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Report of the Inquiry Committee concerning the Hon. Paul Cosgrove

Rapport du Comité d'enquête au sujet de l'hon. Paul Cosgrove

(v. originale en anglais)

Presented to the CJC
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REPORT TO THE CANADIAN JUDICIAL COUNCIL

OF THE INQUIRY COMMITTEE APPOINTED UNDER SUBSECTION 63(3) OF THE *JUDGES ACT* TO CONDUCT AN INVESTIGATION INTO THE CONDUCT OF MR. JUSTICE PAUL COSGROVE, A JUSTICE OF THE ONTARIO SUPERIOR COURT OF JUSTICE

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Presented To The CJC November 27, 2008

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OF THE INQUIRY COMMITTEE APPOINTED TO CONDUCT AN INVESTIGATION INTO THE CONDUCT OF MR. JUSTICE PAUL COSGROVE, A JUSTICE OF THE ONTARIO SUPERIOR COURT OF JUSTICE

1. This report contains our findings and conclusions to assist the Canadian Judicial Council in deciding whether to recommend that Justice Paul Cosgrove be removed from the Ontario Superior Court of Justice.

2. The procedural history of this matter is relevant to our findings and conclusions because it places in context a statement read by Justice Cosgrove on the second last day of the hearing before us, on September 10, 2008. Independent counsel and Counsel for Justice Cosgrove addressed at some length the significance of the statement, which we in turn will consider later in this report.

I.

The Procedural History

3. The trial of Julia Elliott on charges of second-degree murder and interfering with a dead body commenced before Justice Cosgrove in Brockville, Ontario on January 27, 1998. However, on February 13, 1998, after less than nine full days of evidence in front of the jury, defence counsel embarked on a *voir-dire* relating to an unproduced will-say statement from a police witness. The trial proper never resumed.

4. Between February 13, 1998 and September 7, 1999, defence counsel brought three mid-trial applications for a stay of proceedings and numerous sub-applications in pursuit of an evolving theory that, at the behest of OPP case-manager Detective Inspector Lyle MacCharles, and with the tacit approval of Crown Counsel, police investigators engaged in a conspiracy to concoct evidence and develop a case that could result only in Ms. Elliott's being convicted.

5. On September 7, 1999, Justice Cosgrove stayed Ms. Elliott's trial as an abuse of process, and ordered that the Crown pay her legal costs from the outset of the proceedings. In particular, he found that police officers, Crown counsel and senior officials of the Ministry of the Attorney General had committed more than 150 violations of Ms. Elliott's rights under the *Canadian Charter of Rights and Freedoms* ("*Charter*"), thereby compromising her right to a fair trial. In addition, he concluded

that misconduct of the Crown and the police delayed Ms. Elliott's trial and therefore violated her s.11(b) *Charter* right to a trial within a reasonable time. **Justice Cosgrove's Ruling on September 7, 1999 (without its appendices) is Appendix A to this report.**

6. The Court of Appeal for Ontario, on December 4, 2003, allowed an appeal by the Crown from Justice Cosgrove's Ruling and set aside his order staying the charges and his order for costs. The Court of Appeal also ordered a new trial. **The Court of Appeal's reasons are Appendix B to this report.** (They are also reported at 181 CCC (3d) 118.)

7. Ontario's Attorney General complained about Justice Cosgrove's conduct in the *Elliott* trial. On April 22, 2004, he wrote to the Chief Justice of Canada in her capacity as Chair of the Canadian Judicial Council, asking the Council to commence an inquiry into Justice Cosgrove's conduct. He did this pursuant to s. 63(1) of the *Judges Act*, which provides:

> The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

(The Attorney General's letter is Appendix C to this report.)

8. After receiving the Attorney General's letter, the Canadian Judicial Council appointed us to serve as the Inquiry Committee pursuant to s. 63(3) of the *Act*.

9. Justice Cosgrove brought an application before us which was argued in December, 2004. He argued that s.63(1) of the *Act* is unconstitutional as infringing the independence of the judiciary because it confers powers on the federal Minister of Justice and provincial attorneys general greater than those granted to other people for advancing complaints about federally-appointed judges.

10. We disagreed with Justice Cosgrove and on December 16, 2004, we held s.63(1) to be constitutional.

11. Justice Cosgrove applied to the Federal Court for judicial review, and on October 26, 2005, that Court found s.63(1) to be unconstitutional.

12. The federal Minister of Justice appealed that decision, and on March 12, 2007, the Federal Court of Appeal reversed the Trial Division, and found s.63(1) to be constitutional.

13. Justice Cosgrove sought leave to appeal to the Supreme Court of Canada, but leave was denied.

14. In March, 2008, we set September 2, 2008 as the commencement date for the inquiry. (Mr. Cherniak, as independent counsel, had already provided Justice Cosgrove with the particulars of the matters we would be asked to consider. He had done so by Notice to Justice Cosgrove dated February 29, 2008. **That Notice is Appendix D to this report.**)

15. Justice Cosgrove then brought a further interlocutory motion before us. On May 9, 2008, he argued that we should hear an argument, *before the commencement of the inquiry*, that Mr. Cherniak's particulars disclosed no case against him which could result in his removal from office, and the Canadian Judicial Council was accordingly without jurisdiction. Borrowing from the Canadian Judicial Council's reasoning in its 2003 report to the Minister of Justice concerning Mr. Justice Boilard, Justice Cosgrove said he intended to argue that the particulars disclosed no instance of bad faith or abuse of office, and were confined instead to challenging his discretionary judicial decisions, thus not engaging s.65(2) of the *Act* (which authorizes the Council to recommend removal).

16. We disagreed that this argument should be heard before the start of the inquiry, and we advised Justice Cosgrove and Mr. Cherniak of our conclusion the same day, May 9, 2008. We said we would instead hear that argument at the time of the hearing in September.

17. Counsel for Justice Cosgrove then asked the Committee to give reasons for its decision. We declined the request.

18. Justice Cosgrove applied for judicial review of the decision not to hear his jurisdictional argument in advance of the hearing on the merits. The Federal Court of Canada dismissed that application, with reasons pronounced August 11, 2008.

19. So the inquiry began as scheduled, on September 2, 2008.

20. Mr. Cherniak, assisted by Ms. Cynthia Kuehl, distilled his presentation in a manner which we found to be most helpful. The trial transcript from *Regina v. Elliott* occupied over 20,000 pages. Mr. Cherniak presented us with four volumes of transcript supplemented by testimony from four witnesses. The four volumes marshalled the transcript in accordance with the particulars Mr. Cherniak had provided previously. Thus, for example, volume one contained particulars 1, 2(a) and 2(b), and the transcript pages were selected for each particular and presented, respectively, with that particular.

21. The inquiry, in its first 6 days, was occupied primarily with Mr. Cherniak leading us through the particulars and the underlying pages of transcript in support. There was, and there could be, no dispute about the relevant events. The transcript captured them. (The next part of this report, beginning at paragraph 28 below, will examine the particulars and set out our related findings.)

22. On the 7th day of the inquiry, Justice Cosgrove addressed us. He read his statement, referred to above in paragraph 2. **The statement is Appendix E to this report.**

23. Later the same day, September 10, 2008, Mr. Cherniak advised us (Transcript p.1708) that Justice Cosgrove's statement caused Mr. Cherniak to change his position, so that in his view the case against Justice Cosgrove was no longer capable of meeting the test for removal. In other words, given the statement, he withdrew from his position that the facts as a whole were capable of supporting Justice Cosgrove's removal from office.

24. However, in response to a question from us, Mr. Paliare, Justice Cosgrove's counsel, then told us that Justice Cosgrove's statement did not amount to an admission of judicial misconduct (Transcript pp.1771-1773), and Mr. Cherniak, on the following day, said to us that if Justice Cosgrove did not admit judicial misconduct, Mr. Cherniak was back to his original position, that the facts of the case were capable of supporting Justice Cosgrove's removal (Transcript pp.1866, 1871, 1877 and 1880).

25. Faced with that position, Mr. Paliare, for Justice Cosgrove, replied that Justice Cosgrove's statement *does* amount to an admission of judicial misconduct (Transcript pp.1882, 1884-1885), but that the misconduct should not lead to a recommendation for his client's removal.

26. Counsel for Justice Cosgrove never did present, or proceed with, his application for a ruling that the Canadian Judicial Council was without jurisdiction as he had contended all along.

27. It will be necessary to address below both the timing and the nature of Justice Cosgrove's statement. If we conclude that his now-admitted misconduct should otherwise lead to his removal, we will need to consider whether the statement causes us to change that conclusion.

II.

Findings of Fact Arising From the Particulars Alleged

28. We said earlier that Mr. Cherniak provided particulars in his Notice (Appendix D) and provided Justice Cosgrove and us with selected transcript pages from the *Elliott* trial in support of each particular. (He also provided the full transcript of the *Elliott* trial.) Justice Cosgrove in virtually every instance accepted that Mr. Cherniak had properly selected all the relevant transcript pages for each particular. Occasionally, he supplemented the pages with a few further pages.

29. We will quote the particulars here, adopting the numbering employed by Mr. Cherniak in his Notice (Appendix D), and set out our findings under each particular. We have made these findings having in mind section 65(2), paragraphs (b) and (c), of the *Judges Act*, the two paragraphs upon which Mr. Cherniak has relied. Section 65(2) reads as follows:

> Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> (a) age or infirmity
>
> (b) <u>having been guilty of misconduct,</u>
>
> (c) <u>having failed in the due execution of that office</u>, or
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> The Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office. (emphasis added)

30. In making our findings below, we have kept in mind what the *Elliott* trial was intended to address. It was to be a murder trial. The essence of the Crown's case was described by the Court of Appeal at paragraphs 6-32 of its reasons, attached here as Appendix B. We will not repeat those paragraphs, but we emphasize them because Justice Cosgrove's handling of the trial soon left the Crown's case entirely out of the picture. The focus, if it can be called that, was almost always elsewhere, where in our view it should not have been.

Particular 1:

By the conclusion of the multiple voir dire proceedings and motions commenced by defence counsel, Justice Cosgrove found that Crown counsel, police and others had committed in excess of 150 breaches of the Charter of Rights and Freedoms (the "Charter"). Most of these breaches were not sustained on appeal, but rather were found by the Court of Appeal to be ... "ill-founded", "unwarranted" and "completely without foundation". The Court of Appeal concluded that Justice Cosgrove's use of the Charter to remedy baseless and frivolous claims brought the administration of justice into disrepute. The number of unsustainable findings of breaches of the Charter demonstrates either a profound lack of knowledge of the appropriate use and interpretation of the Charter, or a bias against the Crown and police, which is particularized further below.

31. The Court of Appeal addressed Justice Cosgrove's findings of *Charter* breaches at paragraphs 111-166 of its reasons, Appendix B. Paragraph 166 of the reasons concludes the analysis as follows:

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

32. In this case, in most of the more than 150 *Charter* breaches he found, Justice Cosgrove did not cite any section of the *Charter*, he did not address any argument by counsel and he referred to no evidence to support the conclusions of fact upon which he appeared to rely.

33. In almost every instance, there was no evidence to support a finding of any conduct, by Crown or police, which could be viewed as a *Charter* breach.

34. Kevin Murphy was lead counsel for the defence in the *Elliott* trial. Throughout the proceedings, Justice Cosgrove regularly relied on his statements, without more, for the facts underlying the *Charter* motions. The judge did little or nothing to control Mr. Murphy's conduct.

35. Independent counsel, Mr. Cherniak, said this about Mr. Murphy, and Justice Cosgrove's reaction to him:

> This misconduct [of Justice Cosgrove] - - and I use that term "misconduct" - - in the way the trial went was in commission with respect to the treatment of Crown attorneys, the Ministry and its lawyers and the police, the federal Crown, civilian witnesses, such as Hutton and the doctors and the Bell Canada people and the family, and the misconduct on the case that I presented was also in omission by what amounted, in my view, to virtually a complete failure to rein in the excesses of defence counsel, who put on what I think, in my experience - - and I have had a lot of experience in criminal and civil courts across this country - - can only be described as one of the most disgraceful exhibitions that has ever been seen in a Canadian courtroom. And as best I can tell, Mr. Murphy conducted himself in that way virtually every day.
>
> That conduct was virtually unchecked by Justice Cosgrove. Rather than check it, many times he simply called on Crown counsel to respond, even when the excesses were really - - were beyond outrageous. (Transcript p.1863, emphasis added)

36. Justice Cosgrove allowed Mr. Murphy to take control of the trial and the evidentiary "foundation" for most of the *Charter* rulings was confined, as we have noted, to whatever Mr. Murphy said it was in the course of his inflammatory and rambling submissions.

37. Further particulars, which we address below, amplify this first particular.

Particular 2:

Throughout the course of the trial in Regina v. Julia Elliott, Justice Cosgrove adopted a suspicious attitude towards the Crown and government agencies, including but not limited to the provincial Ministry of the Attorney General and its counsel, the police, the Federal Crown, and immigration authorities. This attitude by Justice Cosgrove has been the subject of previous comment by the Court of Appeal in relation to other unrelated matters. Such an attitude was manifest in this case in the actions by and comments of Justice Cosgrove which, when viewed in their totality, are capable of leading a reasonable observer to believe that Justice Cosgrove is not capable of acting impartially in matters involving governmental agencies. These unfounded allegations unfairly marred the reputations of Crown counsel, police and others, and the conduct, in and of itself, eroded the necessary confidence in the integrity of the administration of justice and of the bench.

