THE CANADIAN JUDICIAL COUNCIL

IN THE MATTER OF AN INQUIRY COMMITTEE CONSTITUTED PURSUANT TO SECTION 63 OF THE JUDGES ACT R.S.C. 1985, C. J-1 AS AMENDED INTO THE CONDUCT OF THE HONOURABLE PAUL COSGROVE OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO

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HELD BEFORE THE HONOURABLE LANCE S.G. FINCH (CHAIRPERSON), THE HONOURABLE ALLAN H. WACHOWICH THE HONOURABLE J. MICHAEL MACDONALD KIRBY CHOWN and JOHN P. NELLIGAN, Q.C.

at Federal Court of Canada
180 Queen Street West, Courtroom No. 7A, Toronto, Ontario
on Tuesday, September 2, 2008 at 9:32 a.m.

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APPEARANCES:

Earl Cherniak, Q.C. Cynthia Kuehl	Independent Counsel appointed pursuant to the *Complaints Procedure*
Chris Paliare Richard Stephenson Robert A. Centa	for The Honourable Paul Cosgrove
George K. Macintosh, Q.C.	for the Inquiry Committee

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LIST OF EXHIBITS

Toronto, Ontario

--- Upon commencing on Tuesday, September 2, 2008 at 9:32 a.m.

THE CHAIR: Yes, gentlemen.

MR. CHERNIAK: Good morning, panel. My name is Earl Cherniak. I appear as independent counsel to this inquiry, and I am assisted by my partner, Cynthia Kuehl, K-U-E-H-L.

THE CHAIR: Thank you, Mr. Cherniak. Yes.

MR. PALIARE: Chris Paliare acting for Justice Cosgrove, assisted by my partners Richard Stephenson and Rob Centa.

THE CHAIR: How do you spell the last name, please?

MR. PALIARE: P-A-L-I-A-R-E, Stephenson --

THE CHAIR: It was the last, last name I was --

MR. PALIARE: Centa, C-E-N-T-A.

THE CHAIR: Thank you.

MR. PALIARE: And Justice Cosgrove is sitting with us at the counsel table.

THE CHAIR: Thank you. Mr. Cherniak.

OPENING SUBMISSIONS BY MR. CHERNIAK:

MR. CHERNIAK: Thank you. May it please the panel, this inquiry is mandated by statute following the complaint by the Attorney General of Ontario to the Canadian Judicial Council on April 22nd, 2004, following which the CJC, as provided for in section 63(1) of the Judges Act, constituted this inquiry as to whether a recommendation should be made that Justice Cosgrove should be removed from office on the grounds set in section 65(2) of the Judges Act.

The constituting of this inquiry, as the panel knows, survived a constitutional challenge by Justice Cosgrove.

We have prepared a book of relevant statutes and authorities, which should be before you and which I wish to make some reference during my opening. It is in two volumes. They are white. The covers are white.

The relevant sections of the Judges Act are included in the books, as are the Inquiries and Investigations By-laws of the CJC. They are at tabs 1 and 3.

The relevant sections of the Constitution Act are in tab 2. Pursuant to section

65(3) of the Judges Act, the CJC appointed this Inquiry Committee. I propose to file the complaint of the Attorney General of Ontario as Exhibit 1 to the inquiry.

I believe the panel has copies of all the material that I propose to file. I know you have some of it.

EXHIBIT NO. 1: Complaint of Attorney General of Ontario.

MR. CHERNIAK: The complaint of the Attorney General relates to the conduct of Justice Cosgrove in the trial of Regina versus Julia Yvonne Elliott for murder.

The complaint of the Attorney General of Ontario refers to and incorporates large parts of the reasons of the Ontario Court of Appeal in the appeal from Justice Cosgrove's decision on September 7th, 1999 to stay the charges against Julia Elliott, and I propose to file the reasons of the Court of Appeal for Ontario dated December 4, 2003 as Exhibit 2 in the inquiry, and the complaint in the Court of Appeal reasons, along with the notice that I will come to, to provide a framework for the case that I will present.

EXHIBIT NO. 2: Reasons of

the Court of Appeal of Ontario, dated December 4, 2003, complaint in Court of Appeal reasons with notice.

THE CHAIR: Is there any agreement between counsel, Mr. Cherniak, as to the evidentiary value or effect of these documents? For example, if there were expressions of opinion in the Ontario Court of Appeal's reasons, how are we to treat that?

MR. CHERNIAK: I am not sure that we have -- we don't have a formal agreement. I am going to come in my opening briefly to deal with what effect in this proceeding the reasons of the Court of Appeal are, the position I take, at least, and I do intend to review that briefly this morning in my opening, and then it will be a matter of the final submissions.

I suspect there won't be a lot of difference between us, but we do not have a formal agreement on that point. Perhaps you can hear what I have to say and --

THE CHAIR: I see Mr. Paliare is about to offer us something. At this point, can you assist?

MR. PALIARE: Yes, I can. In fact, we will be taking the position that you can look at the letter of the Attorney General and you can look at what the Court of Appeal said, because that's how we got here, i.e., background, but I disagree with my friend that there will not be much difference between us, because there will be a huge difference between us as to the use you can make of either of those two documents.

We take the position, for the purposes of your determination, they are not of any value. They are not relevant. So when I get to my opening, I will put some of that to you, but I didn't want to be left without having answered your question, Justice Finch, on behalf of Justice Cosgrove.

THE CHAIR: Thank you.

MR. CHERNIAK: The Canadian Judicial Council, pursuant to the Inquiries and Investigations By-laws, section 3, appointed me as independent counsel to present the case to the inquiry -- that's the words used in the by-law -- and make submissions on procedure and issues of applicable law. The by-laws provide that I am to act impartially and in the public interest.

The role of an Inquiry Committee was recently considered in the Matlow inquiry. If you look at tab 12 of volume 1 of your books of authorities, you will see the passage that I am going to refer you to, and it is a useful summary that this panel might find helpful. Starting at paragraph 11 at page 5, it reads:

> "By-law 8(1) of the Inquiries and Investigations By-laws provides that:
>
> "8(1) The Inquiry Committee shall submit a report to the Council setting out its findings and its conclusions in respect of whether or not a recommendation should be made for the removal of the judge from office."

Paragraph 12:

> "In carrying out its responsibilities, the Inquiry Committee must bear in mind that it is the CJC that it is to report its --"

Underlined "its":

" -- conclusion, submit a report of the investigation to the Minister and 'may recommend that a judge be removed from office.' This Inquiry Committee is, in effect, the means by which the CJC conducts the investigation and gathers the factual information necessary for it to reach conclusions and make any recommendation it decides to make to the Minister."

Paragraph 13:

"That being the case, the 'findings' of fact that the Inquiry Committee includes in its report to the CJC must be sufficient, in both extent and detail, to enable the CJC to accept any conclusion drawn or recommendation made by the Inquiry Committee, or reject it and develop its own

conclusion or recommendation on the basis of its own assessment of the facts relevant to the issue being considered. Therefore, it is incumbent on this Inquiry Committee to make and express all the findings of fact that may be necessary for the CJC to make any recommendation that it determines to be appropriate, independent of what this Inquiry Committee concludes or recommends, and independent of what this Inquiry Committee concludes may be a sufficient factual basis to enable it to make a recommendation."

I suggest that is a useful outline of the function of an Inquiry Committee.

While we are on that page, so we don't have to turn it up again, I want to refer to paragraph dealing with the standard of proof, and this issue will come up when we make our final

submissions, but paragraph 14 has some significance, because it says:

> "In defining its role and responsibility, the Inquiry Committee must bear in mind two further significant factors. First, this Inquiry Committee is an investigative body, not an adjudicative one. As such, it does not have a responsibility to arrive at a judgment in respect of any particular issue or issues. Second, independent counsel acts impartially and does not bear any onus of proof. It is, therefore, necessary to give some consideration to the standard of proof and the evidentiary standard by which the Inquiry Committee is to make it factual determinations."

At a later stage, the standard

that it set will be relevant.

The nature of the work of this Inquiry Committee is important. If you turn to the Ruffo case in the Supreme Court of Canada 1995 at tab 25 in volume 2, at page 311, 312, the Ruffo case was a case that involved consideration of judicial conduct in respect of Quebec Provincial Court judges. So it was an analogous framework for the consideration of a federal inquiry.

My submission is that this is in no sense an adversarial proceeding; rather, it is an inquiry as to whether a recommendation for removal or some other disposition should be made in the first instance by the Inquiry Committee to the CJC.

What Justice Gonthier said is instructive. This is at the bottom of page 311, and these passages are marked:

> "As I noted earlier, the Comite's mandate is to ensure compliance with judicial ethics; its role in this respect is clearly one of public order. For this purpose, it must inquire into

the facts to decide whether the Code of Ethics has been breached and recommend the measures that are best able to remedy the situation. Accordingly, as the statutory provisions quoted above illustrate, the debate that occurs before it does not resemble litigation in an adversarial proceeding; rather, it is intended to be the expression of purely investigative functions marked by an active search for the truth.

"In light of this, the actual conduct of the case is the responsibility not of the parties but of the Comite itself, on which the CJA confers a pre-eminent role in establishing the rules of procedure, researching the facts and calling witnesses.

Any idea of prosecution is thus structurally excluded. The complaint is merely what sets the process in motion. Its effect is not to initiate litigation between two parties. This means that where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comite does not thereby become both judge and party: As I noted earlier the Comite's primary role is to search for the truth; this involves not a lis inter partes but a true inquiry in which the Comite, through its own research and that of the complainant and of the judge who is the subject of the complaint, find out about the situation in order to determine the most

> appropriate recommendation based on the circumstances of the case before it."

My submission is that the statements by Justice Gonthier apply with equal force to an inquiry under the Judges Act.

Similar consideration was set out by Madam Justice Sharlow when this matter, on a constitutional challenge, came to the Court of Appeal. You will find what she said at tab 14 in volume 1 at page 728, 729.

Looking at the bottom of page 728, Madam Justice Sharlow, under the heading "Judicial independence and judicial conduct", said:

> "An independent judiciary is essential to the rule of law in a democratic society. Indeed, the Inquiry Committee in this case said that judicial independence is the single most important element in the rule of law in a democratic society, followed closely by the necessity of an independent bar (Inquiry

Committee decision --"

That's the decision of this Inquiry Committee paragraph 26. I agree:

"The independence of the judiciary is a constitutional right of litigants, assuring them that judges will determine cases that come before them without actual or apparent interference from anyone, including anyone representing the executive or legislative arms of government."

