the case that I presented was based on the
23 complaint of the Attorney General of Ontario
24 concerning the conduct in the Elliott trial. That
25 was the complaint and that was my -- I was

1 appointed independent counsel to investigate that
2 complaint and I did. My mandate went no further.

3 I did not put forward -- I am
4 sorry, I did put forward findings of the Court of
5 Appeal in the two earlier cases, but fairly
6 contemporaneous, concerning Justice Cosgrove's bias
7 against the Crown, highly relevant to the issues in
8 the Cosgrove case. They were a matter of public
9 record, reported cases in the same time frame. The
10 Inquiry Committee chose, as was their right, to
11 ignore them and I do not quarrel with that decision
12 or the reasons for it.

13 My present reasons for giving
14 little weight to the letters of support was to the
15 lack of relevance to the Elliott case. Though the
16 letter writers had been given the particulars, none
17 of them had any knowledge of what transpired during
18 the almost two years of the Elliott trial, nor had
19 they, nor should they, nor had they purported to
20 comment on it without it having any relevance.

21 But I do not think it is right to
22 say, as did this council in Matlow, that in
23 addition to letters such as put forward here on
24 behalf of Justice Cosgrove that there could have
25 been letters put forward that went the other way

1 that complained about or expurgated Justice
2 Cosgrove in other cases or other matters or dealt
3 with his fitness to hold office.

4 I could not, as I saw my role, as
5 I see my role, in conscience or fairness have put
6 forward such letters. To do so, I would have had
7 to investigate the circumstances of what were the
8 basis for those letters to see if they had merit
9 and give Justice Cosgrove an opportunity to meet
10 them if I intended to put them forward.

11 Considerations of similar fact evidence might have
12 arisen. They might or might not have resulted in
13 complaints to the Canadian Judicial Council and
14 might or might not have been dealt with in one way
15 or another by the Canadian Judicial Council.

16 If they had been and rejected,
17 they certainly couldn't have been used. If they
18 had been found valid by the Canadian Judicial
19 Council different considerations might apply or
20 they might have been pending complaints.

21 My job, had I had that view, and
22 the inquiry would have been very different and
23 would have been much more akin to a royal
24 commission into Justice Cosgrove's career.

25 In my view, in my respectful view,

1 I had no mandate under the legislation or under the
2 Judges Act or the by-laws to do any such thing.

3 With great respect, my view is
4 that the Canadian Judicial Council doesn't have
5 that power either. It's mandate is to deal with
6 the complaints against judges and deal with those
7 complaints and not inquire, generally, into the
8 fitness of a judge to hold office.

9 In my view, to consider otherwise
10 and to permit that kind of evidence to be put
11 forward would be to invite judicial review of an
12 inquiry that took such a course unless full answer
13 and defence was permitted.

14 So my view, for what it's worth,
15 is that the letters in this case should be given no
16 or little weight on either of the issues before the
17 Inquiry Committee or by the Canadian Judicial
18 Council.

19 So there it is. The writers --
20 eminent as they are, jurists, lawyers and citizens
21 -- have no knowledge of what the evidence showed
22 about the conduct of Justice Cosgrove in the
23 Elliott trial.

24 The Canadian Judicial Council
25 recommendation to the Minister, in my view, should

1 be based upon its view of the misconduct proved and
2 conceded by Mr. Justice Cosgrove and the Canadian
3 Judicial Council's view of the effect of the
4 statement and apology on what would otherwise be
5 its recommendation.

6 I don't think I can be of further
7 help to this Council, but I am quite prepared to
8 give the Council whatever assistance it requires.

9 CHIEF JUSTICE SCOTT: Thank you
10 very much, Mr. Cherniak.

11 Mr. Paliare, do you have a
12 response?

13 MR. PALIARE: I do. It will be
14 very brief, I might add.

15 REPLY SUBMISSIONS BY MR. PALIARE:

16 I have two things I wanted to say.
17 One was, I never said that Justice Cosgrove gave
18 his apology at the earliest possible moment. So I
19 am not sure where that came from but it was
20 mentioned by Mr. Cherniak.

21 You need to remember that in the
22 process that was initiated in this case, it was a
23 complaint by the Attorney General and, therefore,
24 you get a hearing under section 63(1). It's unlike
25 the normal complaint process.

1 You will see in the Justice Matlow
2 matter, and I am not sure whether it was in the
3 decision of the inquiry or whether it was the
4 decision of the CJC, Justice Matlow did have
5 opportunities in the complaint process to
6 acknowledge his wrongdoing and make an apology and
7 he steadfastly had refused to do so.

8 In this process where the
9 complaint is triggered by the attorney general,
10 there is no -- there are no steps that one normally
11 goes through in, it was all part of our argument in
12 the constitutional challenge to do that.

13 Now, the first time we received
14 the particulars would have been in early March of
15 2008. It was our view that when one looks at the
16 decision in Boilard, that if discretionary
17 decisions are made in the context of a trial that
18 those are not matters that can be subject to
19 discipline. Rightly or wrongly, that was our view.
20 And that we intended to bring a motion that all of
21 these decisions that were made by Justice Cosgrove
22 were made in the context of judicial decision
23 making.