38. The reference above to previous appellate comment is to passages in two decisions of the Court of Appeal for Ontario pronounced in June, 1997, *Perry v.*

Ontario (1997), 33 O.R.(3d) 705 and *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735. We have decided not to give weight to the impact of those decisions, and we have instead confined our analysis to what happened in the *Elliott* trial, which itself occupied more than 1 and ½ years. We mention here also that we are not giving weight to the letters submitted to us on behalf of Justice Cosgrove in our determination of whether his conduct in *Elliott* should lead to a recommendation for removal. One element in some of the letters was that what Justice Cosgrove did in *Elliott* was isolated conduct. The two Court of Appeal decisions, *Perry* and *Lovelace*, might have suggested otherwise. We are leaving both the letters and the two decisions to the side and, as we said, confining our analysis to what happened in *Elliott*.

Particulars 2(a) and (b):

(a) Justice Cosgrove found that numerous Crown counsel, police officers, and former Assistant Deputy Attorney General Murray Segal had deliberately deceived the court or had undertaken steps which were calculated to deliberately mislead the court and were knowingly in breach of court orders. These serious findings were made despite a lack of evidentiary foundation and, at times, despite previous findings by Justice Cosgrove to the contrary.

(b) With respect to Mr. Segal, Justice Cosgrove made these findings despite the fact that Mr. Segal was not a party, was not counsel of record, and had no opportunity to respond to the allegations before the finding was made.

39. Justice Cosgrove made rulings against Assistant Deputy Attorney General Segal at paragraphs 64-70 in his Ruling dated September 7, 1997 (Appendix A). He found Mr. Segal acquiescent and wilfully blind in permitting the court to be deliberately deceived about the knowledge and involvement of Crown counsel in a particular meeting. (The meeting referred to here had nothing to do, or should have had nothing to do, with the murder trial, but we are confining our discussion here to what Justice Cosgrove found against Mr. Segal.)

40. Justice Cosgrove also found that Mr. Segal, in seeking to quash defence subpoenas served on several Crown counsel in the course of the trial, breached unspecified *Charter* rights of Ms. Elliott because, in Justice Cosgrove's view, the submissions to quash the subpoenas were inconsistent, contradictory, unfounded and misleading.

41. The transcript, however, contains no evidence that Mr. Segal did anything wrong, or even questionable, in any aspect of the *Elliott* trial.

42. Mr. Segal was never given notice that his conduct was in issue. In the result, he was not heard from before Justice Cosgrove made these remarkable findings against him.

43. Particular 2(a), cited above, also refers to police officers. Retired Detective Inspector Bowmaster, who testified before us, was also castigated by Justice Cosgrove. The Ruling on September 7, 1999 (Appendix A) focuses on Mr. Bowmaster at paragraphs 165-172. Justice Cosgrove found that Mr. Bowmaster repeatedly gave "deliberately false or misleading evidence". There is no evidence however to support any finding that Mr. Bowmaster mislead the court. For the Ontario Provincial Police, he served as the case manager of the *Elliott* prosecution after the first case manager became ill. Justice Cosgrove ordered Crown counsel running the trial not to discuss the case with Mr. Bowmaster. Nor, by Justice Cosgrove's rulings, could the testifying officers speak with Crown counsel. No basis for these orders is found in the transcript. Counsel for Justice Cosgrove before us, rightly, did not seek to justify them. They served to sterilize the prosecution.

44. Justice Cosgrove cited Mr. Bowmaster for contempt in the *Elliott* trial. The basis for the citation was that Mr. Bowmaster had told an OPP officer when to come to court in order to give evidence. Justice Cosgrove considered that to be contemptuous of his prohibition against Crown or police discussing the *Elliott* case with one another. (Justice Chadwick later dismissed the contempt citation.)

45. Constable Nooyen also testified before Justice Cosgrove, and he found her testimony to be "untruthful and unreliable" and given with the intent to protect another officer in the OPP and to mislead the RCMP and the court (Appendix A, para.307). Constable Nooyen was cross-examined on a statement she gave to the RCMP. The RCMP were investigating alleged wrong-doing by OPP officers in an unrelated case, and one of those officers also worked on the *Elliott* case. (As we will mention later, Justice Cosgrove, in the course of the trial, determined that he would investigate the RCMP investigation, which had little or nothing to do with the *Elliott* prosecution.) When Constable Nooyen was in the course of being cross-examined on her statement to the RCMP, but was out of the courtroom, Justice Cosgrove observed: "I should tell you that the witness [i.e. Constable Nooyen] is either a bald faced liar or incompetent to be useful to the court in this area under questioning; I haven't decided which, but please go ahead". (*Elliott* Transcript, July 20, 1999)

46. What gave rise to those remarks by Justice Cosgrove? It is apparent from the transcript that Constable Nooyen was confused as to the identity of another officer she had spoken to briefly, four years earlier, and she changed her evidence to name the correct officer. However, we can see no rational basis for the unrestrained manner in which Justice Cosgrove characterized her testimony.

Particular 2(c):

Absent an evidentiary foundation to do so, Justice Cosgrove repeatedly caused successive Crown counsel to testify on the voir dires, thereby disqualifying them as Crown counsel and denying Crown the right of counsel of its choice.

47. A series of Crown counsel prosecuted the *Elliott* trial. Throughout the trial, Mr. Murphy made unsubstantiated allegations that lawyers appearing for the Crown had participated in preparatory meetings which were improper and which would provide information relevant for the defence. On review of the transcript, this position proved unfounded. There is no evidence that any Crown counsel participated in any meeting warranting his or her being called as a witness. However, Justice Cosgrove repeatedly rejected Crown submissions on the point, finding that the meetings were relevant and that the various Crown counsel were compellable witnesses. This meant that a succession of Crown counsel were precluded from continuing the prosecution and were relegated instead to being witnesses on the *voir dires* or motions. At least four Crown counsel were disqualified from acting and were compelled to testify. (Another four Crown counsel from another trial were also compelled to testify in *Elliott*.)

48. Justice Cosgrove also ordered that the disqualified Crown counsel could not discuss the case with the replacement Crown counsel. The effect of this on the prosecution was extremely detrimental. David Humphrey testified before us. He and another lawyer from outside the Crown office, Harvey Strosberg, Q.C., were retained late in 1998 to take over as Crown counsel for the balance of the abuse of process motion then underway. Mr. Humphrey testified about the difficulty of coming into *Elliott* mid-way through, sorting through 21 boxes of materials and not being able to discuss the proceedings to that point with his predecessors. As he said to us:

> And not being able to speak with the lawyers who had previously had carriage of the case, we weren't really confident that we put it all together. (Transcript p.1827)

He added:

> My great worry was that the trial Crowns who went before me may well know that there are witnesses out there who have evidence that can answer many of these allegations, but I couldn't talk to them. I couldn't ask them that very basic question. (Transcript p.1828)

Particular 2(d):

Justice Cosgrove further denied the Crown the counsel of its choice by disqualifying James Stewart from being counsel, and requiring that future Crown counsel involved in the trial must have had no prior involvement in the case. In doing so, Justice Cosgrove denied the Crown the ability to have counsel who had any knowledge of the case and appeared to suggest, without basis, that the fact of previous involvement inhibited Crown counsel from carrying out his or her duties.

49. We addressed this particular to some extent in addressing Particular 2(c).

50. James Stewart appeared for the Crown in *Elliott* in February, 1998. He was called in because Justice Cosgrove had determined that Crown Flanagan should be called as a witness and therefore could no longer prosecute. However, Justice Cosgrove then denied standing to Mr. Stewart as Crown because he had spoken with Mr. Flanagan about the case before appearing for the Crown. Mr. Murphy for the defence submitted, and Justice Cosgrove accepted, that this compromised Mr. Stewart's "independence". When Mr. Stewart began his reply for the Crown, on February 19, 1998, Justice Cosgrove interrupted him, saying, "No, counsel, you offend the Court." Mr. Stewart, no doubt taken aback, replied, "I'm sorry?". Justice Cosgrove continued: "I'm sorry, - you offend the Court with your argument. You should not, having been challenged as a person properly to make argument before the Court, extend that argument and assume that you will continue as counsel." Justice Cosgrove then called upon him to demonstrate that he was sufficiently independent. Two pages along in the transcript, Justice Cosgrove asked: "Well, how can the Court feel confident that you are not Mr. Flanagan if you are a lawyer who has worked as a colleague of Mr. Flanagan in the preparation of the material for this Court which is challenged by the Defence?" Mr. Stewart interjected that the Crown has the right to select counsel of its choice. Justice Cosgrove replied: "Well, surely it has to be somebody else who is not potentially the same person or tarred with the same allegation of the Defence?...[If] you indeed are a colleague of Mr. Flanagan and have advised him in these proceedings, then, in a sense, you are Mr. Flanagan before this Court."

51. Eventually, Justice Cosgrove disqualified Mr. Stewart from any further representation of the Crown. There was no basis for that. There had been no lawful basis established for disqualifying Mr. Flanagan as Crown in the first place. Mr. Stewart's mistake, according to Justice Cosgrove, was that he had been briefed by Mr. Flanagan before appearing, thus compromising his "independence". Mr. Stewart's disqualification was no more comprehensible or legally justifiable than was Mr. Flanagan's.

52. When Messrs Strosberg and Humphrey appeared for the Crown, in December, 1998, Justice Cosgrove questioned their independence too, and then asked them to research, "whether there is any reported precedent in the common law jurisdiction of independent, so-called independent counsel being retained midway through a homicide trial."

53. As matters progressed, Justice Cosgrove did not bar Messrs Strosberg and Humphrey from continuing to represent the Crown, and Mr. Humphrey did so, although always with the limitation that he was prevented from discussing the case with his predecessors who had appeared for the prosecution.

Particulars 2(e) and (f):

(e) Without a basis in the evidence, Justice Cosgrove expressed concern on numerous occasions that Crown counsel was "woodshedding" its witnesses or that Crown counsel were attempting to tailor their evidence, and then ordered Crown counsel not to speak to any of its witnesses, including police witnesses and Crown counsel who had been ordered to testify, thereby denying the Crown the ability to properly prepare its case.

(f) Justice Cosgrove further denied the ability of new Crown counsel to prepare its case by ordering that previous Crown counsel (disqualified by virtue of being witnesses on the voir dire) could not communicate with new Crown counsel or with police witnesses, thereby denying one party, the one representing the Attorney General of Ontario and charged with representing the public interest, the ability to prepare its case and of obtaining instructions from other more senior Crown counsel. One result was that, in final submissions on the stay motion, defence counsel at the trial argued that the Crown's inability to know its case resulted in an unfair trial for the accused. Justice Cosgrove commented that the inability of the Crown to prepare should have been to the advantage of the accused.

54. These particulars are related, and 2(e) can be viewed as a subset of 2(f). It can also be seen that these two particulars to some extent overlap with particulars 2(c) and 2(d), discussed earlier.

55. In November of 1998, the Crown in the *Elliott* trial was represented by Mitchell Hoffman. He argued that prior Crown counsel should not be required to testify. Mr. Hoffman wanted to be briefed by these counsel. In the course of a ruling, on November 23, Justice Cosgrove said this:

> In my view, and my order is, they [i.e. prior Crown] may not have any communication whatsoever with Mr. Hoffman or his successor. They should not directly or indirectly have communication with Mr. Hoffman or his successor. They may not have a copy of the court's ruling of

> Friday last. They are in the position of being witnesses on a live issue before the court and, in the context of the law to which the court made reference, I agree that potentially the whole objective of separating witnesses from counsel could be undermined by, not an in-court participation, but an out of court participation, by preparation of argument in response, for example, to this renewed application by Mr. McGarry or Mr. Cavanagh and then simply handing it to replacement counsel to argue. They are in that process combining their roles as witness and counsel and that is what the law is intended to prohibit and was the basis of the court's decision on Friday last.

56. There was no legal basis, and Mr. Murphy's assertions for the defence were the only "factual" basis, for disqualifying earlier Crown counsel from acting, for compelling them to testify, for precluding them from briefing their successors and for precluding their successors from preparing their testimony with them.

Particular 2(g):

In his interactions with Crown counsel during the course of evidence, Justice Cosgrove used intemperate or denigrating language, was unfair and exhibited bias towards the Crown, and acted in a manner that was prejudicial to the Crown.

57. In the course of the proceedings on October 7, 1998, Crown counsel Cavanagh rose to object to the cross-examination of a police officer. When he did so, Justice Cosgrove replied:

> THE COURT: Well, I am glad you have made it a respectful submission, because my respectful answer is that your interruption is nothing but an interruption and designed to interrupt the cross-examination. It has no merit, whatsoever. I would ask you to think carefully about your next interruption, Mr. Cavanagh. Please sit down.
>
> MR. CAVANAGH: Your Honour, it is not my design to interrupt...
>
> THE COURT: Please sit down, counsel.