Then she refers to Beauregard and Lippe:

"Justice Strayer expressed this principle as follows in Gratton --"

And I won't bother reading the citations, but Justice Strayer says:

"Suffice it to say that independence of the judiciary is --"

I am sorry. This is a quote from

Justice Strayer in Gratton:

> "Suffice it to say that independence of the judiciary is an essential part of the fabric of our free and democratic society. It is recognized and protected by the law and the conventions of the Constitution as well as by statute and common law. Its essential purpose is to enable judges to render decisions in accordance with their view of the law and the facts without concern for the consequences to themselves. This is necessary to assure the public, both in appearance and reality, that their cases will be decided, their law will be interpreted, and their Constitution will be applied without fear or favour. The guarantee of judicial tenure

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

End quote. Madam Justice Sharlow goes on to say:

> "However, judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary."

She gives a citation from the Moreau-Berube versus New Brunswick case.

In the case of a federal section

63 inquiry, which this is, it is not the complainant but, as indicated earlier, independent council that presents the case to the Inquiry Committee. Having made the complaint, even an Attorney General has no further role in a CJC section 63 inquiry.

I referred earlier to the proposition that independent counsel, in presenting the case to an Inquiry Committee, bears no onus of proof. Rather, in my respectful view, the role of independent counsel is to present the case to the Inquiry Committee for its consideration so that it can report to the Canadian Judicial Council sending out its findings and conclusions in respect of whether or not a recommendation should be made, as contemplated by section 8 of the by-laws of the Matlow committee, Inquiry Committee referred to.

The case presented by independent counsel is to assist the Inquiry Committee in its work. The rationale for this proposition, in my submission, is rooted in that part of the doctrine of the independence of the judiciary that addresses the issue of complaints and misconduct against judges, which the jurisprudence posits as an important aspect of judicial independence, and the

fact that this is an inquiry and not an adversarial process, the judiciary alone is the appropriate regime for the review of judicial conduct, to use the words of Madam Justice Sharlow in Cosgrove, and not the state, not the bar or the complainant.

In Canada, in the case of federally appointed judges, the scrutiny and the regime for the review of judicial conduct since 1971 is mandated by the Judges Act, section 63 and the following sections and the by-laws of the Canadian Judicial Council, and it is within the jurisdiction of the Canadian Judicial Council.

While an Inquiry Committee such as this one may be instituted to include lawyers, as well as judges, its function is to report to the Canadian Judicial Council, which is made up only of judges and, indeed, Chief Justices.

So the role of independent counsel is to facilitate the work of the Inquiry Committee, but he or she -- in this case he -- there is no sense of parte. There is no sense of parte and does not plead the case to be presented for a particular result, finding, conclusion or recommendation, because that is for the Inquiry Committee and the CJC alone.

The exception to this approach -- and, in my submission, it is really a corollary more than an exception -- is that the independent counsel may, after investigation and consideration, take the position that there is no case for judicial misconduct to be presented, such as occurred in the Boilard inquiry, which you will find at tab 9.

But even then, the decision whether or not to proceed in the face of the recommendation of independent counsel is that of the Inquiry Committee, and then the CJC. In Boilard, the Inquiry Committee disagreed with the submissions of independent counsel, but ultimately the Canadian Judicial Council disagreed with the Inquiry Committee.

So given the role of independent counsel, I will make no submission at the end of the evidence as to what findings, conclusions or recommendations the Inquiry Committee should come to. Rather, I will make submissions to assist the Inquiry Committee in determining whether the case presented is capable of supporting a recommendation for removal or some other recommendation, but whether the case so presented does or does not

support a recommendation or supports some other finding is for this committee, based on its consideration of all the evidence presented to it, and its understanding of what constitutes misconduct by a judge, and then your findings and conclusions or recommendations will be considered by the Canadian Judicial Council as a whole.

Of course, under the Judges Act, the role of the Canadian Judicial Council in the process that could lead to removal is itself one of recommendation only to the Minister and not decision, because, under the Constitution Act, a Superior Court or other federally appointed judge can only be removed by a joint address of both Houses of Parliament.

The accepted test as to whether the recommendation for removal of a judge, pursuant to section 65(2) of the Judges Act -- is the Marshall's test, and you will find that at tab 12 at page 27. Sorry, at tab 11 at page 27.

You will see that the Inquiry Committee in that case formulated a test which seems to have been accepted universally since that time, in these words:

"The test we would propose to

> apply, as applicable to this case, is an alloy of these many considerations and takes the following form:
>
> "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?"

It is useful, as well, to review the definition of the judicial function, and that was done at some length by Justice Gonthier in Re Therrien in 2001 at tab 24 in volume 2, starting at page 74, paragraph 108, under the heading "The Role of the Judge: 'A Place Apart.'"

Justice Gonthier said:

> "The judicial function is absolutely unique. Our society assigns important

> powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the Canadian Charter, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies."

I will omit the citations:

> "Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the

ones who state the law, grant the person rights or impose obligations on him or her. "If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them --"

I will leave out the rest:

"Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains: "Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law.

> Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment."

Justice Gonthier goes on to say:

> "The public will therefore demand virtually irreproachable conduct from

anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens."

On February 29th, 2008 Justice Cosgrove was provided with a notice containing an outline of the facts, allegations and particulars found in the evidence and transcripts from the proceedings in the earlier trial, which, in the view of independent counsel, as stated in the notice, if accepted by the Inquiry Committee, are capable of meeting the test for removal from office under section 65(2) of the Judges Act and the Marshall inquiry test.

I propose to file that notice as Exhibit No. 3.

EXHIBIT NO. 3: Notice to

Justice Cosgrove dated February 29, 2008.

MR. CHERNIAK: In 2004, after this Inquiry Committee was constituted and independent counsel was retained, Justice Cosgrove was supplied with the following material: A complete copy of the transcripts of evidence and particulars in Regina versus Elliott held in Brockville and Ottawa before Justice Cosgrove; secondly, complete copies of the facta filed on the appeal in Regina versus Elliott; thirdly, access to the appeal books, which included all exhibits except those we understood to be under seal, as requested, or a complete copy if requested.

The Elliott trial and the various motions and evidence that led to the stay of proceedings by Justice Cosgrove occupied a period, on and off, of two years from September 1997 to September 1999. The transcripts of evidence from that hearing amounted to some 20,000 pages in 120 volumes of evidence at the conclusion of which, on September 7th, 1999, Justice Cosgrove gave reasons for his order staying the proceedings, which was the subject matter of the appeal to the Ontario Court of Appeal.

Those reasons are found in the books of evidence that I will be filing. The appeal of the Attorney General of Ontario from that order was heard by the Ontario Court of Appeal in September 2003. The factum of the Attorney General, quite unusually, at least in my experience, amounted to some 1,700 pages and the responding factum was some 850 pages.

The response of Julia Elliott to the Attorney General's appeal was, as well, most unusual, as noted by the Court of Appeal at paragraph 2, 3 and 4 of its reasons, in that appeal counsel for Ms. Elliott, not the same counsel as at trial, did not seek to support either the reasons of Justice Cosgrove or the conduct of her counsel at trial. Rather, the new counsel attacked the conduct of the trial and the competence of both Julia Elliott's counsel and the trial judge.

The decision of the Court of Appeal ordering a new trial was pronounced on December 4th, 2003, and I have already filed that and there is another copy in the books of evidence.

This Inquiry Committee is aware of the motion made by Justice Cosgrove in May 2008 that there is no basis to proceed with this

inquiry, because the particulars and allegations made in the notice are not capable of supporting a recommendation for removal, and the Inquiry Committee was advised recently that the motion will not be made at the outset of the inquiry.

Independent counsel and counsel to Justice Cosgrove have agreed as follow: (a) Justice Cosgrove's motion will be deferred until the conclusion of the presentation of the case by independent counsel; (b) independent counsel will not take the position at that time that it is inappropriate for the Inquiry Committee to hear and decide Justice Cosgrove's motion at that time, and that the Inquiry Committee should defer hearing or determining Justice Cosgrove's motion until after he has adduced such evidence as he wishes to put before the Inquiry Committee; (c) rather, it remains for the Inquiry Committee to determine when it will hear Justice Cosgrove's motion; and (d) the issue to be determined by the Inquiry Committee on Justice Cosgrove's motion, whenever it is heard, is whether the case presented by independent counsel is capable of supporting a recommendation for removal or, failing that, supporting a finding of misconduct short of that warranted removal.

HON. MACDONALD: Sorry, can you run that by me one more time?

MR. CHERNIAK: Yes. The issue to be determined by the Inquiry Committee on Justice Cosgrove's motion, whenever the Inquiry Committee decides to hear it, is whether the case presented by independent counsel is capable of supporting a recommendation for removal, or, failing that, support a finding of misconduct short of that warranted removal.

And, finally, (e) should the Inquiry Committee hear Justice Cosgrove's motion at the conclusion of the presentation of the case by independent counsel and make a ruling that the evidence is capable of either supporting a recommendation for removal or some other recommendation, Justice Cosgrove will then have the ability to adduce such further evidence as he sees fit, after which, following submissions by counsel, the Inquiry Committee will make its final report to the CJC setting out its findings and conclusions in respect of whether or not a recommendation should be made and its recommendation on the basis of all of the evidence presented.

I propose to proceed as follows:

In addition to the exhibits already filed, I offer five volumes of material, which include Court of Appeal reasons which are already an exhibit; (b) the reasons of Justice Cosgrove on the stay application dated September 7th, 1999 and the appendices attached to those reasons, which include, inter alia, earlier rulings of Justice Cosgrove in the Elliott trial; (c) extracts from the evidence and submissions in the Elliott trial arranged by reference to the particulars given to Justice Cosgrove in the notice to him, with a cross-referenced index to avoid, as much as possible, duplication in the evidence; and (d) the last volume is a further volume of extracts provided by Justice Cosgrove's counsel to supplement what is in the four volumes prepared by independent counsel.

In addition to those five volumes and the books of evidence, I may call certain participants in the earlier trial, including certain Crown counsel, police officers and lay witnesses, with respect to certain aspects of the trial. I understand from Mr. Paliare that he may object to some or all of these witnesses. I do not propose to call any of them until next week.

With the exception of one of those proposed witnesses, they all reside outside of Toronto in the Ottawa or Brockville areas.

As I indicated, the proceedings over the two-year period of the trial resulted in some 20,000 pages of transcript. We have excerpted a relatively small portion of it in the evidence books that you have behind you, but it is still a considerable volume.

The entire transcript is available in this courtroom in hard copy and electronically on disk and can be supplied to the panel, and Ms. Kuehl advises me it is searchable. I propose to offer the five volumes of the books of evidence as the next five exhibits, Exhibits 4 to 8, and the volumes are numbered 1 to 5, so volume 1 will be Exhibit 4.

EXHIBIT NO. 4: Book of evidence volume 1.

EXHIBIT NO. 5: Book of evidence volume 2.

EXHIBIT NO. 6: Book of evidence volume 3.

EXHIBIT NO. 7: Book of evidence volume 4.

EXHIBIT NO. 8: Book of evidence volume 5.