24 And the one thing we know is he
25 made those decisions in good faith, were they

1 wrong? Yes. Were they seriously wrong?
2 Absolutely. Were there many errors? For sure. But
3 that's what Boilard is about. And so, it was our
4 view that we wanted to bring that motion, and we
5 wanted to have that motion heard before there was
6 any evidence called because, on the notice itself,
7 when one looked at it, there was no case that could
8 be made out based on the decision in Boilard.

9 I won't get into the details of
10 what happened, but that motion never arose at the
11 beginning of the case because the Committee was of
12 the view that it would hear the evidence and Mr.
13 Cherniak and I agreed that we would deal with that
14 motion at the end of the evidence of the
15 independent counsel.

16 It was in the course of listening
17 to the evidence introduced by independent counsel
18 that Justice Cosgrove came to the realization,
19 having heard the evidence played back in the way it
20 was by Mr. Cherniak. I don't mean that in any
21 negative way, I mean it just struck him that it was
22 the right thing to do; and we did it on the sixth
23 or seventh day.

24 So that's how the timing arose
25 with respect to the apology. But it wasn't as

1 though there was some place for him to apologize or
2 recognize the wrongdoing when the complaint came in
3 from the Attorney General. If I am wrong about
4 that I would love to hear as to where that is found
5 in the rules or the statute that would permit it.

6 But, in any event, we challenged
7 the constitutionality of that provision
8 unsuccessfully. So that's Item 1.

9 But Item 2 is the letters of
10 support. I strongly disagree with my friend's
11 position on that. He says you ought to give those
12 letters no weight and, in particular, he says two
13 things: One, he disagrees with the findings of,
14 the conclusions of the CJC in the Matlow report,
15 and he says, secondarily, that what he was retained
16 to do was to investigate one complaint, that is
17 Regina v. Elliott, it was not a royal commission
18 and therefore his focus was really on the
19 investigation regarding Regina v. Elliott.

20 Well, in my respectful view, it is
21 erroneous from his perspective to not look at what
22 this body has said consistently, consistently with
23 respect to sanction and, that is, you have to take
24 a prospective look at whether or not public
25 confidence would be adversely effected by keeping

1 the judge in question in his judicial role.

2 Surely, one of the measures of
3 that is to get insight into that person's character
4 from people who are knowledgeable about him to
5 assist you in determining whether or not he or she
6 is someone who would be fit to remain in office and
7 have public confidence. Those kinds of character
8 letters are used in every professional discipline
9 body in which I have been involved either as
10 prosecutor or as defence.

11 You ask rhetorically 'well, where
12 else would you get this kind of information from?'

13 Mr. Cherniak says, 'well, the people who wrote
14 those letters had no knowledge about Regina v.
15 Elliott'. I say that's just not so. First of all,
16 many of them were judges and many of them were
17 lawyers. I cannot believe that there was a lawyer
18 or a judge in the Ottawa/Brockville area that
19 wasn't fully aware of what Regina v. Elliott said
20 in the Court of Appeal and how critical it had been
21 of Justice Cosgrove. It was front-page news in
22 every newspaper in Eastern Ontario.

23 So to say that they wouldn't have
24 known, understood or appreciated the significance
25 of what occurred in Regina v. Elliott is, in my

1 respectful view, just not correct.

2 So I say that I disagree with my
3 friend that you should deviate from your findings
4 in the Matlow report in which you said that
5 character letters were important, critical, from
6 looking at this from a prospective point of view
7 and that failure to consider them was an error in
8 principle.

9 As I said, I have been ably
10 assisted throughout by my two partners and, yet
11 again, they come to my rescue.

12 In Mr. Cherniak's submissions to
13 you at paragraph 30, he says to you that in
14 determining what the appropriate sanction should be
15 there are certain factors you ought to look at and
16 there are five that he sets out in paragraph 30.
17 The fourth of those is you ought to take into
18 account the judicial history and career of the
19 judge.

20 And, so, I don't mean to hoist my
21 friend on his own petard, but that's what we did
22 with respect to the character letters. We gave you
23 the inside view, the insightful view of his four
24 regional senior justices, his fellow colleagues,
25 lawyers who appeared in front of him who then

1 momentarily. This is obviously not one of those
2 cases where there is any unlikelihood we are going
3 to wander in in the next little with a decision, it
4 will take us some time.

5 It remains for me to thank both
6 counsel, Mr. Paliare and Mr. Cherniak, for your
7 help this morning. We will let you have our
8 decision as soon as we can. Thank you, again. We
9 are adjourned.

10 --- Whereupon matter adjourned at 11:40 a.m.

I HEREBY CERTIFY THAT I have, to the best
of my skills and abilities accurately recorded by
shorthand, and transcribed therefrom, the forgoing
proceeding.

Lisa Baker, CSR, RPR