(The transcript leading to the above exchange shows that the cross-examination question was improper and that it was entirely reasonable for Crown counsel to object.)

58. The circumstances were the same on October 19, 1998. Mr. Cavanagh again rose to object to an improper line of questioning. The Crown's objection was reasonable, but Justice Cosgrove concluded his exchange with Mr. Cavanagh this way:

> THE COURT: I suppose eventually we might learn what the officer knows about it, if the Crown doesn't keep interrupting without any justification.
>
> Proper cross-examination is to produce material and to inquire whether a witness knows anything about it. There's nothing more or less than that that has been offered to this witness.
>
> MR. CAVANAGH: Thank you, Your Honour.
>
> THE COURT: Mr. Cavanagh, your argument is totally without foundation and totally erroneous and one that is so blatantly without merit, I wonder why you rise...
>
> MR. CAVANAGH: I rise, your Honour, because he's approaching him...
>
> THE COURT: That's rhetorical. Please sit down, Mr. Cavanagh.
>
> MR. CAVANAGH: Well, Your Honour...
>
> THE COURT: You're abusing the court, Mr. Cavanagh. Please sit down.
>
> MR. CAVANAGH: I'm not abusing the court, Your Honour, but you said that I keep rising...
>
> THE COURT: I have ruled that you are abusing the court, Mr. Cavanagh. Please sit down.
>
> MR. CAVANAGH: I have risen once this afternoon.

59. When Crown counsel James Ramsay made a reasonable objection to a cross-examination question, Justice Cosgrove replied:

> That's a frivolous objection, counsel, if ever I've heard one. Please go ahead. You are interrupting the cross-examination, and if you continue in this fashion, I will have to instruct you not to interrupt at all. Please be more judicious in your interruptions. Go ahead, Mr. Murphy.

60. We commented earlier about the grossly unprofessional conduct of Mr. Murphy for the defence. The transcript contains endless examples of cross-examination by Mr. Murphy which were wholly improper, followed by Crown objections which were reasonable, followed in turn by Justice Cosgrove harshly criticizing the Crown for objecting and saying nothing to Mr. Murphy.

61. In one instance, when a police officer was being cross-examined and produced his notes, Justice Cosgrove permitted defence counsel to review the notes while preventing Crown counsel from doing so. Crown counsel was not permitted to see the notes until after defence counsel had cross-examined with reference to them.

62. When James Cavanagh was appearing for the Crown, and Mr. Murphy objected that he had misrepresented the facts in his submission, Justice Cosgrove aligned himself with Mr. Murphy, stating that "we have a distinct problem" that Mr. Cavanagh demonstrated "ignorance" of the facts and was "misinformed" such that a further review of the evidence would be "humbling" for Mr. Cavanagh. In fact, Mr. Cavanagh had been correct in his submissions.

63. In another instance involving Mr. Cavanagh, Justice Cosgrove learned that he had spoken with Crown counsel in an unrelated murder trial. Justice Cosgrove had ordered the other prosecutor to testify in *Elliott*. He had made that order because the two trials had the same case manager who was under investigation by the RCMP for wrongful conduct in the police investigation in the other trial. From Mr. Cavanagh having spoken with the other Crown counsel, Justice Cosgrove concluded that he had "pre-empted cross-examination" and that his having a discussion with the other Crown was "totally irregular". In the result, Justice Cosgrove directed no communication between Mr. Cavanagh and the other prosecutor or between any Crown counsel in *Elliott* and any Crown who might testify in *Elliott*. We can find no rationale for these comments or orders.

64. When Crown counsel sought to introduce hearsay evidence to show the state of mind of the author, and not for the truth, Justice Cosgrove commented that in 15 years on the bench, he had rejected the Crown's argument on hearsay "by every Crown counsel who has put it before me" and added that he had "never been overruled."

Particular 2(h):

Justice Cosgrove refused to allow Crown counsel Ramsay to bring a motion for the recusal of Justice Cosgrove, on the basis that different Crown counsel would be replacing Mr. Ramsay at a later stage, even though Mr. Ramsay was Crown counsel at that time and was instructed and prepared to bring the recusal motion.

65. The transcript discloses no basis for denying Crown counsel Ramsay the opportunity to bring the recusal motion. He was instructed and ready to do so. Justice Cosgrove denied him the right to proceed simply because at a later stage other Crown counsel would be replacing him.

Particular 2(i):

In advance of completion of the evidence on certain issues, Justice Cosgrove made comments that suggested that he had prejudged such issues. The comments were often intemperate, or unfair to the witness or to the parties and served to further negatively affect the perception of the administration of justice.

66. As an example of this particular, prior to the completion of the evidence and the argument on whether Constable Laderoute had fabricated a note, Justice Cosgrove found that he did so. In response to Crown counsel Ramsay's comment that it was "suggested" that a fabrication had occurred, Justice Cosgrove stated: "No, it's not 'suggested'; it's alleged, and I can put you at ease – I accept that the Officer has said in this court that he did do that! [i.e.: he did fabricate a note]". In fact, Constable Laderoute's testimony, viewed as a whole, did not support that finding, nor was it appropriate to make any finding on the point at that stage of the proceeding.

67. The transcript revealed several further conclusory statements by Justice Cosgrove which were obviously premature.

Particular 2(j):

68. Particular 2(j) addresses Justice Cosgrove's ruling on the compellability of Crown counsel Cavanagh as a witness and says that Justice Cosgrove "descended into the arena" by indicating that there were matters of interest for the Court which he would explore when Mr. Cavanagh was called if they were not addressed by counsel. This is the only particular we have not taken into account in our assessment of Justice Cosgrove's conduct overall. He might better have refrained from making the comment he did, but we do not believe that a judge announcing that he will canvass with a witness issues which are of interest to him is capable of warranting censure, either standing in isolation or even in the context of the *Elliott* transcript as a whole.

Particular 2(k):

Justice Cosgrove required former Crown counsel, Mr. Cavanagh, (disqualified because he was a witness on the voir dire) to attend to explain statements attributed to him in a newspaper article about police misconduct, following a withdrawal of an unrelated impaired driving charge against Radek Bonk. When Crown counsel objected to the motion by defence counsel to recall Mr. Cavanagh, Justice Cosgrove indicated that he believed that there was a connection as it was relevant to Mr. Cavanagh's status and credibility as a witness and, further, that he anticipated that defence counsel would raise this issue when he read the same article in the newspaper that morning.

69. Crown counsel, Mr. Cavanagh, also happened to be Crown counsel in an unrelated case in Ottawa, an impaired driving charge against Radek Bonk. Mr. Cavanagh withdrew the charge against Mr. Bonk mid-trial because of Mr. Cavanagh's conclusion that police evidence in the *Bonk* case was unreliable. Mr. Bonk was a sports celebrity and the withdrawal of the charge was covered in the newspapers. Justice Cosgrove read the newspaper coverage. Although there was no rational link between the *Elliott* trial and the *Bonk* trial, Justice Cosgrove decided that Mr. Cavanagh should be recalled in *Elliott* to explain statements attributed to him in one of the newspaper stories about the *Bonk* case. The report in question said in part: "Cavanagh said yesterday he had never before handled a case that featured both discrepancies in an officer's testimony and contradictions from a fellow officer. 'It's very rare' he said. 'In this instance it was fatal to the case.'"

70. Justice Cosgrove concluded that this quotation from a newspaper article about the *Bonk* case called into question Mr. Cavanagh's credibility. Justice Cosgrove concluded that because Mr. Cavanagh had been Crown in the *Elliott* trial, where Justice Cosgrove believed there was comparable police misconduct, Mr. Cavanagh should be recalled to explain what he was reported to have said about *Bonk* and to compare it to the *Elliott* scenario.

71. In the result, Mr. Cavanagh was recalled in *Elliott* and examined to explain what had occurred in *Bonk*.

72. Leaving aside for the moment that Mr. Cavanagh should not have been required to testify in *Elliott* in the first place, there was nothing in the newspaper report from *Bonk* to cast doubt on Mr. Cavanagh's credibility so as to have him recalled in *Elliott*. Furthermore, the *Bonk* case had nothing to do with the *Elliott* trial.

Particular 2(l):

Justice Cosgrove inappropriately aligned himself with defence counsel. During the evidence of Crown counsel Cooper (counsel on the Cumberland trial), Justice Cosgrove indicated that he assumed the question he had for the witness would be the same as the one contemplated by defence counsel, and then stated, "We'll see whether we are reading one another's mind". After asking his question of the witness, Justice Cosgrove sought confirmation from defence counsel whether he had read his mind about the question.

73. The exchange giving rise to this particular took place in *Elliott* on September 25, 1998 and it was as follows:

> THE COURT: Mr. Murphy.
>
> MR. MURPHY: ... would I be permitted to ask one question?

THE COURT: Mr. Cavanagh? I think...

MR. CAVANAGH: I'd allow my friend to ask the question and I can object or not if...

THE COURT: Pardon me?

MR. CAVANAGH: ...and then I would object or not, if we could proceed that way.

THE COURT: Yes. I assume you were going to ask the same question I was going to ask, but...

MR. MURPHY: Well, maybe Your Honour can ask it, and if it is, I won't.

THE COURT: All right. That's a real challenge. We'll see whether we are reading one another's mind.

When did, to your knowledge, was Detective Inspector MacCharles substituted by someone else in this case?

THE WITNESS: When did the change take place from MacCharles to Bowmaster?

THE COURT: Yes.

...

THE COURT: Did I read your mind, Mr. Murphy?

MR. MURPHY: Yes. I guess I have a question to follow up, which might be equally predictable...

THE COURT: I just wanted to know that I had read your mind. Go ahead and do the follow up.

74. Viewed in isolation, this exchange conveys the impression of the judge and the defence working together. When it is viewed together with many similar occurrences in the transcript, that is, of Justice Cosgrove appearing to side with the defence, it gives the appearance of an anti-Crown bias.

Particular 2(m):

Justice Cosgrove ordered disclosure to defence counsel of a memorandum prepared internally by Crown counsel listing incidents of bias by Justice Cosgrove.

75. For reasons which may by now be apparent, the Crown in the course of the *Elliott* trial reached the conclusion that Justice Cosgrove was exhibiting bias against the Crown to the point where the Crown would ask him to recuse himself. Internally, the Crown prepared a memorandum documenting instances of his apparent bias.

76. Justice Cosgrove, on August 5, 1999, made two exceptional rulings. He found that this internal Crown memorandum ought to have been produced to the defence, and he ordered it produced, and he found that the non-production was a breach of Ms. Elliott's right to prepare and offer a full defence. Justice Cosgrove further directed that two Crowns, Mr. Cavanagh and Mr. Pelletier, attend before him with the original and copies of the internal memorandum to ensure its immediate production to counsel for the defence.

Particulars 2(n), (o) and (p):

(n) Justice Cosgrove referred, during the course of evidence, to the "so-called independent investigation" by the RCMP into the former OPP case manger of the Elliott case (Det. Lyle MacCharles) (arising out of an unrelated incident), thereby denying its credibility and portraying the RCMP and OPP as colluding in that investigation, there being no evidentiary basis to do so.

(o) Justice Cosgrove improperly interfered with the RCMP investigation by requiring that the RCMP provide to the court, all of its investigative notes, during the course of the investigation itself, for review and inspection by the court, notwithstanding the very limited relevance of the evidence collected.

(p) On two occasions, Justice Cosgrove refused to rescind his non-communication orders so that police witnesses could speak to the RCMP without being in breach of the orders, despite being advised that the orders were delaying the RCMP investigation. Justice Cosgrove stated that he was "scandalized at what professed to be the professionalism of the RCMP in coming to the court to ask for an exception to that order." Justice Cosgrove subsequently criticized the RCMP for the delay in the completion of its investigation.

77. We have grouped these three particulars because they have in common the RCMP investigation of Detective MacCharles, the original OPP case manager for the *Elliott* case. We referred above to the fact that the RCMP were investigating Detective MacCharles for alleged wrongdoing in another case, unrelated to *Elliott*.

Because of MacCharles' central role as case manager in *Elliott*, the Crown disclosed the investigation of him in the other case.

78. That disclosure had unforeseeable consequences in *Elliott*.

79. In effect, Justice Cosgrove brought the RCMP investigation of Detective MacCharles into the *Elliott* trial by launching his own inquiry into the RCMP investigation. In his ruling on September 7, 1999 (Appendix A), at paragraph 297, he concluded that the RCMP investigation "was co-opted by the OPP officers and Crown prosecutors and that it lack[ed] the basic characteristics of an 'independent' investigation – free from any influence by the Crown and the OPP." He then provided what he regarded as six instances of how the independence of the RCMP investigation was undermined. This investigation of the RCMP was uncalled for and resulted in the *Elliott* trial being effectively cast aside while Justice Cosgrove turned his mind to the RCMP.

80. Justice Cosgrove interfered with the RCMP investigation in various ways. While that investigation was ongoing, he ordered that the RCMP investigators' original working files be produced in his court.

81. He refused to permit police witnesses in the *Elliott* trial to speak with the RCMP investigators, and when the RCMP advised him that they needed to speak with these people to carry on with their investigation, he said he was "scandalized at what professed to be the professionalism of the RCMP in coming to the court to ask for an exception to that [non-communication] order." Ironically, he later criticized the RCMP for delay in the completion of their investigation.