MR. CHERNIAK: One of the reasons that the books of excerpts are as lengthy as they are is that it was considered appropriate to provide the surrounding context of the trial in respect of each particular of the allegations put forward in the notice, and I will refer as I go along to the particulars in the evidence, but from the trial evidence in the proceedings that are relevant to each particular.

I don't propose to read all the material in the evidence books. That would take much longer than we have available to us, but, rather, to direct you to the pages most relevant to the particular in consideration, and I will summarize other portions, but it is the evidence itself that is the case that I present to the extent it differs from what I say.

It is important to appreciate at the outset that while there are separate allegations of misconduct against Justice Cosgrove with a number of particulars under each allegation, it is really only one complaint of misconduct, with several aspects to it.

The complaint is that Justice Cosgrove misconducted himself in how he conducted the Elliott trial towards the Crown, towards Crown counsel, the police, the witnesses and the public. The misconduct that is the basis of the complaint of the Attorney General in the case that independent counsel is presenting is not that he granted a stay of a prosecution that was reversed by the Court of Appeal; rather, the case presented relates to the conduct of the proceedings and the misuse of the Charter.

Independent counsel -- and I am sure this panel appreciates the distinction between a judicial decision that is simply wrong and subject to reversal and conduct that is capable of supporting a recommendation for removal, which may or may not have within it a judicial decision.

The case that independent counsel is presenting is that the conduct of the Elliott trial is capable of supporting a finding that has brought the administration of justice into disrepute and is capable of satisfying the Marshall test for a recommendation for removal.

The reasons of the Court of Appeal that Chief Justice Finch asked me about earlier are

relevant not because they reverse the findings of Justice Cosgrove, but because they are capable, along with the evidence of the trial, of supporting the conclusion that the administration of justice was brought into disrepute by the manner in which the trial was conducted to such an extent that the Marshall test is met.

The fact that there were 150 Charter breaches by the Crown and the police that were found almost entirely not to be justified is relevant not because of the decisions themselves, but what Justice Cosgrove's use of the Charter shows about his suspicions about the particular, complaint of suspicions and bias against Crown, Crown counsel and the police that are particularized in the notice.

While some of the allegations and particulars in the notice deal with orders and findings made by Justice Cosgrove in the Elliott trial, the issue before this Inquiry Committee, again, is not whether those decisions were right or wrong, but whether in undertaking the inquiries that resulted in those decisions and the circumstances that led up to them, along with other matters that occurred in the course of the trial,

there is support for a recommendation for removal.

In order to determine the issue before this Inquiry Committee, the findings of fact, conclusions and the recommendations that this Inquiry Committee is bound to do, the view of independent counsel is that the Elliott trial must be looked at as a whole, the sum of the various aspects of it, and not the individual particulars and the evidence as to those particulars taken individually.

Some of what occurred at the trial and the evidence that I will read to you is capable of being considered more indicative of judicial misconduct than other aspects of the trial and, were they considered simply in isolation, would not likely be capable of supporting a recommendation for removal, but it is the conduct of the trial as a whole that is at issue, and the basis for the notice, not the individual particulars of the alleged misconduct.

This being the case, my respectful view is that the Inquiry Committee ought to review all of the relevant incidents, evidence and events that mark the Elliott trial that are part of the case to be presented.

This was the view of the majority of the Inquiry Committee in the Bienvenue inquiry in 1996, and you will find this at tab 7 of volume 1 of the books of authorities at pages 60 to 61. There is in that tab both the reasons of the Inquiry Committee and one judge who dissented, so I am reading from the majority decision under the heading "Recommendation".

HON. WACHOWICH: Page, please?

MR. CHERNIAK: Page 60. What the majority said was this:

> "If the judge's meeting with the jury after the verdict had been an isolated occurrence, we would merely have expressed our disapproval of this violation of paragraphs 65(2)(b) and (c) of the Act --"

Being the Judges Act:

> " -- on the assumption that such an occurrence would not happen again. The judge's remarks about women and his deep-seated ideas behind

those remarks legitimately cast doubt on his impartiality in the execution of his judicial office. Yet impartiality is the essence of the office of judge. Accordingly, this violation led us to conduct a further analysis to determine whether Mr. Justice Bienvenue had become incapacitated or disabled from the due execution of the office of judge.

"That analysis required us to review all the incidents that marked Tracy Theberge's trial or occurred after trial. We also particularly took account of Mr. Justice Bienvenue's testimony at the inquiry. We find that the judge has shown an aggravating lack of sensitivity to the

communities and individuals offended by his remarks or conduct. In addition -- the evidence cannot be clearer -- Mr. Justice Bienvenue does not intend to change his behaviour in any way.

"Because his conduct during all the incidents, that marked Tracy Theberge's trial Mr. Justice Bienvenue has undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. In our view, this is the conclusion that would be reached by a reasonable and informed person.

"Combining the test used by the Committee of the Canadian Judicial Council in the Marshall case and that applied by the Supreme Court

> to assess judicial impartiality and independence, we believe that if Mr. Justice Bienvenue were to preside over a case, a reasonable and informed person, reviewing the matter realistically and practically -- and having thought the matter through -- would have a reasonable apprehension that the judge would not execute his office with the objectivity, impartiality and independence that the public is entitled to expect from a judge."

The majority reasons, and particularly these paragraphs of the Inquiry Committee, were accepted by a majority of the Canadian Judicial Council in its report to the Minister of Justice recommending removal of Mr. Justice Bienvenue from office, and you will find that at tab 6, at tab 6 on the last page of the tab 71.

MR. NELLIGAN: May I hear that again, please?

MR. CHERNIAK: Tab 6, the very last page, page 71. This is the report of the Canadian Judicial Council, and it says it is the reasons of all the majority members, except Chief Justice McEachern, and it reads in the passage marked on page 71:

> "We are, however, of the view that the question whether Mr. Justice Bienvenue breached the duty of good behaviour under s. 99 of the Constitution Act is one exclusively for consideration by Parliament. We have, therefore, only addressed the provisions of s. 65 of the Judges Act.
>
> "The totality of the matters dealt with by the Inquiry Committee demonstrably support the majority Committee's conclusion that 'Mr. Justice Bienvenue has

> shown an almost complete lack of sensitivity to the communities and individuals offended by his remarks.' Interwoven throughout the evidence is a complete lack of appreciation by Mr. Justice Bienvenue of the duties and responsibilities of a judge.
>
> "It is important to note that the majority emphasized that: "In addition -- the evidence cannot be any clearer -- Mr. Justice Bienvenue does not intend to change his behaviour in any way."

The committee goes on to say there has been no change; at least the majority goes on to say there has been no change, and concludes by saying:

> "It is essential to the integrity of the administration of justice that the public have

confidence in the impartiality of the judiciary. We agree with the majority of the Inquiry Committee that the public can no longer reasonably have such confidence in Mr. Justice Bienvenue."

I do not propose to further open by summarizing the case to be presented, as would be the case in an adversarial trial. It is well summarized in the complaint of the Attorney General and the Court of Appeal reasons, and I propose to go to the evidence and deal with the evidence supporting the particulars in the notice.

I understand Mr. Paliare has an opening.

MR. PALIARE: I do, Mr. Cherniak.

OPENING SUBMISSIONS BY MR. PALIARE:

MR. PALIARE: Members of the committee, it is my privilege to appear on behalf of my client, the Honourable Mr. Justice Paul Cosgrove. We welcome the opportunity to address the Inquiry Committee at the outset of these proceedings, because, in our view, it is

appropriate for the Inquiry Committee, when undertaking its important work, to do so with the appropriate focus and mindful of the applicable principles that will guide your work.

Mr. Cherniak has touched on some of those principles, and he and I may part company with respect to some of them, and that is why, in my respectful view, we should deal with this at the outset in order that we can at least be on the same page.

My opening will be in four parts. The first will be dealing with the legal framework, and, unlike Mr. Cherniak, I think it is important that we deal with my second and third points, which are the factual framework and the chronology, and, finally, procedural issues that we want to raise with you at this stage.

In terms of the legal framework, one of the critical aspects that we say will guide the committee and the participants in this inquiry is an understanding of the legal analysis that must ultimately be applied by this committee in reaching its conclusion.

From our perspective, if this inquiry is to proceed in an organized and

systematic fashion, it is critical that there be a common understanding as to the relevant legal tests and standards that will be applied.

As a result, we want to take a few moments to outline for you the understanding of that legal framework that we bring to this proceeding. In our view, it is both convenient and appropriate to address these matters at the outset.

One important consideration that we say must guide you is the recognition of the truly extraordinary nature of the proceeding you are undertaking. Inquiries into the conduct of Superior Court judges are a rare occurrence in Canada. There have been only eight such inquiries since 1990. That rarity in and of itself makes an Inquiry Committee proceeding an extraordinary event.

However, as you will see, even amongst this constellation of rare events, the nature of the allegations in this specific case set it apart from all but one other judicial conduct inquiry undertaken by this body.

As you will see from the notice of allegations, this is not a case where Justice Cosgrove is accused of taking a bribe. He is not

accused of making sexist or racist comments either inside or outside the court. He is not accused of speaking out publicly on matters of public controversy. He is not accused of participating in a case where he had a pecuniary or other interest in the outcome. He is not accused of using his judicial office for personal gain, not accused of being intoxicated or disorderly in the courtroom or elsewhere. And, finally, he is not accused of having committed some kind of criminal or other unlawful act.

Rather, the allegations in this case are restricted in their entirety to a series of judicial decisions made by Justice Cosgrove in the discharge of his judicial duties in a criminal trial over which he was the presiding judge for approximately two years.

No one can suggest that the issue of legal correctness, or lack thereof, of any of those judicial decisions is a proper matter of inquiry for this body. My friend acknowledges that. A determination of a mistake of fact or law is the exclusive function of appellate courts in our system of justice, and neither this Inquiry Committee, the council as a whole or parliament can

or will assume the role of an appellate court.

Moreover, the failure to meet some standard of competence in fulfilling judicial duties is also not a basis for removing a Superior Court judge. You can find that proposition in the decision dealing with Justice Gratton at page 34.

Judges are only answerable to their own consciences and to appellate courts for the correctness of their decisions.

In the Marshall case, there is a presumption that is found throughout the later cases that judges ought not to be removed from office for legal errors. Moreover, in the course of deciding a case, a court is entitled to comment on evidence before it and upon the conduct of the parties or witnesses as part of its judicial duty to analyze the evidence and comment upon it.

If a review of the legal correctness of Justice Cosgrove's judicial decisions is not a question for this committee, then I ask: What exactly is the mandate of the committee? It would appear that the position of Mr. Cherniak is that your role is: (a) not to determine what Justice Cosgrove decided; (b) not to determine how he decided what he decided; and (c)

not even to determine how he should have decided what he decided.

Rather, according to Mr. Cherniak, your task is to determine why Justice Cosgrove made the judicial decisions that he made and whether he made those judicial decisions for a judicial purpose or for some other improper purpose.

I say make no mistake. It is critical for this committee to understand the nature of the task that it is being asked to undertake. Judges are entitled to the presumption that their actions are taken in good faith.

If you are to overcome that presumption, you can only do so by peering inside the judicial mind of Justice Cosgrove and examining the very core of the deliberative process that he brought to his judicial decisions in the case of Regina versus Elliott.

It is for these reasons, Justice Finch and members of the panel, that we say this case is truly extraordinary. To our knowledge, there is only one other case where a judge's motivation for making a judicial decision has been the basis for a judicial conduct inquiry, and that is the Boilard case.

I know you are familiar with that case, and the Council's decision in that case will play an important role in your consideration of the present case as it proceeds.

Independent counsel makes reference to the test for removal as a result of judicial misconduct established by the Council as that found in the Marshall case.

Everybody always talks about the Marshall case in the principle, but I underscore that in the Marshall case the CJC specifically determined that there had been no allegation made that any of the impugned actions reflected improper motivations. That wasn't what the Marshall case was about, unlike what the instant case is going to turn on. Rather, the allegations in the Marshall case were based on the words used to express the judicial decision and not the reason that the decision was made.

You will recall that the decision was the appropriate decision, but inappropriate language was used in its reasons, and the inquiry turned on the inappropriate use of those words, because, in essence -- and these were my words -- that the panel who determined the case said

Donald Marshall was basically the author of his own misfortune. I think the precise words were something like the miscarriage of justice is more apparent than real, and so it was the use of words as opposed to motive that drove that inquiry, and they articulated in that case the general standard against which the Council will measure the conduct of judges when the removal is at issue.

Mr. Cherniak took you to it, but it is worth repeating, if I may: Is the conduct alleged so manifestly and profoundly destructive of the concept of 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?

Subsequently, however, something that Mr. Cherniak didn't take you to, the Council explained how the Marshall test would be applied in circumstances like the one that you are going to have to decide; namely, where a judge's discretionary judicial decision and decisions form the basis of the alleged misconduct.

In Boilard, the Council confirmed that no finding of judicial misconduct can be made

in respect of a discretionary judicial decision unless the judge made the impugned decision in bad faith or in abuse of office.

Here is what they said:

> "Except where a judge has been guilty of bad faith or abuse of office, a discretionary judicial decision cannot form the basis for any of the kinds of misconduct or failure or incompatibility in the due execution of office contemplated by clauses 65(2)(b), (c) or (d) of the Judges Act, nor can the circumstances leading up to such a decision do so."

With Boilard, the Council clarified the type of discretionary judicial decision that can meet the Marshall test. Specifically, only those discretionary judicial decisions that are made in bad faith or in abuse of office can amount to conduct so manifestly and profoundly destructive of the concept of

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.

It is not necessary at this stage to discuss in detail the essential elements of the tests of bad faith or abuse of office. Suffice it to say that in each case it is necessary to demonstrate the existence of a subjective intention to take an action for an ulterior or improper purpose.

In my respectful view, that is the heart of what bad faith or abuse of office is. It is necessary to get to a subjective intention that the judge took his action or her action for an ulterior or improper purpose.

And note, we say, that bad faith or abuse of office must be established on the basis of clear, cogent and convincing evidence. That is the standard of proof. And, in fact, I am going to take you to this. Justice McEachern said, in a CJC report in the Bienvenue case, that the grounds must be powerfully persuasive. That's the standard of proof.

So when my friend says to you he

doesn't have an onus in this case, I suggest to you he is not stating the proposition accurately, because Justice Cosgrove gets the benefit of the presumption of good faith, and that presumption can only be displaced by positive evidence -- that is, evidence that is clear, cogent and convincing -- and must be powerfully persuasive.

HON. MACDONALD: I don't think independent counsel is saying there is no onus. He is simply saying it is not his onus in his role as independent counsel.

MR. PALIARE: I just say he does have an onus, and that's the onus that he has. He has to displace the presumption that runs in favour of these decisions, and so he took you to the decision of Justice Matlow's at tab 12, Justice MacDonald.

He took you to paragraph 14. If I could ask you to turn to that, at tab 12, paragraph 14, the heading is "Standard of Proof", and what I understood him to say, Justice MacDonald, and he only read you paragraph 14, is that he sets out these two propositions, the first that:

> "The Inquiry Committee is an investigative body, not an

> adjudicative one. As such, it does not have responsibility to arrive at a judgment in respect of any particular issue or issues. Second, independent counsel acts impartially and does not bear any onus of proof."

He does in the circumstances of this case, unlike the case with respect to Justice Matlow, and what he didn't do, though -- the heading is "Standard of Proof" -- he didn't take you to paragraphs 15 and 16, which I would like to do. Paragraph 15:

> "Independent counsel submits that the evidentiary requirement for establishing judicial misconduct is 'clear and convincing proof based on cogent evidence.'"

He cites the decision of the Ontario Judicial Council in Re Douglas at paragraphs 7 to 9 in which that standard is adopted:

> "Counsel for Justice Matlow

> has made no specific representation, but accepted in his oral submissions the formulation put forward by independent counsel."

In Justice Matlow's case, independent counsel recognized the importance of the clear, cogent and convincing standard. Mr. Cherniak in his opening does not acknowledge that. He didn't say it isn't the standard, but he didn't take you to that paragraph. At paragraph 16:

> "The standard of proof and evidentiary standard do not appear to have been specifically considered by any previous CJC inquiry committee. The matter was, however, commented on by Chief Justice McEachern in his separate but concurring reasons in the report of the CJC in the Bienvenue matter. There, he wrote:
>
> "The standard of proof in this matter is the civil

> standard of a balance of probabilities. Because of the importance of the issues, the grounds must be powerfully persuasive."

To reiterate, if I may, that independent counsel can't submit that the evidence is capable of meeting the test, unless he adduces evidence, in my respectful view, that displaces the presumption. I don't know whether that answers the question, and, to that extent, he has the onus to do that.

As a result, we say to the committee at the outset that there is a very narrow and specific lens through which you must view the allegations advanced by independent counsel and the evidence proffered to establish those allegations.

In particular, you must consider those allegations and that evidence with a view to determining whether it is capable of establishing the existence of bad faith or abuse of process, abuse of office. We say that when you hear these allegations and you review that evidence, you will conclude that the standard has not and cannot be established.

Let me move to the factual framework, which Mr. Cherniak has not done. We wish to address the committee at the outset of these proceedings as to a general description of the nature of the proceeding which gives rise to this inquiry and the place that the proceeding plays in the judicial career of Justice Cosgrove.

You will hear from Justice Cosgrove he is 73 years of age, scheduled to retire in the ordinary course at age 75, in December of 2009. He has been a Superior Court judge for more than 24 years.

Prior to his judicial career, Justice Cosgrove was a member of parliament, held a number of different cabinet posts. Prior to that, Justice Cosgrove was a municipal politician, including a number of terms as mayor of the City of Scarborough in Ontario.

Needless to say, Justice Cosgrove has presided over thousands of judicial proceedings of every description before, during and since his involvement in the matter of Regina versus Elliott right up to today.

On behalf of Justice Cosgrove, I can tell you that he loves his life as a judge.

His judicial colleagues would confirm that he is a judicial workhorse and it defines his life. It is his heartfelt desire to be able to continue to work as a judge until his retirement day.

No one, including Justice Cosgrove, will ever hold up Regina versus Elliott as a case of a model judicial proceeding. The case was bitterly contested over a lengthy period of time, with numerous unusual developments, twists and turns. Justice Cosgrove would be the first to say that nothing he has experienced in his lengthy judicial career before or since prepared him or could have prepared him adequately for what he faced in the Elliott case.

There is no doubt that he would have benefitted from the Ontario Court of Appeal decisions in cases such as -- and we will get to these in argument -- Regina versus Felderhof, Marchand versus Public General Hospital Society of Chatham and Regina versus Kporwodu, all of which addressed similar mistakes made by other senior trial judges and all of which were decided after he issued his stay decision.

The trial in Regina versus Elliott, as Mr. Cherniak has told you, started in

1997, September of 1997. In September of 1999, nearly two years after the trial started, Justice Cosgrove issued a decision staying the charges against the accused in the Elliott matter.

More than four years later, in December of 2003, the Court of Appeal for Ontario overturned his decision and the Court of Appeal concluded that there had been numerous legal errors, and no doubt some of them serious.

Then some four months later, more than four-and-a-half years after his decision, the Attorney General of Ontario initiated this proceeding in April 2004.

Justice Cosgrove cannot and does not stand before you seeking to defend the legal correctness of his decision. That matter has been determined by the Court of Appeal and Justice Cosgrove, like everyone else, accepts that decision.

Moreover, Justice Cosgrove would not suggest to you that with the benefit of hindsight he would have handled the case the same way today. He recognizes that mistakes were made, that he made mistakes and that, in retrospect, he could have handled differently and better many of

the situations that he faced.

Moreover, Justice Cosgrove recognizes that, in retrospect, a number of individuals that appeared before him during the course of the Elliott proceeding were, as a result of his judicial decisions, subject to rulings that were, to say the least, unpleasant for them or worse. He expresses his sincere regret for that.

In particular, he empathizes with the family of the victim who, as a result of the legal errors made by him, experienced a significant delay in achieving the closure arrived at by having a criminal prosecution reach its substantive conclusion.

Without detracting from the genuineness and the sincerity of Justice Cosgrove's feelings of regret, it is also his unflinching view that there is simply no basis whatsoever to the allegation that, as events unfolded in real time before him, he did anything other than handle each and every one of the judicial decisions that he was called upon to make during the course of this lengthy case with anything other than good faith and to the best of his ability.

Yes, it was a difficult case to

manage, and at different times he employed a number of different judicial tactics to manage it, as any judge would. Some were more successful than others. Yes, he had many decisions to make, many of them difficult, many of them turning on findings of credibility based upon the demeanour of the witnesses before him.

Whether these findings were right or wrong, there simply is no basis for any suggestion that those findings were based on anything other than a good faith assessment of the evidence adduced and the submissions made. He approached each decision with the capacity to hear and decide it with an open mind.

Yes, he had a number of legal decisions to make, a number of them novel and complex. Many of those decisions were determined to be unsustainable in law. However, again, right or wrong, there simply is no basis for any suggestion that those legal determinations were based on anything other than a good faith assessment of the evidence adduced and the submissions made.

Justice Finch, I was going to move, because my friend hasn't done it, to

something that is critical, I think, and that is the chronology of events, and I don't know whether you wanted to take a break. I am quite happy to continue, but I leave it to you.

THE CHAIR: We need a break at some time. This is probably a good moment to do that. We will take 15 minutes.

MR. PALIARE: Fine, thank you.

--- Recess at 10:54 a.m.