Particular 2(q):

After staying the proceedings, and without any evidence or submissions by Crown counsel (Mr. Humphrey being denied the ability to make submissions), Justice Cosgrove quashed a federal immigration warrant for the accused and threatened the immigration officer with contempt if she tried to execute it.

82. On the day Justice Cosgrove stayed the proceedings in *Elliott*, September 7, 1999, David Humphrey, serving as Crown counsel at that stage, foresaw the probability that Ms. Elliott would soon be free to go, and he wanted to ensure that she was served with a notice of appeal by the Crown before she fled Canada. He therefore made sure there was an immigration officer present with an immigration warrant authorizing the detention of Ms. Elliott for an immigration inquiry (in a matter unrelated to the murder charge in *Elliott*). Mr. Humphrey reasonably believed that the immigration warrant would secure Ms. Elliott's detention such that she could be served with the appeal notice while still in Canada.

83. However, Mr. Murphy, without notice and with no authorities in hand, asked Justice Cosgrove to quash the immigration warrant, which he proceeded to do. Mr. Humphrey protested in vain that the Crown had received no notice of this application and had no opportunity to raise jurisdictional and other objections to the warrant being quashed.

84. In the result, Ms. Elliott was able to leave the courtroom, and Canada, without being served. (The notice of appeal was only served upon her several days later in Barbados.) Quashing the immigration warrant was Justice Cosgrove's last step in the *Elliott* trial, which had begun approximately a year and nine months earlier.

Particular 3:

Justice Cosgrove failed or refused to control the trial process and, in particular, allowed defence counsel to make unfounded, egregious allegations against the Crown, the police and others. By both his failure to sanction or caution defence counsel and then by requiring Crown counsel or the witness to respond to the allegations, Justice Cosgrove gave credibility to allegations of corrupt and criminal behaviour of Crown counsel and others, thereby affecting the appearance of impartiality and the integrity of the administration of justice.

85. We have spoken already of the grossly unprofessional conduct throughout the trial by Mr. Murphy for the defence. In the face of such behaviour from counsel, a judge must control or seek to control the lawyer, and demonstrate an even hand while doing so. In the *Elliott* trial, the transcript contains countless instances of Mr. Murphy making allegations against the Crown and the police, which were extreme and unfounded, when Justice Cosgrove said nothing in response except to call on the Crown to make reply.

86. As an example, Justice Cosgrove called upon Crown counsel Ramsay to respond to Mr. Murphy's submissions that Mr. Ramsay was an "accessory after the fact" to murder because he was advancing the Crown's case against Ms. Elliott and thus enabling the real murderer to escape. The judge said nothing to Mr. Murphy.

87. In the course of the trial, there was an incident in the courthouse cafeteria one day between Mr. Murphy and Steven Foster, the son of the man Ms. Elliott killed. It appears from the transcript that Mr. Foster made a single intemperate remark against Mr. Murphy in the cafeteria. Back in the courtroom, Mr. Murphy embellished the incident and Justice Cosgrove responded by threatening Mr. Foster with contempt of court, and advised him to return with his own lawyer. He returned the next day with his late father's real estate lawyer, who Mr. Murphy ridiculed as being "inexperienced" and as advancing a position which was "ridiculous" and "irresponsible" such that, in Mr. Murphy's view, "he should be reported to the Law

Society". By contrast, the transcript indicates that this solicitor preformed reasonably and respectfully in the courtroom, considering the extraordinary circumstances in which he was placed. Justice Cosgrove did nothing to curtail Mr. Murphy's verbal assault.

88. Nor did Justice Cosgrove admonish Mr. Murphy for his comparison of the Ministry of the Attorney General's office to "the last days of the Third Reich where Generals and members of the SS were scrambling, literally like rats deserting a sinking ship, to make arrangements for themselves... ." (Later, Mr. Murphy, of his own initiative, made a highly-qualified apology with respect to this outburst, when he advised the court that his simile was not intended to embrace the wartime atrocities of the SS.)

89. When Mr. Humphrey for the Crown objected to Mr. Murphy's description of actions by the Crown and the police as being "corrupt", saying that this description was "absurd", Justice Cosgrove did not admonish Mr. Murphy, but instead told Mr. Humphrey not to use the word "absurd". In this example, there was no basis for the reference to corruption, and an entirely reasonable basis for characterizing it as "absurd".

90. We were shown in the transcript further examples in support of this particular. Repeatedly, Justice Cosgrove appeared to side with the defence and to support positions of the defence which were unsupportable. An observer of the trial could only have concluded that Justice Cosgrove continually exhibited a bias against the Crown's position.

Particular 4:

Justice Cosgrove misused his judicial office when he offered, as an alternative to potential contempt citations against the Ottawa Sun and Brockville Recorder and Times, for reporting on the retainer of two "outside" Crowns (on the basis that it violated his publication ban), that the media could repair any erroneous impressions left by the articles by publishing another article, the content of which was suggested by Justice Cosgrove. The content included statements that the delay in the trial to date was due to fresh production by the Crown, thereby maligning the Crown in the eyes of the public.

91. In December, 1998, the newspapers named in this particular reported on Messers Strosberg and Humphrey being retained to act for the Crown in *Elliott*. Justice Cosgrove found that the press thereby undermined the *Elliott* trial and violated his publication ban. He proceeded to call for representatives of the two papers to appear before him and show cause why they should not be cited for contempt. Representatives of the papers subsequently appeared, with their counsel.

92. Justice Cosgrove suggested that a possible alternative to a contempt citation would be for the newspapers to print a further story as directed by Justice Cosgrove.

93. David Scott, Q.C., appeared as counsel for the Ottawa Sun. He described this invitation as "extraordinary" and submitted that it would be "inconceivable" for the Court to direct the media on what it should print in order to avoid being cited for contempt. Justice Cosgrove eventually concluded that he would not proceed with a contempt hearing or ask any other judge to do so.

94. Justice Cosgrove came to the correct conclusion in this incident, but it is an incident which should have never arisen. In the first place, there was nothing remotely contemptuous in the newspaper articles, and Justice Cosgrove should have resisted the invitation of defence counsel for him to find otherwise. What is more troubling is Justice Cosgrove then thinking that he could have the media print his version of events, and do so in order to avoid being cited for contempt.

Particular 5:

Justice Cosgrove repeatedly misused his judicial office by making threats of citations of contempt or of arrest, without basis.

95. We have already observed three incidents in which Justice Cosgrove threatened people with contempt charges. He cited Detective Inspector Bowmaster with contempt for telling other police officers when to come to court to testify (paragraphs 43 and 44 above). He threatened Mr. Foster, the son of the deceased, with contempt as a result of the courthouse coffee shop incident (paragraph 87 above). Immediately above, we addressed his threatened contempt citations against two newspapers for printing that new counsel were being retained to represent the Crown.

96. There were several other abuses of the court's contempt powers.

97. Justice Cosgrove threatened to cite federal Crown Eugene Williams, Q.C., for contempt for an allegedly unsatisfactory explanation of why one federal Crown counsel, as opposed to another, had attended court one day. There had simply been a problem with scheduling.

98. Justice Cosgrove ordered a Bell Canada employee, Gilles Gauthier, to attend court, on the threat of a warrant for his arrest, in the absence of any evidence that Mr. Gauthier would not attend and when there was no urgency associated with his evidence. The basis for this order was that on the previous day, a subpoena had been left at Mr. Gauthier's office, when Mr. Gauthier had already left for the day, and which required his attendance 10 minutes after it was served. When Mr. Gauthier did attend, Justice Cosgrove repeated that he would have had Mr. Gauthier arrested had

he not attended, and he criticized Mr. Gauthier for his response to the subpoena when it appears that Mr. Gauthier did nothing wrong.

99. Similarly, Justice Cosgrove indicated that a Doctor Li, a physician for Detective Inspector MacCharles, would be arrested if he did not attend in court the next day to canvass his availability to re-attend on some other day. This was said in Doctor Li's absence and when there was no reason to believe he would not respond to a subpoena. As a result, Doctor Li was required to attend court, travelling from his offices an hour away, for a brief scheduling attendance. Later in the trial, Justice Cosgrove referred to this Doctor Li incident as a "circus", when he threatened to have arrested the physician for another police officer if that physician did not clear his or her schedule to attend on the date Justice Cosgrove stipulated.

100. Justice Cosgrove also advised that he intended to cite five police officers for contempt if they delayed in the production of further notes.

101. He said he intended to cite a Detective Constable Ball for contempt for alleged interference with defence counsel, out of court, without having heard any evidence in support of a citation, and relying solely on defence counsel's description of the events.

102. Above, at paragraphs 82-84, we referred to an immigration officer who was in court with an immigration warrant on the last day of the trial. Justice Cosgrove threatened to cite her with contempt if she attempted to serve Ms. Elliott with the immigration warrant in an unrelated matter after Justice Cosgrove had stayed the proceedings against Ms. Elliott.

103. These are not the only incidents demonstrated, but they are enough to show Justice Cosgrove's repeated abuse of his contempt powers.

Particular 6:

The totality of the evidence and the conduct of the proceedings supported the observation by the Court of Appeal that, due to the failure of Justice Cosgrove to control the proceedings, "on occasion, the proceeding seemed to resemble nothing so much as a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial."

104. Several times we have alluded to Justice Cosgrove, in effect, leaving the trial to the side and embarking on his own investigations of perceived abuses barely related or entirely unrelated to the *Elliott* trial. Thousands of pages of transcript were consumed by testimony which was wholly irrelevant to the prosecution or defence of Ms. Elliott.

Particular 7:

105. As the 7th particular, independent counsel asserted that Justice Cosgrove's conduct in *Elliott*, viewed in its totality, was inconsistent with the standards of conduct expected of judges as discussed in the Canadian Judicial Council's "Ethical Principles for Judges". Independent counsel then quoted the following six of these principles:

(a) That "judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence";

(b) That "judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons";

(c) That, in performing adjudicative duties with diligence, the judge is expected to strive for "impartial and even-handed application of the law, thoroughness, decisiveness, promptness, and the prevention of the abuse of process and improper treatment of witnesses";

(d) That "judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case";

(e) That judges are to "treat everyone before the court with appropriate courtesy"; and

(f) That judges are obliged "to treat all parties fairly and even-handedly" and to "ensure that proceedings are conducted in an orderly and efficient manner".

106. Counsel for Justice Cosgrove contended that ethical principles for judges were not published until after the *Elliott* trial was concluded, so that the Committee should not consider them. In fact, the ethical principles were first published in November 1998, about midway through the *Elliott* proceedings. They were the product of wide consultation with the judiciary across Canada and it seems highly unlikely that the judge could have been unaware of them as they were being debated.

107. However, we have assessed Justice Cosgrove's conduct in *Elliott* substantially in light of s. 65(2) of the ***Judges Act***.

III.

The Four Witnesses Who Testified Before Us

108. After Justice Cosgrove read to us his statement (Appendix E), we asked that four witnesses Mr. Cherniak had been intending to call still be called in order to provide us a more complete sense of how Justice Cosgrove's conduct of the *Elliott* trial affected those who participated. We heard from these witnesses on the final day of the hearing, September 11, 2008. Mr. Cherniak led their evidence and it was not challenged by Mr. Paliare. The credibility of the witnesses was beyond question and they gave compelling evidence. We quote portions of it below.

Curt Flanagan

109. Mr. Flanagan was the lead Crown counsel in *Elliott* until March, 1998, and he was called as a witness twice after that. Mr. Cherniak asked him how the *Elliott* case compared to other murder trials he had prosecuted. He answered:

> A. The Elliott trial was completely different than any murder trial that I have prosecuted, and I have prosecuted many. The murder trial, quickly after the trial, became an inquiry if you like, targeted - -
>
> Q. You mean after the trial commenced?
>
> A. Yes. Became a targeted inquiry into conduct of Crown counsel and police officers, and so it wasn't really a trial. It was more of an inquiry into our actions based on innuendo and speculation by defence counsel thrown before the court without any foundation, evidentiary foundation, whatsoever.
>
> Basically, very quickly after the trial started, defence counsel would make scurrilous, in my respectful view, malicious allegations of Crown counsel and police. The allegations included suborning perjury, obstruct justice, conspiracy; and, as a result of that, the trial judge embarked on a path to explore any avenue suggested by defence counsel.
>
> As a result of that, I was taken off the case. More appropriately, I was compelled to testify. It was argued that I wasn't a compellable witness, but the trial judge decided otherwise, and basically the trial Crowns, myself and Mr. Findlay, were witnesses.