--- Upon Resuming at 11:13 a.m.

THE CHAIR: Mr. Paliare.

MR. PALIARE: Thank you. In terms of the chronology, as we indicated previously, the Elliott matter was long, bitterly contested and featured many sometimes bizarre twists and turns. You are being asked to review and dissect many allegations related to judicial decisions in the context of a complex murder trial, where those decisions were made at least nine years ago and some of them 11 years ago.

Some of the unusual features of the Elliott case included the following. First, the proceeding commenced with an application by the accused that Justice Cosgrove recuse himself from the case. That motion was refused; in retrospect,

maybe not such a good decision. In any event, it was refused.

Second, at a point in time during the proceeding, there was a suggestion by a Crown that the Crown was bringing a motion to recuse Justice Cosgrove. The Crown had prepared an internal document listing allegations of bias that they perceived by Justice Cosgrove, and so they were contemplating a recusal motion.

However, Crown counsel with carriage of the matter at the time, because it got to be known that there was this memorandum, specifically advised Justice Cosgrove that the Crown would not in fact pursue such a motion and the Crown never did.

So, third, although the Crown apparently made an explicit decision not to seek to have Justice Cosgrove recuse himself, it is apparent that the Crown was fully aware of what the Crown felt were potential bases for such a motion.

The Crown memorandum setting out potential bias claims was prepared and circulated during the trial amongst certain members of the Attorney General's office, including -- and this name will get to be important from my friend's

point of view -- the Assistant Deputy Minister, Murray Segal. He knew about it. He participated in discussions about it, and the Crown decided it would not bring that motion.

So you ask almost rhetorically: What were they doing four-and-a-half years later when the Attorney General filed this complaint?

Fourth, that the defence brought no less than three separate motions to have Justice Cosgrove stay the proceedings. The first motion was dismissed, the second was deferred and, finally, the third was allowed.

The fifth odd thing about this matter, in terms of its nature and what occurred, was he was called upon to deal with a very aggressive, tenacious defence counsel. I am certain Mr. Cherniak will agree that that was the case.

Justice Cosgrove's attempts to manage the conduct of defence counsel met with, at most, mixed success. The Court of Appeal for Ontario ultimately referred to some of defence counsel's tactics as, quote, deplorable, end of quote. Interestingly, in his closing oral submissions, counsel for the Crown referred to

defence counsel in the following terms, and this is Mr. Humphrey's comments about defence counsel:

> "He has courageously, tenaciously, admirably discharged his obligations to his client, and it simply can't be said on the basis of his performance that there has been any interference in his ability to represent the interests of the applicant."

End of quote. Sixth, one of the tactics employed by defence counsel was to make repeated, sometimes extravagant, allegations of misconduct by the police and others. Occasionally, Justice Cosgrove determined these allegations had merit, but, largely, the allegations were dismissed.

Seventh, then in this environment during the middle of the trial, the court learned that a very senior police officer, who had played a major role in the police investigation in Elliott -- he is sometimes referred to as the case manager -- Detective Inspector Lyle MacCharles, had essentially confessed to a very serious, arguably

criminal, act in relation to another murder prosecution proceeding concurrently in the Ottawa courthouse at the time.

The wrongdoing involved counselling junior officers to conceal evidence in the other murder case, called Cumberland, and then obstructing a police investigation into the matter.

The court also learned, Justice Cosgrove learned, that the RCMP was conducting a criminal investigation into Detective Inspector MacCharles' conduct in relation to both the Cumberland case and the Elliott case -- that is, had Detective Inspector MacCharles engaged in similar conduct in the Elliott case? -- all the while, of course, Justice Cosgrove trying to ensure that the accused was going to get a fair trial.

The next bizarre thing that occurs, or that is consistent with Justice Cosgrove's approach in the case, is, in his closing oral submissions on the stay application, Crown counsel had this to say about Detective Inspector MacCharles, quote:

> "The other problem, if I can describe it as a problem for the Crown in general terms,

this Detective Inspector, now retired, Lyle MacCharles was caught dirty."

End of quote. It carries on, continues on saying, quote:

"I am not here to eulogize the man to the extent that I am here to talk about the man. I am here to candidly concede that there are huge credibility problems relating to Detective Inspector MacCharles. He is clearly implicated and involved first in the unlawful disposal of a firearm, and more importantly he is involved in obstructing a very serious OPP investigation conducted by one of his colleagues, Detective Inspector Grasman. No one has asked my opinion, but for what it is worth, in my opinion is that is clearly at a minimum an attempt to

obstruct justice and a very serious one."

Initially, there is an OPP investigation. It ultimately gets turned over to the RCMP into Detective Inspector MacCharles, and that is in the middle of this Elliott trial.

Needless to say, to have a Crown attorney refer to a very senior police officer, who was a witness in the trial before Justice Cosgrove, in these terms is a very unusual occurrence.

To recap on chronology, the case started in 1997. The stay motion is decided September of 1999, almost two years to the day. The Crown made no recusal motion during the trial. The Crown never made a recusal motion even after it had put together its memorandum, and the Attorney General's complaint is filed four-and-a-half years after the September 1999 decision.

Of course my friend might say to you, Well, shouldn't they have waited until the Court of Appeal decision? There is no reason for that to be the case. That's item 1.

Item 2 is the Court of Appeal decision comes down in December of 2003. This thing -- here he's muttering away, Oh, they had to

wait for the 60 days to end before they decided whether they were going to seek leave to appeal to the Supreme Court of Canada.

In Bienvenue, the complaint by Minister of Justice Rock and the Attorney General for Quebec was filed immediately after the trial, and there was an issue about whether or not they could proceed concurrently and the CJC said, absolutely, they can proceed concurrently.

So there was no reason -- and my friend is just making it up -- there is no evidence that the Attorney General turned its mind to waiting until the Appeal was decided. They had in their mind some bases for their view about Justice Cosgrove's conduct during the trial and did nothing for four-and-a-half years. I just need to put that into context.

We have laid out this information for you not for the purpose of attempting to defend the correctness of either Justice Cosgrove's ultimate disposition of the matter or the numerous impugned rulings he made along the way.

Our only point is that as you attempt to digest the history of this proceeding, its highly unusual nature is a very relevant part

of the context that you must keep in mind.

Let me back up, as well, about the four-and-a-half years between the stay motion being granted in September of 1999 and the Attorney General's complaint letter in April of 2004.

I can tell you that during that time frame there was never a motion made by the Attorney General in any of the cases Justice Cosgrove sat on -- and there were many, certainly many criminal cases -- that he should recuse himself during that time frame; nor between the time that the Court of Appeal decision came down in December of 2003 and the writing of the letter in April of 2004 were there any such motions ever made by the Attorney General.

In short, never any motion by the Attorney General at any time that Justice Cosgrove shouldn't hear their cases.

Procedural issues. My friend has quite fairly set out what we had agreed to with respect to the Boilard motion, and I hope that's acceptable to the panel.

With respect to the record and viva voce witnesses, one of the things that we would want to be made an exhibit, and we spoke to

my friend, Mr. Macintosh, about this at the break, is that you have a copy of the entire proceedings, rather than just the excerpts, because what my friend will attempt to do is to take the shards from the transcript and try to turn them into a Waterford crystal vase. But, in our view, we think you need to look at this case from the beginning, because, you see, what my friend will say to you is, Look at this decision. How could he have made this decision? We put it into context. We gave you a couple pages before, a couple of pages after. That ought to do it.

On day 13, when Justice Cosgrove decided that issue, he didn't have day 14 and day 15 or day 22. He was deciding it based on what he had in front of him at the time. So you can't take these abstracts and just simply say, Look at what he did here, because, in my respectful view, and I say it with some reluctance, but it is essential.

You've got to look at this entire transcript from day one and see what he did as he went along, if in fact you think there is any legitimacy to what it is Mr. Cherniak is putting before you, because, otherwise, it is unfair, because he didn't have the Court of Appeal level of

hindsight; didn't have it.

And so this case evolved in the normal way that a case evolves, and we candidly admit some mistakes were made, some more serious than others, and that is what the Court of Appeal is for.

Let me finish on that. When you get the disk of the entire transcript -- we only got the five binders on Friday. I am not being critical or anything like that, but we have tried to match it up, and we had drafts earlier on, but they don't match.

You are going to find that the pages aren't perfectly lined up, and so there may be some bumps in the road, is what I am simply advising you. As we go ahead, we may not be on the same page with respect to some of these allegations. I alert you to that. I don't know how that arose, but that's the case.

I also want you to know that there may be some bumps in the road with respect to viva voce evidence. We got late will-says from my friend, the last one of which I think I got yesterday. He is not sure whether he is going to call these people or not, but I am not going to be

asking for an adjournment, but we may need some time to look at some these.

We don't know whether there are any more coming. My friend has indicated he is not going to call anybody with whom he hasn't provided us a will-say. There are others on his list for whom we don't have will-says, and he is not going to get to that evidence, he says, until next week, in any event.

We need to raise with you the issue that Justice Finch put to my friend about the letter of complaint from the Attorney General and the Court of Appeal decision.

We don't have any objection to this material being in front of you, but we say there are different categories of these documents and those to which we make no objection, which are the transcripts, and that is because we say that is what this case has to be decided on and only decided upon; that is, the transcript.

What was it that Justice Cosgrove decided based on the evidence, the material, the witnesses that he had before him?

We say that you can -- the second category is that there is a more limited use that

you can make of the Attorney General's letter and the Court of Appeal. That's how we got here, but you can't, in my respectful view, rely on any of that for any determination about allegations of misconduct.

What you have is the Court of Appeal's role, and you've got judicial misconduct to be dealt with by the CJC. They are very different roles, and the opinion of the Court of Appeal on some matter is of no relevance, in my respectful view, to your determination about judicial misconduct.

And you have to remember, as well, not only is that a proposition that is obvious, but, also, there was nobody there defending this decision at the Court of Appeal, and that's because the issue wasn't about judicial misconduct, in my respectful view, and so none of those assertions by the Court can or should be used by you.

Then there are other documents that my friend has put before you that we say should not be used by you at all and to which you should make no reference, and those include the ethical standards that my friend has put before you. And they, in my respectful view, on their

face make it clear, and we can deal with this in argument at the end, cannot and should not be before you.

Particular 7, for example, of the particulars should not be dealt with on the basis that the ethical principles for judges somehow and should play some role in your determination. They are principles. They are matters that can and should -- people should strive for who are judges, but the statement of purpose of the document itself makes it clear that they are not to be used as standards for defining judicial misconduct.

I will save that for another day, but I just wanted to raise that with you.

I say that the matter before you cannot and should not include any recognition or dealing with the Court of Appeal decision, because the notice itself that my friend has put before you and which is Exhibit 3 -- if I could just have a moment. Excuse me, I'm just looking for my copy. I have it.

It is at page 3 and it is the bottom of the page, and it says:

> "These are the matters for consideration by the

Committee, the hearing of the inquiry before the Committee, and pursuant to his obligations as set out in the bylaws. Independent counsel will present facts, complaints and allegations for the Committee's consideration as to whether the conduct of Justice Cosgrove in Regina versus Julia Elliott are '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.'"

End of quote:

"In particular, independent counsel will put forward the

following facts, the complaint and allegations which are founded --"

I underscore:

" -- which are founded in the transcripts and evidence from the proceedings in Regina versus Julia Elliott and which, in the view of independent counsel, if accepted by the Committee, are capable of meeting the test for removal from judicial office under subsection 65(2) of the Act so as to warrant that recommendation by the committee."

So, in my respectful view, that is what we are talking about, and this is the limitation that must be imposed on independent counsel, because this is the case we have come to deal with; that is, my friend will be putting forward facts, complaints and allegations which are founded in the transcripts and evidence from the

proceedings in Regina versus Elliott, not what the Court of Appeal held, not what the Attorney General's view was of thing four-and-a-half years down the road where he never complained either at the trial or subsequent, and not with respect to the ethical standards, which I might add, parenthetically, didn't come into force until at least half way through the Elliott case.

And I think there may be some other document my friend has put into his material in the brief of authorities that came in in -- it is inconceivable to me how my friend could have put this in and somehow relies on it, which is tab 5 of his brief of authorities, some guidelines on the use of contempt powers prepared by the Canadian Judicial Council, when? May of 2001.

The entire case of Regina versus Elliott took place between 1997 and 1999. What that document has to do with this case I am sure will unfold in the fullness of time, but is lost on me, because it cannot in any way impact on whether or not Justice Cosgrove engaged in misconduct between 1997 and 1999.

I apologize for taking a bit of time. Because my friend was not going to put this

into any context, I felt obliged to give you some brief chronology so that you can better understand some of these shards as they come before you.

Unless you have any questions, those are our opening statements.

THE CHAIR: Thank you, Mr. Paliare. Mr. Cherniak. Some of us had difficulty hearing you before, Mr. Cherniak. Can we ask you to speak up, please?

MR. CHERNIAK: I don't know whether the microphone is on or not. Maybe this doesn't work. I'm a little hoarse today, so I will do my best.

THE CHAIR: Thank you.

SUBMISSIONS BY MR. CHERNIAK:

MR. CHERNIAK: But please let me know. I do have a low voice and I am somewhat hoarse, so I will do my best. These microphones don't appear to be operating.

I just want say two things in respect of certain matters that my friend outlined. One is I am certainly not asking the panel to peer into the mind of Justice Cosgrove in his conduct of the Elliott trial. The case that I am presenting is what occurred, and why it occurred will be for

this panel, I suppose, but my case is what occurred, not what was in Justice Cosgrove's mind.

With respect to the Court of Appeal reasons, my submission is this is an inquiry, not a trial. We are not dealing with the Rules of Evidence, and while the Court of Appeal reasons are certainly not determinative of the issues that this inquiry panel has to deal with, they are relevant to it and they are, in part, relevant to the allegations and particulars that are the basis of the notice.

And I simply remind the panel that if you look at page 2 of the notice, the Court of Appeal reasons are referred to, or certain aspects of them are referred to in the various bullet points dealing with the issue of calling Crown counsel, the suspicion against Crown counsel, the reference to the Assistant Deputy Attorney General and the matter of the Charter, and I will be offering, from time to time, what the Court of Appeal said about certain aspects of the evidence, simply because that's what they said about it, and it gives a useful background, not because it is determinative, but it does indicate the appellate view of what transpired in the trial, which, as I

say, will not be determinative of what is before this inquiry committee but, in my submission, is relevant.

I would for convenience, as I go through some of these matters, ask you to have the Court of Appeal reasons available. It is one of the reasons I filed it as a separate exhibit, so it would be easily convenient for you, rather than going back and forth in the large books, and the notice to Justice Cosgrove and the relevant book.

I am going to start with volume 1. As I indicated, volume 1 in tab 1 starts with particular 1 in the notice. The way it is set up, each of the particulars is given under the various tabs, and then the material in support of that particular is found under the particular tab.

Particular 1 refers to the finding of Justice Cosgrove of some 150 breaches of the Charter and the Court of Appeal's decision on them. And the reference is to the Court of Appeal's conclusion that:

> " -- Justice Cosgrove's use of the Charter to remedy baseless and frivolous claims brought the administration of

justice into disrepute."

And the particular is that:

"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."

In support of that, we have put forward the Court of Appeal reasons, and then the lengthy reasons for judgment of Justice Cosgrove on the stay motion, some 75 pages of September 7, 1999, in which he made the approximately 150 findings, some of which were repetition of findings that he had made on an earlier decision in March of 1998, I believe, and his earlier rulings are appendices to Justice Cosgrove's reasons.

I am certainly not going to take the time to read the entire Court of Appeal reasons now or then, but the Court of Appeal characterization of these findings is found in the Court of Appeal reasons starting at paragraph 1, simply summarizing them, referring to the finding,

and then at paragraphs 111 to 166.

MR. PALIARE: Excuse me, Justice Finch and my friend. I just need to rise to say this is not evidence and that we object to my friend proceeding in this fashion, to be able to use the Court of Appeal decision, and it may be that this is the place we need to deal with this.

I just say this is completely improper. It is not evidence, and, moreover, it is completely inconsistent with the case that we thought we had to deal with in this matter, as set out at the bottom of page 3; that is, my friend had four years in which to draft this, and he says this is, in particular, what it is I'm going to put forward, and what I'm putting forward are the transcripts and the evidence from the proceedings.

We have no objection to that, but, in my respectful view, this is simply not appropriate. In fact, in the Matlow case, the panel hearing the Matlow case refused to allow Mr. Cavaluzzo to put the decision in of the Divisional Court. They said, We are not going to let you put that in, at all, because that's not what we are here for. We are not here to look at the decision of the panel. We are here to look at judicial

misconduct.

And, in my respectful view, the Court of Appeal's opinion about what it heard is of no moment and is not relevant, in my respectful view, and it has to be hearsay. It is their opinion and it is not what this case is about.

These cases that have gone through the CJC have made it crystal clear that these two are solitudes. The Court of Appeal deals with errors with respect to reasons. The CJC deals with misconduct, and their opinion, in my respectful view, as I have said, is of no moment.

And it is inappropriate for my friend to do anything other than do what he said he was going to do at the bottom of page 3; and, that is, found his allegations on transcripts and evidence from the proceedings, no mention of the Court of Appeal decision.

In my respectful view, he is right. He couldn't have said that and shouldn't have, and, moreover, can't rely on what the Attorney General said, except for the purposes of getting this matter before you.

In the Marshall case at tab -- we didn't get these authorities until this morning, so

I was working from a different set. It is tab 11 at page 20. This is what the panel dealt with at the outset, and so maybe this is the place to deal with it, because they say at page 20 near the bottom:

> "The Committee first considered what evidence, if any, should be called. Our counsel, independent counsel, submitted (a) that apart from possible testimony of the reference judges, their conduct should be judged only on the evidence they had before them at the time of the reference panel."

I say to you that's what this case has to be about. It can only be about judging him on the basis of what he had before him at the time he made that decision, because of course what you have now is the hindsight of the Court of Appeal looking at the entirety of this record and making a determination that there were serious errors made.

So, in my respectful view, the record, what you should be looking at, and Justice

Cosgrove's conduct should be judged only on the evidence that he had before him in making the decisions that he did, and that what my friend has done is not appropriate. That's why --

THE CHAIR: Mr. Paliare, I will just offer my preliminary reaction to your objection, subject, of course, to what my colleagues may have to say about it.

Mr. Cherniak has just told us that what he proposes to do with this is not to offer the Court of Appeal's opinion as determinative of any issue, but simply as an indication of what they thought occurred at the trial.

The document is already marked as an exhibit. We have all read it I am sure at least more than once. At the moment, I can't see any basis for not letting Mr. Cherniak proceed with it. What weight we give to it, whether it is relevant at all at the end of the day, is a matter we will have to consider later in your submission.

Speaking for myself at the moment, I wouldn't be inclined to stop him from referring us to it now. I don't know what my colleagues' view is.

MR. PALIARE: Just in response,

all I say is that our view is it is not relevant, and that if it is not determinative of anything, my friend ought not to be putting it forward as anything other than, This is how we got to where we are. I can't put it any differently than that, Justice Finch.

THE CHAIR: I think we are all of the view that at the end of the day it is entirely open to this panel to disagree entirely with everything that the Ontario Court of Appeal had to say on any matter that touches on the issues before us, but we don't think that is a reason for preventing Mr. Cherniak from proceeding.

MR. PALIARE: Thank you.

MR. CHERNIAK: You will see in particular 1 that the particular refers to the reasons of the Court of Appeal. I am simply directing you to those paragraphs of the reasons that bear out the particular, and they start at paragraph 111 to 166 dealing with the Charter violations and they say what they say.

I particularly refer you to the general comment on the findings at paragraph 123, which has been excerpted in the notice, as you will recall, on the previous page of the notice, and to

the conclusion at paragraph 166.

Included in the same tab are the reasons for judgment of Justice Cosgrove on the stay application, and I simply point out to you the conclusory nature of the findings dealing with going right from really paragraph 22 to the end.

I refer you, as well, in the Court of Appeal reasons to paragraph 6 to 32, which I won't take you through, which set out in a summary form the factual background of the evidence that was adduced as to the case against Julia Elliott before the stay motion was brought.

The stay motion was brought, as I recall, in February of 1998 after hearing evidence and voir dires on the statements and the like, and the trial itself, the trial proper, never resumed on February 1998 on until September 7th, 1999. The stay motion took up the entire time of the court, as I recollect it.

That's really all I want to say about particular 1.

Particular 2 deals with, in particular, the allegation that throughout the course of the trial, Justice Cosgrove adopted a suspicious attitude towards the Crown and

government agencies, including the Ministry of the Attorney General, its counsel, the police, the federal Crown and immigration authorities, and the particular points out that the attitude of Justice Cosgrove had been the subject of previous but contemporaneous almost comment by the Court of Appeal. And in particular 2 we have listed the two cases that I have reference to.

MR. PALIARE: If I could rise yet again, we take objection to those two cases being before you and with respect to my friend making a reference to them. We do not have the complete record in either of those two cases.

If my friend was intending to rely upon decisions that are totally unrelated to Regina versus Elliott, it would have been interesting to see what the entire file is. There is no similar fact relationship between the cases that he wants to rely on, Perry and Lovelace and Regina versus Elliott.

Perry and Lovelace both dealt with Aboriginal matters. They were not criminal cases. There is no nexus between them whatever, in my respectful view, and it is totally improper to have two unrelated matters before you when my friend in

-- as I say, I get back to the drafting of this complaint. He says he is going to be relying upon the transcripts and the evidence from the proceedings in Regina and Elliott.