> Any witness that the defence suggested that may have anything to do with this giant conspiracy was called, and away we went on that track.
>
> So when you ask me the question what it was like, it was absolutely a completely different experience. It was an atrocious experience. It was a very unsettling experience to be attacked professionally without any foundation, without any evidence.
>
> (Transcript p.1792 l.16 – p.1794 l.3)

110. Mr. Flanagan was asked to testify concerning the orders prohibiting him from speaking with police witnesses and with other Crown counsel:

> A. In the first place, it prevented me from conducting the trial as a Crown prosecutor. The orders that were made by the trial judge essentially prevented pretty well anybody from talking to anybody. It was, you couldn't talk to pretty well any police officer or clearly any person that was a potential witness.
>
> I couldn't talk to my assistant Crown. I couldn't prepare or talk to witnesses with the view that you were - - after this motion, you were going to continue as the prosecutors, because we were the prosecutors for this case.
>
> So it completely hamstrung me as Crown counsel to be able to effectively do anything.
>
> I am reminded, frankly, when Mr. Findlay - - for example, there was the compellability motion for Mr. Findlay, and there was an argument in court. Counsel had raised - - defence counsel had suggested that Mr. Findlay can't remain in court because he is Mr. Flanagan's eyes and ears, and Mr. Findlay was taken out of court. So you can see, what does that say about the Crown prosecutor, again, based on nothing, based on no evidentiary value.
>
> So it completely hamstrung the Crown attorney in relation to be able to continue with the case.
>
> With respect to your second point, obviously you can't have counsel - - however many that may be, you can't have counsel step into a murder case without talking to counsel that was previously on it to at least give the person the proper background and what the case is about, and we were prevented from doing that.

> So when Mr. Stewart stepped in, who was the senior Crown in Ottawa at the time, when he stepped in, albeit he was on for about 20 minutes, on the record, you couldn't necessarily talk to him after he finished in relation to court. When Mr. Ramsay came in, you couldn't brief Mr. Ramsay because of these orders.
>
> So it made it very difficult, if not impossible, with respect to continuing with respect to the case.
>
> (Transcript p.1794 l.23 – p.1796 l.17)

111. Mr. Flanagan lived in Brockville, Ontario, when the *Elliott* trial began there. He was the senior Crown counsel in Brockville. His assisting counsel on the case, Mr. Findlay, also lived in Brockville. Mr. Flanagan spoke of the effect on them both from how the *Elliott* trial was run:

> A. The effect was significant. I think you have to understand; you have to put it into context. This was a high profile, if you like, murder case that occurred in a jurisdiction that is very small.
>
> The City of Brockville, where the trial took place, is about 25,000 people, maybe 30, tops. You are in a very small jurisdiction. When defence counsel makes allegations that the Crown attorney, who is the chief administer of justice in that town, is engaging in things like conspiracy, having witnesses trying to change their evidence, obstructing justice, misleading the court, and then when the trial judge makes findings against the Crown attorney and the police in relation to this so-called giant conspiracy, it has a tremendous effect.
>
> You are the Crown attorney in a very small town. Everybody - - this case was front page. When this decision came out about all the breaches - - and I forget how many that the trial judge found, but I know it was in excess of 100.
>
> When this case came out, it was on the front page of the Brockville Recorder and Times. It was on the front page of the Ottawa Citizen. It was on the front page of the Ottawa Sun. And so you in a small jurisdiction, as the administration of justice, sure it's going to have an effect.
>
> Your reputation - - the most important thing to a lawyer is his integrity and his credibility, and I would go a little further than that. With respect to a Crown attorney, that is extremely important. You represent the public, and for the breaches the trial judge found and the

allegations, the criminal allegations that were let proceed, had a tremendous effect. People are looking at you like, what's going on here?

And keep in mind, Mr. Cherniak, I wasn't the Crown attorney for not even five years in this jurisdiction. I was the so-called new Crown attorney coming in. I started in '93. The Elliott case started in '95. That's when the incident was. We were at trial in '97/98 when I got compelled as a witness. So I'm a fairly new Crown in the jurisdiction, and so it had a tremendous effect with respect to me professionally.

The other thing, too, is after the decision, you're appearing before Superior Court judges after that. What are they thinking when they have a Superior Court judge -- who, incidentally, was the only Superior Court judge criminally at that particular time in the jurisdiction -- what are they thinking of Crown counsel, who's just been found as part of a hundred and so breaches?

So, yes, it has a significant effect on me professionally. In my respectful view, it damaged my reputation unfairly.

With respect to Mr. Findlay, Mr. Findlay was my second in command, but Mr. Findlay had only been in the Crown's office in Brockville for less than five years. This was Mr. Findlay's first major case. I can tell you that it also -- he's in the same boat as I am.

You have three Crowns in the Crown attorney's office in Brockville, and two of the Crowns have been found to have been wrapped in all these breaches. So, yes, it's going to have a significant effect professionally.

With respect to personally, it was astonishing what the effect was personally. I had people coming up to me, neighbours, other people, saying, What happened? What's going on?

I saw the judgment. I lost sleep over it. I was stressed over it, and I think you have to put it into context. This isn't a situation that happened in a day. This is a situation that went on for an extended period of time, where I'm called as a witness in March, asked all kinds of questions about whether or not I coached witnesses or whether or not I tried to suppress or obstruct justice by not preventing evidence -- or preventing evidence from going to the court without any foundation, and then I'm called about seven, eight months later in Ottawa to testify, and again the same allegations made to me.

So yes, it's going to have an effect. It's a prolonged effect. This isn't something that happened in an hour or a day. This is something that took place over a year and a half. And I'm from Ottawa, incidentally, where the trial continued.

So personally, yes, it had a tremendous effect. When the judgment came out, for example, to give an example, lawyers were interviewed in Ottawa. One of them suggested that there should be an inquiry, ironically, an inquiry into Crown's conduct as a result of this.

I was an assistant Crown that practised ten years in Ottawa. My family is in Ottawa, and I can tell you that it had a significant effect on me. I remember my mother telling me, What's going on, what happened, who is this guy? Yes, it had a tremendous effect.

My kids are in school in a small town. Everybody knows what you do. In a small little town, you're the Crown attorney. People know you're the Crown attorney. People know your kids, your kids -- that their father is the Crown attorney. So, yes, it had a tremendous personal effect.

On Mr. Findlay, I can tell you for a very -- categorically, that man changed after that trial. He was stressed. He felt almost like someone had kicked him in the stomach, that his reputation was just like, How could this happen based on nothing? So from a personal effect, it was large.

The other thing is it goes without saying, I suppose, is what about the public's -- effect from the public's point of view? This is the public looking in at the Crown attorney and the senior assistant Crown attorney, and all those Charter breaches in relation to mislead or willfully blind. What do they think? What do they think of the administration of justice in the small Town of Brockville when you have the Crown.

So there's an effect on the administration of justice from their point, in my respectful view. And this was aside from it. I mean, you didn't ask me, Mr. Cherniak, but there's a tremendous effect on other people: The family, the Foster family, the police officers. You could see it. Everybody was walking on eggshells in this trial.

Q. Did the Court of Appeal judgment help?

A. Well, you know, did the Court of Appeal judgment help? The Court of Appeal judgment redressed a terrible wrong. Does the Court of Appeal judgment help? I don't know, Mr. Cherniak. Where does the Court of Appeal judgment appear in the paper? I can tell you it wasn't on the front page.

So, yes, in answer to your question, the Court of Appeal at least said this was wrong. The Crowns, they didn't have any conduct whatsoever in relation to it. But you know it's out there. Once it goes out there for a year and a half, people are looking at you like -- because this is the Superior Court judge of the jurisdiction that was there for years making these calls.

(Transcript p.1797 l.15 – p.1803 l.19)

Glen Bowmaster

112. Mr. Bowmaster, whom we have referred to earlier, was a case manager for the OPP in the *Elliott* trial. He served with the OPP for 38 years. He testified about the effect on his work as case manager from Justice Cosgrove's order that he could not speak with officers who might have to testify:

A. From the onset, it was very difficult, near impossible, in that I met with the Crown attorney of the day, who was Mr. McGarry, when I came on board, and pretty much what he instructed me was he really couldn't talk to me, nor could any of the officers talk to him, really, as the Crown attorney.

But having said, I was still in a position to advise them and help them through the case. So at the very beginning, I went into the court and I really had no appreciation for what Mr. McGarry had said to me until I was there for the first day.

After that first day, I left the court, and I called one of the senior officers in the provincial police and I said to him, I think it would be advisable if the force had a lawyer present in the courtroom on behalf of our police officers, because the Crown was virtually ineffective. And the way we see these cases, we do the investigation, we bring it to the Crown attorney, and, for all intents and purposes, they are our counsel.

In this case, they -- really, their hands were tied. They weren't able to be our counsel on any matters where the Crown would attempt to interject or rise on behalf of the police witness. They didn't have that opportunity. They were shut down.

So I was concerned and the officers were concerned they didn't have any representation.

Q. Was the request you made for the police to bring in outside -- in effect, outside counsel other than Crown attorney, was that common in your experience, or not?

A. No, we've never -- I've never certainly asked for it, and I can't think of any case where we've ever had that requirement.

Q. What about specifically your ability to -- I know that you gave evidence at some -- for some time, and I'm not going to really ask you about your evidence. But what about your ability to communicate with and get the various police officers there to assist or give evidence in the trial? What effect did events have on your ability to do that?

A. Well, it was extremely difficult. The officers themselves were very apprehensive. No one wanted to testify in this case. Of course they were under subpoena or they were being called by the Crown, so it wasn't an option. They were very nervous.

Ultimately, as a police officer, I think the worst thing -- it's always in the back of your mind, you certainly don't want to commit an offence where you're going to yourself end up being an accused person.

And in this case, everybody was so afraid that what they were going to do was going to offend the court, and they themselves were virtually on trial throughout this whole experience. They didn't want to testify. They didn't want to have anything to do with it.

We really weren't able to talk -- well, of course, we couldn't talk about the evidence, and that was a given. Everyone was familiar with that concept. That wasn't anything new, but we weren't able to really speak to each other on even matters that, you know, were affecting them to come to court.

(Transcript p.1812 l.15 - p.1815 l.10)

113. Mr. Bowmaster also testified about the contempt citation against him (which we referred to above, at paragraphs 43 and 44):

Q. Just give us some idea what effect being cited for contempt had on you?

A. It was a tremendous effect on me. It was tremendous effect on the officers that I was there to supervise.

As for myself, this whole issue surrounded getting the officer to come to court. It was being discussed in court that defence counsel was going to issue a subpoena, and, as I have just stated, I think most police officer, we consider ourselves an officer of the court, and I interjected and said that wouldn't be necessary; he was a member of our force. Certainly I could have him appear in court.

I conveyed that to the Crown, who conveyed it to the court, and that's ultimately what happened. I knew I wasn't to discuss any of the evidence with that officer, and we didn't. I have no idea what his testimony was in court, and to this day I have never seen what it was.

He was very upset. He did not want to come to court. I said, well, simply, you do not have a choice. You're going to court. You have to come to court.

He asked me -- without getting into any hearsay here, he was concerned of what was happening, and he conveyed to me that he had heard rumours and he was reluctant.

Anyway, he did come to court, and, as a result of his testimony, I was brought back into court and cited for contempt.

As I say, first of all, it has a tremendous effect. The other officers are looking to me for supervision, for guidance, and here's the guy who's in charge, just got cited for contempt. So what kind of a supervisor is that?

That message also goes upward in the force to my supervisors, senior members of the OPP. What has this officer done that he has been cited for contempt? I mean, you're a representative of the force; in the community, as well. It gets reported in the papers. I have to go and appear in other courts.

Aside from that, it had an effect on myself and on my family, ultimately. Ultimately, I guess if you get convicted of contempt, you could very well end up in jail. It's one thing to be, you know, counselled by the people who you report to. It is another thing to end up being found guilty of an offence.

You go home and you tell your wife you just got cited for contempt of court. What does that mean? It means you'll have a

hearing. What is the end result? I don't know. Could go to jail, I suppose. Would that be what the outcome would be? I don't know. It had a really large effect. It had a devastating effect.

Q. The panel will review this evidence in due course, but am I correct that the citation for contempt was for having spoken to Constable Alarie?

A. I believe that's what it was.

(Transcript p.1817 l.1 – p.1819 l.12)

114. Finally, Mr. Bowmaster was asked about a prohibition against him speaking with the deceased's family:

A. In most cases, the victim's family have -- generally, in a number of cases, they're being interviewed, or at least if they're not being interviewed, they are in constant communication with the police. The police are responsible, in today's world, to keep the family advised of an investigation, how it is progressing, without discussing evidence, of course, and that goes even before any court process is involved.

However, in this instance, no one was allowed to talk to anybody. The family would often ask the officers. Constable Roy, Debbie Roy, was the officer that was in court every day.

Q. She was sort of a witness coordination constable?

A. Yes, with the Crown, and of course she was in court, as were the family members. She really couldn't convey anything to me, but the family members would ask us often, you know, Where's this going to go? What's it going to result in?

They would hear evidence, but of course we couldn't discuss it; they couldn't discuss it. They couldn't ask for -- really even ask any opinion from anyone. They were conveying to us that they felt the justice system was failing them, that this is not the way they would expect a trial would go.

...

So there is a huge disconnect with police and victims' families. We really weren't allowed to speak to them to give them any kind of comfort or assurance that what was being done -- everything that could be done was being done.

> The Crowns, of course, weren't really able to speak to them. It was a situation of -- you know, it was impossible. No one could speak with anyone.
>
> (Transcript p.1819 l.21 – p.1821 .15)

David Humphrey

115. Mr. Humphrey was one of the two lawyers retained to represent the Crown late in 1998 in the continuation of the abuse of process motion.

116. He testified about several of the incidents he experienced in *Elliott*, and we have addressed most of them earlier. In particular, Mr. Humphrey, as a replacement Crown counsel, could not speak to his predecessors, and we referred to that at paragraph 48 above.

117. Mr. Humphrey was the Crown counsel at the conclusion of the *Elliott* trial, and we discussed, at paragraphs 82-84, his efforts to stop Justice Cosgrove from quashing the immigration warrant which would have detained Ms. Elliott so that she could have been served in Canada with the notice of appeal. As Mr. Humphrey described the events:

> My impression at that point was that everything was done. And what I recall then happening is Mr. Murphy was on his feet, and this was sort of the crescendo of the case, from my perspective.
>
> I remember looking at him and he had either taken off his gown and/or his tabs, but I remember looking at him thinking all is done, he's starting to shed his court garb and get ready to go outside, and then he turns around and he sees this woman.
>
> Q. The immigration officer?
>
> A. That's exactly right. And then he immediately turned to Justice Cosgrove and announced that he wanted to bring an application to quash the immigration warrant. I'm not sure when, but, in pretty short order, I was on my feet, as well, and I remember standing there looking at Mr. Murphy. He is asking the court to quash the warrant, and then the court asks the immigration officer to come forward -- and that's all in the transcript -- and she is trying to explain that the warrant she has has nothing to do with the charges that were just stayed. And the court says, Well, I've heard that story before, and then quashes the warrant.

> I attempted to put some comments on the record. I didn't believe at that point there was any ability on my part to change the court's mind, but I was trying to make some obvious observations about lack of notice, lack of jurisdiction, lack of opportunity for someone representing the Department of Immigration to make submissions on whether or not the warrant issued by -- I believe it was by the Deputy Minister of Immigration, should be quashed, and I was essentially cut off.
>
> (Transcript p.1841 l.25 – p.1843 l.11)

Steven Foster

118. Finally, we heard from Steven Foster, the son of the man Ms. Elliott killed, who had the encounter with defence counsel Murphy in the courthouse cafeteria. Mr. Foster, an aircraft mechanic, was the one witness before us whose daily life has nothing to do with courtrooms and the justice system. Mr. Cherniak asked him how he was treated as a witness during cross-examination. He answered:

> A. I thought I was treated quite shabbily. It was a pretty rough ride. I wasn't expecting it, being a witness, in that I felt like I was being treated as the accused. I mean, it's a blur now, when I look back on it, because there's the fog of time, of course, but I do remember how it felt, and it felt as though Justice Cosgrove was, I think, abandoning me on the stand.
>
> Q. Were there some accusations leveled at you by defence counsel?
>
> A. Yes, counsel Murphy, that's correct. He was calling me all sorts of names. I guess a bigot was one of them, amongst others, and I was taken aback by it, because, first of all, it's untrue, but that line of questioning -- and I understand it's a courtroom situation.
>
> There's freedom to ask questions and cross-examine, and such, but I didn't expect for a moment that I would be accosted like that on the stand. I mean, I was in shock, anyway, as anybody would be, following the death of my father.
>
> You know, I won't get into all that. I'm not going to cry crocodile tears for anybody, but it was a pretty tense moment facing the trial and having to take the stand in it, to start with. To then face that sort of acrimonious assault, I was stunned, quite frankly.
>
> (Transcript p.1850 l. – p.1851 l.19)

119. Mr. Foster also testified about being threatened with contempt as a result of the cafeteria incident:

> Q. And you were asked to come to court the next day with a lawyer, and you did, as a result of an incident that occurred in the cafeteria, I guess?
>
> A. That's correct.
>
> Q. I am not going to ask you to go through the details of that, because the panel has heard that. I would just like to get your reaction to the suggestion, the citation for contempt?
>
> A. Yes, I suppose it's further to initially being put on the stand and sort of how I felt about counsel Murphy, that as time wore on -- I mean, I was getting a pretty good grudge going for this character, who I think performed like a wing nut, but that's my opinion, and, you know, he's free to do whatever he wanted to do.
>
> But, in the same vein, he was in a public cafeteria. And, again, I won't get into all the details. There's not many of them.
>
> I simply found myself at the coffee dispenser with him up beside me, and, you know, I said to him -- the exact words were, "Have you always been such a pain in the ass?" Because, really, I'd just about had it with the theatrics and the circus-like atmosphere it was taking, you know, what should have been a trial for the truth, and it was turning it into something other.
>
> You know, my emotions got the better of me and I did say what I said, and I didn't otherwise, you know, assault him or anything like that. He flew out of control, and I guess he thought he'd use the moment for his advantage and tried to get a bunch of people on his side in the cafeteria, you know, that I shouldn't be anywhere near him or something.
>
> But, anyhow, further to that, when we got back into the courtroom -- and all I did was went and sat back down with my aunt and uncle, anyway, in the cafeteria.
>
> Q. Your aunt and uncle being whom?
>
> A. Violet and Larry Pender.
>
> Q. Yes.

A. Which, at the time, they simply advised me to not pay much attention, because he was still running around and yelling and going on, and I took their advice and I simply sat down and had my coffee and that was the end of it.

When we went back into the courtroom, Mr. Murphy immediately raised the issue, and Justice Cosgrove suggested that I get a lawyer and that I was going to be cited for contempt. Again, you know, kind of stunned with that, but I did that. I called up -- well, the only lawyer that I knew was a guy that I'd used in real estate, who was my father's lawyer for real estate and such, as well, Winston Tennant.

I told him the situation and he agreed to represent me. He informed me that the charges were serious, that, you know, I might very well be in jail for this. Here I was at the murder trial of my father, trying to get that to its ultimate conclusion or see it to that, and here I was maybe going to be going to jail before the perpetrator of the crime. It was insane.

As it turned out, the charges were dismissed or retracted, whatever. It left me even more despondent about the goings on in the proceedings and that it might somehow conclude itself -- be it guilty or innocent, that it might conclude itself at a jury level.

(Transcript p.1852 l.2 – p.1854 l.23)

120. Counsel for Justice Cosgrove did not challenge the evidence of any of these four witnesses. All of them were entirely credible. We accept their uncontradicted evidence as true and reliable.

IV.

Does the Conduct Proven Warrant a Recommendation for Removal?

121. The issue raised by this complaint against Justice Cosgrove requires a careful delineation between judicial conduct that is curable in the appellate process, and therefore immune from the process of conduct review; and conduct that is not capable of redress on appeal and involves abuse of judicial independence, or abuse of the office of a judge.

122. The starting point for such an analysis must be the principle of judicial independence, and "… the liberty of the judge to hear and decide cases without fear of external reproach": ***Moreau-Bérubé v. New Brunswick(Conseil De La***

Magistrature), [2002] 1 SCR 249 (at para. 56). Madam Justice Arbour quoted from ***Beauregard v. Canada***, [1986] 2 SCR 56 as follows:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. [Also see *Valente, supra, per Le Dain J., at p. 685.*]

123. Justice Arbour continued:

> The Canadian Judicial Council echoed this principle in the Marshall Report, *supra*, asserting that "[j]udicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise and articulate independent thought in judgments free from fear of removal"…

124. And further:

> While acting in a judicial capacity, judges should not fear that they may have to answer for the ideas they have expressed or for the words they have chosen.

125. In ***Moreau-Bérubé***, a Provincial Court judge giving oral reasons for sentence made statements that were perceived as giving rise to a reasonable apprehension of bias. Although the judge apologized soon after making the statements, a recommendation for her removal from office was upheld on appeal to the Supreme Court of Canada.

126. Giving judgment for the Court, Arbour J. pointed out that there would be some cases where the appeal process would not provide an adequate remedy for a judge's missteps. She said:

> In some cases, however, the actions and expressions of an individual judge trigger concerns about the integrity of the judicial function itself. When a disciplinary process is launched to look at the conduct of an individual judge, it is alleged that an abuse of judicial independence by a judge has threatened the integrity of the judiciary as a whole. The harm alleged is not curable by the appeal process.

127. Once reviewable misconduct has been identified, there is a further question as to whether it is so serious as to require a recommendation for removal, or whether some other recommendation would be more appropriate.

128. At para. 25 above we record Justice Cosgrove's acknowledgement, through his counsel, that his statement to us of 10 September 2008 was an admission of judicial misconduct. His counsel said, however, that the admitted misconduct should not lead to a recommendation for Justice Cosgrove's removal from office.

129. Independent counsel to the Inquiry Committee contended that the facts as particularized and proven were capable of supporting a recommendation for removal. However, he was further of the view that Justice Cosgrove's statement was an admission of judicial misconduct and, given the admission, he submitted that the facts as particularized supported a strong admonition, but no longer supported a recommendation for removal.

130. The case as presented by independent counsel included allegations of conduct that was incompetent, conduct that gave rise to a reasonable apprehension of bias, and conduct that amounted to an abuse of judicial independence or abuse of the office of a judge. In his submissions to us (see para. 35 above), independent counsel also drew attention to the distinction between Justice Cosgrove's acts of "commission" with respect to various participants in the process, and his acts of "omission" in relation to defence counsel, and control of the process. We think this is an important, and helpful distinction because it can assist in separating conduct that is an abuse of office from conduct that may be merely incompetent.

131. An analysis of the conduct in this case must be made against the test accepted by the Canadian Judicial Council in the Marshall case, and applied in subsequent cases, namely:

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

132. Some of Justice Cosgrove's conduct may be said to give rise to a reasonable apprehension of bias. Some such conduct may warrant a recommendation for removal (see ***Moreau-Bérubé*** at para. 73). However, other conduct giving rise to a reasonable apprehension of bias is correctable in the appellate process. There are many examples in the case law where judicial conduct giving rise to an apprehension of bias has been argued as a basis for recusal, and other cases where apprehension of bias has resulted in the judgment under appeal being set aside, and a new trial

ordered. Whether facts giving rise to a reasonable apprehension of bias, will support a recommendation for removal from office appears to be a matter of degree.

133. Actual bias may of course be a ground for recommending removal from office because it would show a defect of moral character, or a lack of integrity and honesty in decision making, such as would undermine public confidence in the administration of justice to the required degree: (see T. David Marshall: Judicial Conduct and Accountability, 1995 Thompson Canada Ltd. (at p. 66), quoting the Honourable I.C. Rand, Inquiry Re: The Hon. Mr. Justice Leo A. Landreville (Ottawa: Queen's Printer, 1966). See also Martin Friedland, A Place Apart: Judicial Independence and Accountability in Canada (a report prepared for the Canadian Judicial Council, 1995) at p. 80-81). However, the evidence in this case falls short of demonstrating actual bias, or bad faith, on the part of Justice Cosgrove. Independent counsel did not press a case of actual bias.

134. Some of the impugned conduct in this case does demonstrate incompetence on the part of the judge. Judges have both the power and the duty to control proceedings before them so as to ensure a fair trial or a fair hearing. Those powers include the power to control counsel, and to protect witnesses from abuse, intimidation or threats.

135. The case as presented by independent counsel includes, at least implicitly, the proposition that conduct that is highly incompetent may amount to "failure in the due execution" of the office of judge (s. 65(2)(b)). We have not been directed to any authority supporting the proposition that incompetence, standing alone, would amount to failure in the due execution of judicial office.

136. There his however academic authority for holding that judicial incompetence is not a ground for removal. In "Judges On Trial", 1976 North-Holland Publishing Co., Professor Shimon Shetreet of the Hebrew University in Jerusalem wrote at pp. 284 and 285:

> d. Incompetence – Ground for Removal
>
> It is firmly established that incompetence is not a sufficient ground for removal. It is true that there are bound to be mistakes in the appointment of judges and that occasionally an appointment 'turns out to be a disastrous error, the more so because the judge concerned remains obstinately fit in mind and body'. This, however, seems to be an inevitable price which society has to pay for maintaining the independence of judges. As it would be difficult to draw the line, if judges were to be removed for incompetence, this standard could be used as a pretext for removing from office judges who were perfectly competent but for some reason or another do not enjoy the support of

> those who control the machinery of removal, whoever they may be. The price for tolerating incompetent judges on the bench should be borne by society in order to protect the competent judges against abuse of power. Just as society is prepared to let some guilty go free to protect the innocent, so is it necessary to let some incompetent judges stay on the Bench to protect the judges against abuse. The price paid is mitigated by the availability of appellate courts which correct injustices. It is still a great price, nevertheless, because appeals and reversals result in greater costs to litigants and contribute to greater congestion in the courts. But it is paid for good cause.
>
> The Justice Subcommittee also expressed the view that incompetence should not be a ground for removal from office:
>
> > The line here between the mildly eccentric and the wrong-headed would be hard to draw: any decision as to incompetence would necessarily appear relatively subjective, in contrast to the apparent objectivity of say, a medical certificate. Moreover, the evidence would come, necessarily, from the judges' handling of actual cases … In our opinion judges should not be removed from office for incompetence.
>
> In short, to protect the so-called 'innocent judges', it is necessary that when the misconduct falls within the area which may justify removal from office, only in serious cases should the penalty of removal be imposed upon the judge.