The panel has now said, Well, we can look at what the Court of Appeal said in that case. In my respectful view, there is no way that my friend can fairly, as independent counsel, now bring forward two other totally unrelated cases, and they should be not permitted and should be stricken from the record and we should not have to make answer to them, because, obviously, if you permit them in, we ultimately will need to respond to them.

They are totally collateral and not relevant to Regina versus Elliott.

MR. CHERNIAK: I simply say the decisions are a fact. The particular deals with the allegation that Justice Cosgrove adopted a suspicious attitude towards the Crown. The two cases, which are in the same time frame, the 1997 time frame, deal with exactly that point.

In one of the decisions, the Court refers, if you permit me to review it, to the suspicious attitude adopted by Justice Cosgrove

towards the Crown. The two cases are referred to, with citations, in the complaint of the Attorney General, and I have simply included them.

They are facts. Their weight, their importance, is for the panel. They are there because they were there. They are contemporaneous and they are facts that I have put forward as being relevant to this particular.

I am in the panel's hands.

MR. PALIARE: I am at a loss to figure out what they are relevant to, so anything else I could say would be repetitive. I have made my position clear.

THE CHAIR: Just a couple of aspects of this that trouble me. I think if we were bound to apply the Rules of Evidence, your objection, Mr. Paliare, would appear to be well-founded, but your friend told us earlier that we are not bound by such rules on an inquiry of this nature; and if the judgments are available to be read, I suppose you would say if we read them, we would have to put them out of our minds just the same as a jury would be told to put out of its mind something that it heard that wasn't in use in court.

We are in kind of a grey area here, I think, because Mr. Cherniak says we are not bound by the strict Rules of Evidence. Have you any response to that?

MR. PALIARE: I do. I don't agree. I just say that if the Rules of Evidence don't apply, why don't you tell me right now what the rules are that apply? What are we applying? What am I supposed to be doing in terms of defending this case, if you say the Rules of Evidence don't apply?

What is it? Is it the shovel theory of evidence? You sort of shovel the stuff in and the panel will sort it out at some point? That's not, in my respectful view, what somebody is entitled to when they come before an inquiry panel.

In my respectful view, what is required is that they be treated fairly and that if my friend is going to rely on some case that my client decided in or about that time or before, I want full disclosure of it. I want to know what the entire case was about.

How can I possibly, possibly deal with the assertion that, Oh, he didn't decide that case properly or he may have been suspicious of the

Crown? He's had hundreds of cases dealing with the Crown over his 24 years. I just say this can't be part of the process. I say this can't be part of the record, because if it goes in and it is dealt with and it is explained, and we ultimately get to having to call evidence, I have to deal with it.

So it cannot, in my respectful view, be permitted in at this stage, and, if I may just have a moment?

Sir, if I could just also underscore for you that in an appendix to the Matlow decision, what I tried to say is that Justice Cosgrove is entitled to, and your by-laws state at section 7, that: The conduct of this investigation must be done in accordance with the principle of fairness, and, moreover, the panel says:

> "Given the mandate of the committee --"

This is paragraph 14 of the appendix:

> " -- and the impact the committee's findings and report may have on the judge whose conduct is under

investigation, Justice Matlow is entitled to a high standard of procedural fairness."

The committee notes, as well, that section 64 of the Act affords the judge, quote:

" -- an opportunity in person or by counsel of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his own and on his or her own behalf." (As read)

End of quote:

"It is in this statutory context that Mr. Barber's motion to quash the summons to witness must be considered."

They are looking at Mr. Barber, who is a reporter for the Globe, as to whether or not he was compellable. Paragraph 24 at the top of that appendix, appendix 2 to the Matlow decision:

"The procedures of this Committee must respect the

> statutory directives to the Committee, including the provision in the Act deeming it to be a superior court. It must, therefore, not only conduct its investigation in accordance with the principle of fairness, but to a standard appropriate to a superior court. It must afford Justice Matlow an opportunity to cross-examine witnesses at the hearing. Taking these statutory directives into account, the Committee holds that the evidence of Mr. Barber must be tendered and be open to cross-examination in accordance with the ordinary Rules of Evidence without regard to that fact that it may have been proven on a recusal motion."

So if in fact we are going to get

into some other case, I want to be able to cross-examine the people in the other case. I am precluded from doing that on this method of my friend trying to establish misconduct.

THE CHAIR: Thank you. Anything else you want to say on this, Mr. Cherniak?

MR. CHERNIAK: Yes. I will just be very brief. As I said, the Attorney General's complaint referred to these cases. The exhibit briefs, we provided my friend with a preliminary copy of the four volumes of evidence that you have -- there were eight volumes then, because we hadn't double-sided them -- on June 30th, which contained these cases.

My friend isn't taken by any kind of surprise that these cases are in. We asked my friend, when we sent him the eight volumes, now four, if there was anything else he wanted us to include in those volumes, because we said, We will include whatever you want in those volumes.

The only thing that he asked us to include is what you have now in volume 5, Exhibit 8, I think, but he had since the end of June to ask us to include anything else.

I simply remind the panel that

this is a public inquiry, not litigation, and all of us, I suspect, have had experience with public inquiries which are not determined, not run, on the basis of the Rules of Evidence, nor should they or could they be, because they are dealing with public issues, not the rights and obligations between parties.

I am not putting these cases forward in the sense that I rely upon them as authorities; far from it. If that was the proposition, they would have been in the case books. The cases are simply a fact with respect to the findings of the court, what the court said on the dates of the cases, that the panel may decide and may not decide -- they may decide otherwise -- may have relevance to the allegation to the particular that Justice Cosgrove -- this is particular 2:

> " -- adopted a suspicious attitude towards the Crown and government agencies --"

And I have listed them. The next sentence says:

> "This attitude of Justice Cosgrove has been the subject

of previous comment by the Court of Appeal in relation to other unrelated matters."

My friend couldn't have been in any doubt about what was referred to, because the very cases were included, first of all, in the Attorney General's complaint in 2004, and, secondly, in the books that I provided to him at the end of June.

And my friend has said in his opening that the Crown never objected to Justice Cosgrove sitting on any case, this case or any other case. I am not sure whether that has relevance or not, but it has no more or less relevance than these decisions of the Court of Appeal.

THE CHAIR: I think we had better have a chat about this. Can you make use of the remaining few minutes by going on to something else, Mr. Cherniak?

MR. CHERNIAK: Certainly. I must say that all I will add to the general part of particular 2 is those two cases, and they will need to be accepted by the panel or I will take them out of the books.

Particular 2 I have read to you. It is the general particular about the suspicious attitude towards the Crown. Particular 2(a), which is the next tab, particularizes the finding that:

> "Numerous Crown counsel, police officers and former Assistant Deputy Attorney General Murray Segal had deliberately deceived the Court or undertaken steps which were calculated to deliberately mislead the Court and knowingly in breach of court orders. These findings were made despite a lack of evidentiary foundation and despite previous findings by Justice Cosgrove to the contrary."

I want to deal, in particular, with the particulars surrounding the findings against Murray Segal, the Assistant Deputy Attorney General. I want to do it in the order that they were made. So particular 2(b) at the following tab deals exclusively with Mr. Segal, and a part of the

evidence in particular 2(a) also deals with Mr. Segal, but I am going to deal with the particular 2(b) first, simply because it is chronologically the --

THE CHAIR: I am not sure I am with you, Mr. Cherniak, when you say it is at the next tab.

MR. CHERNIAK: Yes. When I am talking about the tabs, I am talking about the tabs in the large book. I am in volume 1, which would be Exhibit 5, I believe.

MR. MACINTOSH: Exhibit 4.

MR. CHERNIAK: And the first one I am looking at now would be right at the back of that book, which would be tab 5. There is a very large tab A, which contains material with respect to Mr. Segal, but I will refer to that.

THE CHAIR: Just give me a moment, will you? This is the first page at capital letter "B" --

MR. CHERNIAK: 2(b) is what I am looking at.

THE CHAIR: -- in volume 1 of your materials?

MR. CHERNIAK: Volume 1, the very

last tab in volume 1.

THE CHAIR: Thank you.

MR. CHERNIAK: The particular is that:

> "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, had no opportunity to respond to the allegations before a finding was made."

In the tab, you will find an extract from the stay reasons of September 7, 1999 that deal with Mr. Segal, and they start with paragraph 60. I think I should refer you to these, and then we will go to the evidence references that I say are relevant.

Paragraph 60, the finding is that:

> "The failure of any Crown in Ministry of the Attorney General to disclose to this Court or to defence counsel the fact or extent of the Crown's involvement in the

> August 20th, 1998, decision to refer the Det. Insp. MacCharles in the Cumberland and Elliott cases to the RCMP and an out-of-province Crown is a breach of the applicant's Charter rights."

Paragraph 61 dealt with Segal, but was not found to be a breach of his Charter rights.

Paragraph 63 is of a general nature, but it is one of the two under the heading "Subterfuge by Attorney General in Officially 'Isolating' Trial Crowns", and the finding is that:

> "The deliberate deception of this Court by the Crown and senior O.P.P. officers --"

And they are listed:

> " -- in purporting to formally 'isolate' trial Crowns McGarry and Cavanagh from evident involvement in the August 20th, 1998 decision -- while 'informally' apprising them of it the same day -- so they

> could disavow responsibility for its non-disclosure to the Court and to defence counsel is a breach of the applicant's Charter rights.
>
> "(ii) I find that the conduct, acquiescence or wilful blindness of the Crown -- including Assistant Deputy Attorney General Segal, Regional Senior Crown Pelletier, Senior Crown Berzins, and Crowns Cooper--"

And it goes on to list several of them. And just so you know Cooper, Bair, Dandyk, I believe, are the Crowns in the Cumberland case, and McGarry and Cavanagh were Crowns in the Elliott case:

> " -- in permitting this Court to be deliberately deceived about the actual or 'informal' knowledge and involvement of Crowns McGarry and Cavanagh in the August 20th, 1998 meeting and its

decision is a breach of the applicant's Charter rights."

And then "(C) Motions to Quash Subpoenas", paragraph 66:

"I find that the conduct of Assistant Deputy Attorney General Segal in seeking to quash defence subpoenas served on Crowns Berzins, Pelletier, Cooper, Bair, McGarry and Cavanagh between September 14th and October 7th, 1998, on the basis of inconsistent, contradictory, unfounded and misleading representations to the Court as to the materiality, relevance and necessity of the evidence sought from those Crowns about the August 20th, 1998, decision by the Crown and O.P.P. to refer to the Det. Insp. MacCharles' allegations to the RCMP for independent investigation,

thereby causing further unreasonable delay is a breach of the applicant's Charter rights.