137. As mentioned above, we are not aware of any authority, Canadian or other, where incompetence alone has resulted in a recommendation for a judge's removal. Ordinarily, rulings or decisions that result from an inadequate knowledge of the law or procedure or failure to apply or implement accepted rules and practices, are reviewable only in the appellate process. However, Professor Shetreet appears to acknowledge an exception for "serious cases" of incompetence as providing grounds for removal. It will be necessary to consider whether the incompetence proven in this case rises to the level of such seriousness as to warrant a recommendation for removal.

138. There are other ways in which the judge's conduct may be characterized that overlap with, or accompany, conduct that may be said to be incompetent. Those other characterizations include failure to exercise restraint, and in the more egregious cases, abuse of judicial independence (***Moreau-Bérubé*** para. 58) or abuse of the powers of the office of a judge. In our opinion, conduct which falls into those categories may properly form the foundation of a recommendation for removal. And that is so whether the lack of restraint, or the abuse of powers, is accompanied by conduct that might otherwise be characterized as incompetent.

139. With these considerations in mind, we will examine the various aspects of Justice Cosgrove's conduct particularized and summarized above.

Appearance of Bias

140. As mentioned above, there is no evidence to support a finding of actual bias.

141. Particular 2 contains an allegation of conduct that could give rise to a reasonable apprehension of bias. It is based, in part, on comments by the Ontario Court of Appeal in previous cases. As indicated at para. 38 above, we have not considered the earlier cases referred to, and we do not consider this allegation of a reasonable apprehension of bias as a ground for recommending removal from office.

142. Particular 2(g) is an allegation of bias, but in our opinion may more properly be understood as a failure to exercise restraint. We will return to it later.

143. Particular 2(l) alleges that the judge "inappropriately aligned himself with defence counsel". In our opinion, as briefly described in para. 74 above, this was conduct giving rise to a reasonable apprehension of bias.

144. Particular 3 is conduct that also gives rise to a reasonable apprehension of bias. The particular says it all:

> Justice Cosgrove failed or refused to control the trial process and, in particular, allowed defence counsel to make unfounded, egregious allegations against the Crown, the police and others. By both his failure to sanction or caution defence counsel and then by requiring Crown counsel or the witness to respond to the allegations, Justice Cosgrove gave credibility to allegations of corrupt and criminal behaviour of Crown counsel and others, thereby affecting the appearance of impartiality and the integrity of the administration of justice.

145. To the extent that this conduct was capable of redress in the appeal process it would not be reviewable in this complaint inquiry. It could be, and was, curable by an order for a new trial.

146. However, some aspects of this conduct either give rise to an appearance of bias, or are an abuse of judicial independence, or both. These aspects of the conduct are not curable on appeal. When the judge required Crown counsel to respond to the scurrilous allegations against them made by defence counsel, he gave those allegations credence, and he actually caused harm to the reputation of Crown counsel. As Mr. Flanagan said in his evidence, he and his co-counsel suffered significant harm (see paras. 109-111 above):

> Q. Did the Court of Appeal judgment help?
>
> A. Well, you know, did the Court of Appeal judgment help? The Court of Appeal judgment redressed a terrible wrong. Does the Court of Appeal judgment help? I don't know, Mr. Cherniak. Where does the Court of Appeal judgment appear in the paper? I can tell you it wasn't on the front page.
>
> So, yes, in answer to your question, the Court of Appeal at least said this was wrong. The Crowns, they didn't have any conduct whatsoever in relation to it. But you know it's out there. Once it goes out there for a year and a half, people are looking at you like - - because this is the Superior Court judge of the jurisdiction that was there for years making these calls.
>
> (Transcript p. 1797 1.15 - p.1803 1.19)

147. In our opinion, the conduct particularized in paragraphs 2(l) and 3 gives rise to an appearance of bias that would support a case for removal from office.

Incompetence

148. Many of the particulars of misconduct that have been proven demonstrate incompetence in the discharge of judicial duties. In a global sense, that incompetence was demonstrated in the judge's failure to control the trial.

149. In ***Ashmore v. Corporation of Lloyds***, [1992] 2 All E.R. 486, Lord Roskill said:

> … Indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and inexpensively as possible.

This foundational principle of the common law adversarial process has been understood and applied for a very long time: see ***Garnett v. Ferrand*** (1827), 6 B. and C. 611 at p. 628, 108 E.R. 576; and more recently ***R. v. Felderhof*** (2003), 68 O.R. (3d) 481, 180 C.C.C. (3d) 498.

150. As is evident from the conduct summarized above, the trial judge in this case failed utterly to control the process. Particular 1 demonstrates the trial judge's failure to control a defence counsel whose conduct was grossly unprofessional and

antithetical to trial fairness. Similarly, Particulars 2(c) (d) (e) (f) (g-(i)(ii)), (k), 3(d) and (h) and 6 may all be seen in whole, or in part, as further examples of incompetence.

151. In our opinion, such pervasive incompetence is of grave concern and is bound to undermine public confidence in the administration of justice. The conduct identified at para. 150 above may approach the "serious" case contemplated by Professor Shetreet (para. 136 above) that is the exception to the general rule that incompetence is not a sufficient ground for removal.

152. However, we consider that the public interest concern against removal for incompetence as expressed by Professor Shetreet should be given primacy. Protecting the judicial independence of all judges is more important than sanctioning the troubling incompetence of one.

V.

Lack of Restraint and/or Abuse of Powers

153. There is a range of conduct encompassed here that includes everything from rude, abusive or intemperate language up to misuse of the contempt power, or threats to do so, and beyond that to defamatory statements of persons who had done no wrong and who, in some cases, had no opportunity to answer the judge's damning allegations.

154. Particulars 2(a) and (b) are examples of the latter kind of conduct. With respect to Assistant Deputy Attorney General Murray Segal, the judge held (see his reasons for judgment, 7 September 1999 at paras. 68 and 69) that Mr. Segal had deliberately deceived the Court, or undertaken steps calculated to deliberately mislead the Court and was knowingly in breach of the Court's orders. There was not a shred of evidence to support these allegations. Mr. Segal was not a party to the proceedings, nor was he counsel of record. He was never given notice of these allegations. He had no opportunity to respond to them.

155. For a judge to make such unfounded allegations against anyone is a serious abuse of the judicial office. To make such allegations against a lawyer, and a public official, is especially reprehensible, because of the special value that lawyers necessarily place in their reputations. No judge in the exercise of his office has liberty to malign innocent persons as Justice Cosgrove did.

156. Particulars 2(c) and (d) were cited above as examples of incompetence. However, they are also examples of the abuse of judicial powers. Because he had lost control of the trial, and appeared to take whatever direction defence counsel pointed him in, the judge repeatedly caused Crown counsel to testify on the *voir dire*s,

disqualifying them from acting further as Crown counsel in the case, and denying to the Crown office counsel of its choice. Those are acts of commission that qualify as an abuse of judicial independence.

157. Such arbitrary conduct cannot be shielded from review as an exercise of judicial discretion, or as mere incompetence. The conduct was a deliberate and unwarranted interference in the presentation of the Crown's case. The fact that an ulterior motive for such conduct, such as bias or bad faith, has not been demonstrated, cannot render the conduct any less abusive or unprincipled.

158. Particular 2(g) as proven, demonstrates the use of intemperate and denigrating language which one might characterize as a lack of judicial restraint. It is conduct deserving of reprobation. The conduct particularized in 2(i) would similarly fall into this category.

159. Particular 2(k) is an example of conduct that demonstrates both incompetence, and an abuse of judicial power. The purpose for calling James Cavanaugh to testify about the newspaper article was irrelevant to any matter in issue in the *Elliott* proceedings, and was therefore incompetent. It was an abuse of the judge's power to require Mr. Cavanaugh to attend Court. There was no legitimate or lawful reason for doing so.

160. Particulars 2(n) (o) and (p) which relate to the R.C.M.P. investigation are examples of lack of restraint (denigrating the "so called independent investigation") and also an abuse of the office – by requiring the R.C.M.P. to produce the fruits of its investigation, and refusing to rescind non-communication orders.

161. Particular 2(q) is conduct amounting to an abuse of judicial office. The judge had no jurisdiction to quash a federal immigration warrant for the accused, and purported to do so with no evidence or submissions from Crown counsel. This is arbitrary conduct that is a complete misuse of the judge's office.

162. Particular 4 is conduct that was a misuse or an abuse of the judge's powers. The suggestion that a judge could tell the media what to publish completely misconceives any power a judge possesses.

163. Particular 5 details conduct that is an abuse of the powers of a judge. Ordering Court attendance on threat of arrest was, in the circumstances, improper. Citing, or threatening to cite, for contempt as set out in Particulars 5(c)-(g) was improper and an abuse of the judge's powers.

164. In our opinion, the conduct of the judge referred to in this part in failing to exercise restraint and in abusing the powers of his office is conduct which meets the strict test set out above in Marshall. This conclusion does not rest on the appearance

of bias or on the judge's incompetence in failing to control the trial. It rests rather on his words and conduct, in abusing judicial independence and acting beyond the powers of a judge.

The *Viva Voce* Evidence

165. Each of the four witnesses, who testified before us, gave evidence of the damaging effect that Justice Cosgrove's words and conduct had on them personally, on the conduct of the *Elliott* proceedings, or both. Their evidence amply demonstrates the harm done by the judge's misconduct, and his damaging effect on public confidence in the administration of justice.

166. The damaging consequences of the judge's abuse or misuse of his powers include prohibiting Crown counsel from discussing the case with each other or with witnesses, attributing dishonesty or deceit to Crown counsel, on no factual basis whatsoever, citing Detective Bowmaster for contempt, threatening Mr. Foster and others with contempt and frustrating service of the immigration warrant, with the result that Ms. Elliott was able to flee the jurisdiction.

167. In our opinion, the evidence we have characterized as lack of restraint, abuse of judicial independence, or abuse of judicial powers fully warrants a recommendation for removal from office, subject to whatever effect may be given to the judge's statement of 10 September 2008.

The Judge's Statement

168. Justice Cosgrove's statement is annexed to this report as Appendix E, and should be read in its entirety. However, to give it its proper weight or effect, regard must also be had to the context in which it was given, and to its timing.

169. The judge read his statement to the Inquiry Committee on 10 September 2008, after hearing six days of the evidence adduced by independent counsel. The statement was made with knowledge that independent counsel had intended to call *viva voce* evidence as the next step in the proceedings.

170. It will be remembered that the conduct which is the subject of complaint occurred between September 1997 and September 1999. The judge's reasons for ordering a stay of proceedings were pronounced on 7 September 1999.

171. The Ontario Court of Appeal's judgment setting aside that ruling and ordering a new trial was pronounced on 4 December 2003. The Attorney General of Ontario wrote his letter requesting an inquiry on 22 April 2004.

172. This Inquiry Committee was constituted shortly thereafter and in the fall of 2004 we heard counsel's submissions on the constitutionality of s. 63(1) of the ***Judges Act***.

173. Our reasons for holding the section valid were published on 16 December 2004.

174. Thereafter counsel for Justice Cosgrove sought judicial review of the ruling on the constitutionality of s. 63(1) in the Federal Court of Canada where the judge succeeded. The Crown then appealed to the Federal Court of Appeal where the constitutionality of the section was upheld. Leave to appeal to the Supreme Court of Canada was refused.

175. On 29 February 2008 independent counsel gave notice of hearing and of the particulars of conduct on which he intended to lead evidence.

176. At the same time, or very shortly thereafter, counsel for Justice Cosgrove gave notice of an application for a "Boilard" ruling to the effect that, because the judge's impugned conduct was all in the exercise of judicial discretion, the Council was without jurisdiction to conduct an inquiry. Counsel for Justice Cosgrove sought that ruling in advance of a hearing on the merits. On May 9, 2008, after hearing submissions in telephone conference, the Inquiry Committee rejected the request for an advanced ruling on that subject and directed that the judge's application be made at the time of the hearing on the merits.

177. Subsequently, counsel for the judge asked the Inquiry Committee to give reasons for rejecting his request for an advance ruling. The Committee declined to give reasons.

178. Counsel for Justice Cosgrove then applied for judicial review in the Federal Court of the Committee's ruling refusing an advanced hearing. On 11 August 2008 the Federal Court gave written reasons dismissing the judge's application for judicial review.

179. When the hearing on the merits commenced on 2 September 2008, Justice Cosgrove's motion for a "Boilard" ruling on jurisdiction was, by consent, deferred until after the Committee heard the evidence to be adduced by independent counsel.

180. After six days of hearing the evidence, Justice Cosgrove made his statement. No application for the so-called "Boilard" ruling was subsequently pursued.

181. It was, therefore, almost five years after the Ontario Court of Appeal rendered its judgment, and over fours years after the Attorney General made his complaint, that the judge made his statement, or apology. Up to that point, the judge's position had been, first, that the section of the ***Judges Act*** under which the inquiry was constituted

was unconstitutional, and second, that the Canadian Judicial Council was without jurisdiction because all impugned conduct was in the exercise of the judge's discretion in the courtroom.

182. In his statement (paras. 16-18), the judge offered this explanation as to why he waited so long to apologize:

> I want to address the timing of this apology. At the time of the events, and for years afterward, I had a steadfast belief in the correctness of my decisions. Although they were critized, I, like every trial judge I know, believed my decisions were the right ones. When the Court of Appeal issued its reasons, its harsh assessment of my decision came as a shock to me. Obviously, I accepted their authority to review and correct my judgment. Nevertheless, I was sustained by my view that I had approached the case, and its many problems, in good faith, and to the best of my ability. That overriding belief has informed my view of the case, and this proceeding before the CJC.
>
> Recently, I began to prepare for the current hearing. My preparation has profoundly affected my appreciation of the circumstances of this case. Both on my own and with my counsel, I have spent literally weeks reviewing the record of the trial proceedings, and even reviewing the bench books I created at the time. Finally, I have spent days in this room hearing Independent Counsel's reading passages of the evidence from the proceeding. All of these steps have caused me to re-live the trial, but for the first time from an entirely different perspective.
>
> As a trial judge, I have spent 24 years assessing the actions of others. This process required me to step back and assess my own actions and how they affected others. It has been a revealing and chastening process. That experience has driven home the need for me to make this apology to those affected by my actions, and to make this statement at this time.

Despite the judge's expressed reasons for the timing of his statement, we remain concerned about the delay in its delivery.

183. The content of the statement must also be carefully analyzed. It may not be viewed as an unqualified apology. For example (para. 9), the judge seems to still hold the Crown partly responsible for some of his difficulties; a suggestion that the record completely defies:

> As I have mentioned, the trial was extremely difficult. Counsel for both parties aggressively represented their client's interests. From my

> position, it was a very difficult trial to manage. I tried a variety of techniques to maintain civility in the courtroom and to keep the proceedings focused on the relevant issues at hand. With hindsight, my attempts met with only modest success. I regret that at times I did not try harder and that I did not have more success. (our emphasis)

The judge appears to lack insight into how his own role in the trial contributed to the situation and as a result he minimizes his own responsibility for controlling the trial.

184. The statement further acknowledges "errors" or "mistakes" that were set aside by the Ontario Court of Appeal, and the judge regrets those errors. At para. 8 he says:

> …Moreover, my reasons contained several references to individuals that were not before the court. That was an error, which I regret. I recognize now that my efforts to ensure a fair trial for the accused and to get at the truth made it very difficult for the Crown counsel to prosecute the case effectively. I regret very much the effect my erroneous judicial decisions had on the Ministry of the attorney general, its counsel and the trial process.

185. The judge regrets (para. 9) "… any intemperate, denigrating or unfair language that I may have used…" (our emphasis). He acknowledges "error" in the discretionary exercise of his contempt jurisdiction (para. 11), and recognizes that some of his judicial decisions made in good faith were wrong.

186. The statement contains an apology to all those who have been harmed, including the murder victim's family:

> 14. For the significant errors described above, I sincerely and unreservedly apologize to the Ministry of the Attorney General, its counsel and senior representatives, the police officers and civilian witnesses and counsel that came before me during this case, the public and this Inquiry Committee.
>
> 15. Finally, I would like to apologize to the family of the victim of this crime who, as a result of my legal errors, experienced a significant delay in achieving the closure arrived at by having a criminal prosecution reach its substantive conclusion.

187. In summary, we have carefully considered the judge's statement. Yet, grave concerns remain. Given the judge's serious misconduct over an extended period of time, this statement, even viewed in its most positive light, cannot serve to restore public confidence in the judge, or in the administration of justice.

188. Furthermore, we do not consider that the admonition in place of removal sought by counsel for the judge and endorsed by independent counsel would adequately respond to the conduct. Nor do we think the proposal that the judge not sit on cases involving the federal and provincial Crowns is an appropriate alternative. One may well ask what such a direction would say about the ability of the judge to execute his office.

VI.

Conclusion

189. For the reasons given above, the words used and the conduct engaged in by Justice Cosgrove, over a prolonged period of time, constitute a failure in the due exercise of his office by abusing his powers as a judge. They give rise to a reasonable and irremediable apprehension of bias. Regrettably, his statement is insufficient to offset the serious harm done to public confidence in the concept of the judicial role, as described in the Marshall test. He has rendered himself incapable of executing the judicial office.

190. In our view, the case proven calls for a recommendation for the removal from office of Justice Cosgrove.

[ORIGINAL SIGNED BY:]

The Hon. Lance Finch, CJBC,
Chair of the Inquiry Committee,
on his own behalf and on behalf of
the Honourable Michael MacDonald, CJNS,
John P. Nelligan, Q.C. and Kirby Chown

VII.

Dissenting Reasons of the Honourable Allan Wachowich

191. I concur with my colleagues' reasons outlined above, with the exception of paras. 182-190. I respectfully disagree that this case calls for a recommendation for the removal from office of Justice Cosgrove. I am of the view that Justice Cosgrove's statement is an admission of judicial misconduct and, as such, a strong admonition is appropriate in the circumstances.

192. The Committee has recorded Justice Cosgrove's acknowledgment that his statement to the Committee on September 10, 2008, was in fact an admission of judicial misconduct (at para. 128). Mr. Cherniak was of the opinion that "the facts as particularized and proven were capable of supporting a recommendation for removal" but that "the statement was an admission of judicial misconduct and, given the admission, [Mr. Cherniak] submitted that the facts as particularized supported a strong admonition, but no longer supported a recommendation for removal" (at para. 129). I place significant weight upon the opinion of Mr. Cherniak, who, in his role as independent counsel, represents the public interest. Justice Cosgrove's statement, although late in its arrival, is a sincere admission of judicial misconduct which mitigates in favour of Justice Cosgrove.

193. Although Justice Cosgrove's conduct has been assessed in light of s. 65(2) of the Judges Act, I refer to some of the principles outlined in the Canadian Judicial Council's Ethical Principles for Judges, namely:

> (a) judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence;
>
> (b) judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons;
>
> (c) in performing adjudicative duties with diligence, the judge is expected to strive for impartial and even-handed application of the law, thoroughness, decisiveness, promptness, and the prevention of the abuse of process and improper treatment of witnesses;
>
> (d) judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case;
>
> (e) judges are to treat everyone before the court with appropriate courtesy; and

> (f) judges are obliged to treat all parties fairly and even-handedly and to ensure that proceedings are conducted in an orderly and efficient manner.

194. I consider the above principles in an analysis of Justice Cosgrove's statement to the Committee. The reason for doing so is because independent counsel, Mr. Cherniak, had cited these standards in the Notice sent to Justice Cosgrove in February 2008 (Appendix D). The Notice outlined that Mr. Cherniak was of the view that the conduct of Justice Cosgrove, when viewed in its totality, was inconsistent with the standards of conduct outlined by the Canadian Judicial Council's Ethical Principles for Judges. It is clear that Justice Cosgrove subsequently reflected upon these principles identified by independent counsel, as he refers to them in his statement to the Committee. Specifically, Justice Cosgrove states the following (at para. 13):

> This proceeding has emphasized for me the importance of the work of the judiciary. I have spent much time reviewing the CJC's Ethical Principles for Judges. It is an aspirational document and it is one I work towards every day. I recognize that judges must exhibit and promote high standards of judicial conduct so as to reinforce public confidence. I recognize that at times in the Elliott trial my conduct did not meet the highest standards articulated in the Ethical Principles for Judges. I assure the Inquiry Committee that I have and will continue to dedicate myself to striving to meet those standards at all times.

195. The sincerity of Justice Cosgrove's statement is demonstrated from the outset. He explains that this experience has been "extremely humbling and chastening" for him (at para. 1). He states, "[t]o be clear, I made many mistakes in that trial ... I at times lost my way. ... I now realize that I made a series of significant errors that affected that proceeding" (at para. 3). Justice Cosgrove outlines that he read the Court of Appeal decision carefully and was humbled (at para. 4). He states that "the Court of Appeal found that I had made many errors in my findings of fact and I had misapplied the law on numerous occasions. I accept their reasons without reservation" (at para. 4). Justice Cosgrove notes that he reflected upon the Court of Appeal's decision for the past five years and he then states the following: "The Court of Appeal's reasons for decision have affected me greatly. I have no doubt they have made, and will make me, a better trial judge. I fully appreciate my duties and responsibilities as a judge. I have changed, and will continue to change, my approach to judicial decisions based upon the insights I have obtained from the reasons of the Court of Appeal" (at para. 5). Justice Cosgrove also explains that he has "spent many hours reflecting carefully on the Notice provided to me by independent counsel" (at para. 7).

196. The majority of the Committee notes that Justice Cosgrove's statement may not necessarily be viewed as an unqualified apology (at para. 183) and the Committee

then outlines portions of the statement that raise such a concern. I respectfully disagree, however, that the phrase "[c]ounsel for both parties aggressively represented their client's interests" (at para. 9) can be interpreted, as suggested by the Committee (at para. 183), to mean that Justice Cosgrove still holds the Crown partly responsible for his difficulties throughout the trial. Nor do I agree that utilizing the word "may" in the regret expressed for "any intemperate, denigrating or unfair language that I may have used" (at para. 9) is to be construed unfavourably towards Justice Cosgrove's statement in its entirety. Rather, Justice Cosgrove realizes that his conduct during the trial was not above reproach in the view of reasonable, fair minded and informed persons. He admits, "[w]ith hindsight, my attempts met with only modest success. ... It is certainly not typical of my conduct in the courtroom, and I have and will continue to ensure that I always conduct myself in the best traditions of the judiciary" (at para. 9).

197. Further, the statement illustrates that Justice Cosgrove now realizes he did not perform his adjudicative duties with the utmost diligence. He regrets not adhering to the highest standard of impartiality and an even-handed application of the law, which includes treating all parties fairly and even-handedly and to ensure that proceedings are conducted in an orderly and efficient manner. Justice Cosgrove explicitly reflects upon and regrets his errors of findings against the "Ministry of the Attorney General and its senior representatives, Crown counsel, police officers and public officials" as well as his "references to individuals that were not before the court" (at para. 8). He adds "I regret very much the effect my erroneous judicial decisions had on the Ministry of the Attorney General, its counsel and the trial process" (at para. 8). Moreover, after reviewing the trial transcript, Justice Cosgrove notes that "defence counsel used extravagant rhetoric to characterize the conduct of the Crown counsel and the police. Some of his statements simply had no place in a courtroom. While I interjected from time to time in an attempt to curb his excesses, it is now evident to me that I did not intervene forcefully or often enough. I should have. I will in the future" (at para. 10).

198. Justice Cosgrove also recognizes that he erred in his discretionary exercise of the contempt jurisdiction and he states, "I appreciate the purpose of the contempt power and have carefully reviewed the CJC's Guidelines on the Use of Contempt Powers. I will continue to be guided by them in the future" (at para. 11). He admits that some of his judicial decisions "unnecessarily expanded the scope of the trial and diverted attention from the central issues of the proceeding. These decisions were wrong. They unnecessarily delayed the proceeding and wasted scarce resources on matters that, with the benefit of hindsight, were not material to the proceeding" (at para. 12).

199. Justice Cosgrove ultimately states the following (at paras. 14-15):

> For the significant errors described above, I sincerely and unreservedly apologize to the Ministry of the Attorney General, its counsel and senior representatives, the police officers and civilian witnesses and counsel that came before me during this case, the public and this Inquiry Committee.
>
> Finally, I would like to apologize to the family of the victim of this crime who, as a result of my legal errors, experienced a significant delay in achieving the closure arrived at by having a criminal prosecution reach its substantive conclusion.

200. Although the majority takes the view that the statement, even viewed in its most positive light, cannot serve to restore public confidence in Justice Cosgrove, nor in the administration of justice (at para. 187), I respectfully disagree. It is clear from the statement that Justice Cosgrove has undergone serious reflection about his past conduct, recognizing how his errors have affected the trial process and public confidence in the justice system. He has reviewed the Canadian Judicial Council's Ethical Principles for Judges, as well as the Council's Guidelines on the Use of Contempt Powers. The entirety of Justice Cosgrove's statement demonstrates utmost regret for his conduct, but it also exemplifies his determination to exhibit and promote the high standards of judicial conduct, so as to reinforce public confidence in himself and the administration of justice. It is my view that the public not only understands the gravity of Justice Cosgrove's past conduct and the effect it has had on the administration of justice, but that the public is also capable of understanding Justice Cosgrove's sincere apology and his ability to refrain from such behaviour in the future. Public confidence in the administration of justice is attainable through a strong, public admonition of Justice Cosgrove.

201. I conclude by emphasizing that Independent Counsel is of the view that the facts of this case support a strong admonition as opposed to removal from office of Justice Cosgrove. The reason Independent Counsel came to such a conclusion is because of Justice Cosgrove's sincere admission of judicial misconduct in his statement to this Committee. I agree with Independent Counsel, as displayed in my analysis above, and therefore accept Justice Cosgrove's statement as an admission of judicial misconduct. If there were evidence put forth of a history of judicial misconduct, my conclusion might well be different. I therefore recommend that Justice Cosgrove be strongly admonished for the judicial misconduct displayed in the case of R. v. Elliot, and that he not be removed from office.

[ORIGINAL SIGNED BY:]

The Hon. Allan Wachowich, CJ Alta. Q.B.