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

"(iii) I find the subsequent conduct of Deputy Attorney General Segal in instructing

or permitting Crown Cavanagh to represent to this court on September 16th, 1998 that Crowns Cooper and Bair were not involved in the applicant's case at all and had no relevant or material evidence to give about the August 20th, 1998 meeting, knowing that representation was untrue and calculated to mislead the court, is a breach of the applicant's Charter rights."

And 69:

"I find the conduct of Assistant Deputy Attorney Segal in instructing 'independent' counsel, Crown Sotirakos, to appear before the Court on October 10th, 1998 to oppose subpoenas served on Crowns McGarry and Cavanagh on the basis that neither had any relevant or

material evidence to give concerning the August 20th, 1998 meeting and decision, knowing that the representation was deliberately false and misleading, is a breach of the applicant's Charter rights."

We have set out in the tab the relevant paragraphs with respect to Murray Segal from the Court of Appeal reasons, and they are there. The panel has read the Court of Appeal reasons and I won't take the time to read them.

I will next turn to the evidence, and I see that it is now 12:30.

THE CHAIR: Yes. We will be back at two o'clock.

--- Luncheon Recess at 12:31 p.m.

--- Upon resuming at 2:02 p.m.

THE CHAIR: Before you continue, Mr. Cherniak, we can give you our preliminary ruling on Mr. Paliare's objection with reference to the two earlier cases, Perry and Lovelace.

But we have noted that a reference

to the two cases is contained in the Attorney General's letter of complaint.

They are also referred to in independent counsel's notice to the judge.

We are prepared to accept the documents entered in this respect for the purposes of providing context and to complete the record.

But we express no opinion as to the evidentiary value within these two earlier judgments, and we will reserve judgment on their relevance to the conclusion of the evidence to be presented by independent counsel.

MR. CHERNIAK: Thank you, and I will come back to them when I am done with the Murray Segal issues, and I will simply refer you to the relevant paragraphs.

There is a disk which contains all of the transcripts, and we have a copy for each member of the panel and the reporters.

THE CHAIR: That will be Exhibit No. 9.

EXHIBIT NO. 9: CD disk containing transcripts

MR. CHERNIAK:

Q. With respect to Mr. Segal, I

have read you the findings of Justice Cosgrove on the stay ruling, and have referred you to the Court of Appeal decision.

What I have at Tab 2(D) in Volume I, Exhibit No. 4, are some of the extracts of the evidence we have heard as to Mr. Segal, in connection with the issues mentioned in the notice.

I don't say these are exhaustive, but they are certainly indicative.

I can tell you that Mr. Segal was never called to give evidence -- although, as you will see in a moment, there was a suggestion that he might -- nor was he ever given any indication that there might be findings against him.

Just so you know, anything after March 1998 is in Ottawa, and anything before is in Brockville.

At page 1802 on September 10, 1998, the issue is a subpoena for Crown Pelletier, who is an acting regional director in the Crown attorney's office for the eastern region of Ontario.

Mr. McGarry introduces Mr. Lindsay, who is there on behalf of Mr. Pelletier. Mr. McGarry is one of the Crowns in Ottawa at that

point, along with Mr. Cavanagh, conducting the case for the Crown.

> “MR. LINDSAY: Yes, good afternoon, Your Honour. I appear at the request of the Ministry for Andrejs Berzins and for Robert Pelletier. Andrejs Berzins is, of course, the Crown attorney for our judicial district, and Mr. Pelletier is acting regional director.”

Mr. Lindsay goes on and wishes to make representations about the subpoenas that have been issued to examine those two individuals on the stay motion.

He goes on to say on page 1803, in the middle:

> “MR. LINDSAY: I do have to say, though, that both witnesses, Mr. Berzins and Mr. Pelletier, are bewildered by the subpoena. They advise me that neither of them have been interviewed with regard

to any evidence that they may give, nor have they been asked to provide any statements."

Mr. Lindsay goes on to say on page 1804, that he has been asked to request an adjournment.

Mr. Murphy, on page 805, indicates that he is mystified, given the evidence of Detective Bowmaster, about the meaning of August 20 -- and in this hearing, you will hear a lot about the meeting of August 20.

It was a meeting at which certain police officers and certain Crown attorneys attended to discuss the possibility of an RCMP investigation into the activities of Inspector MacCharles in both the Cumberland matter, which was an internal OPP investigation, and his involvement in the Elliott matter. He was the case manager from the outset for the Elliott trial.

Mr. Murphy goes on with the evidence about that meeting.

Then we go to September 14, page 817, where Mr. Lindsay, having got the adjournment, proceeds to make his argument and is bringing an

application on behalf of Berzins and Pelletier, asking for a variety of remedies.

He goes on at some length, and makes argument that they have no material evidence, nor is it necessary that they give evidence in cases where others were at the meeting, who could give evidence.

Mr. Lindsay goes on and, at page 1823, there is a discourse between Justice Cosgrove and Mr. Lindsay as to whether a certain case applies. Mr. Lindsay points out that he understands the issue is the timeliness about the disclosure of a request to the RCMP to intervene.

That relates to an issue that the Court of Appeal spoke about as to the timing between August 20, 1998, and September 3, 1998.

At page 1824, Mr. Lindsay points out that Berzins and Pelletier are not responsible for the carriage of this case, and put it in that while this may not be a disruption to the case, it will be a disruption to the administration of justice.

Later on, at page 1841, Mr. Lindsay speaks again about the meeting of August 20, and makes his argument. And on page 1842, his

Honour rules that Berzins is necessary, that there is certain information that only he is privy to. He is apparently the person who initiated the expansion of the RCMP review to MacCharles, so Mr. Berzins is ruled relevant.

Then we go to September 25, and at page 2515, Mr. Cavanagh, the assistant Crown who is assisting Mr. McGarry at the trial, makes certain representation about the subpoena for Mr. Cooper.

Mr. Cooper is one of the Crown counsel in the criminal trial.

There is an issue as to whether Mr. Cooper should or should not be in the courtroom, and Mr. Cavanagh goes on to make submissions on that issue.

You will see at the bottom of page 2517, Line 23, that the court has now heard about both Berzins and Pelletier, as they have now given evidence about the August 20 meeting by this time.

Mr. Cavanagh continues on page 2518 with respect to Ms Bair, who is one of the counsels for the Crown in the Cumberland matter.

Then we come to October 9, 1998, and these are the submissions by Mr. Sotirakos, which are referenced in the findings of the judge

in the Court of Appeal.

Mr. Sotirakos is the regional director of the central east region of the Crown attorney's office in Ontario, and he was there because Mr. Murphy has indicated that he wishes to call both Cavanagh and McGarry as witnesses in the voir dire.

Mr. Sotirakos puts forward the position that the subpoenas should not issue, because there is nothing relevant or material, and there would be disruption.

At page 3510, he says he would need some time to bring himself up to speed, and he goes on to say that efforts have been made to have counsel from Toronto there to argue that motion.

At page 3511, he states that the earliest he could have someone there to argue the motion would be the next Tuesday morning, the day after Thanksgiving. And he tells the court that he may not be taking the motion.

Justice Cosgrove, at page 3512, refers to the history of the previous grounds challenging the subpoenas -- some of which I will be coming to in connection with another heading -- and at age 3513, I think Justice Cosgrove is

referring to Crown Lindsay when he says:

> "I am somewhat perplexed that, with the background, therefore, to this case, where the court has learned that Crowns extending to - I think, extending to the level of the deputy minister, have been - have had some knowledge of this case, why it is that I now simply have one of a number of regional Crown officers responding? Why - has any investigation been made as to the availability of Crowns from seven-eighths of the remainder of the province, apart from your particular responsibility?"

Mr. Sotirakos then replies, and on page 3514, he says:

> "The second prong, if I may address it in that fashion. Your Honour indicated that

counsel representing, if you will, the deputy minister, had attended before you at some point. I know that Your Honour doesn't want to get into details with respect to the structure of the Crown attorney office, but in fairness, just so it is clear, the limited information I have is as follows: that Mr. Ramsay attended before Your Honour at some point in the past --"

You will hear more about Mr. Ramsay; he attended earlier in the winter of 1998, when the matter was still in Brockville.

Mr. Sotirakos says on page 3515 that he does report, unlike Mr. Ramsay, to the assistant deputy minister and then to the deputy minister.

Justice Cosgrove asks:

"Well, I guess my question is: Who contacted you with respect to this issue?

MR. SOTIRAKOS: I was contacted last night by the assistant deputy Attorney General, Mr. Murray Segal who was, at one self could take - and I obviously stand to be corrected here - but somewhere in the area of four to six months as a general statement?"

Justice Cosgrove says at the bottom of the page:

"Now, the assistant deputy minister, presumably, has responsibility for the whole of the province?

MR. SOTIRAKOS: He does, Your Honour.

THE COURT: Yes. So that presumably then, in seeking to respond to a request for counsel to appear to challenge the subpoena or to argue, he; that is, Mr. Segal, communicated with

> Toronto and communicated with you. So, as far as I know, he has communicated with two out of the what - six areas, is it?
>
> MR. SOTIRAKOS: Two of the remaining five."

On Tuesday, October 13, David Thompson was the Crown attorney at Coburg, which is east of Toronto and west of Ottawa.

Mr. Thompson was there to respond to a request to examine McGarry and Cavanagh, and he says at page 3549 that he has no prior knowledge of any factual background of the case.

Mr. Thompson then goes on to deal with the jurisprudence, and he says it is not appropriate that these Crowns be called.

At page 3562, Line 23, he says:

> "I will simply finish off my submissions as to the law by saying there are two other themes that flow through the cases. One of those themes is simply this: That compelling a Crown to testify

is an extraordinary step, only to be done in an unusual case, and that exceptional circumstances must exist."

In the middle of page 3563, he says that the secondary of his submissions is whether McGarry and Cavanagh have material evidence, and what that evidence might be.

He then goes on to deal with that issue, and then at page 3566, deals with what he understands the issue is with respect to the evidence.

The first issue is, his concerns about the timeliness of disclosure of the decision to refer the matter to the RCMP and to review, and the timeliness of the disclosure that referral, and the secondary issue being the timeliness of the disclosure of the August the 20 meeting.

Mr. Thompson, at page 3569, refers to the evidence of Detective Inspector Bowmaster, who was the OPP case manager who came into the case in early August 1998, to replace MacCharles when MacCharles was relieved of that responsibility.

He did give evidence on September 8, and Mr. Thompson refers to that, and he says

that he had met with the RCMP last Wednesday, that would be six days before September 8, and outlined the request that was going to made for an independent investigation.

He goes on the paraphrase Bowmaster's evidence, and refers to Mr. Murphy's interjection about the August 20 meeting. When Murphy asked on September 8 when Mr. McGarry would have been aware of the meeting at which the decision was made, according to Bowmaster, to refer the matter, it was made on August 20 and he waited practically a month to be advised of that fact -- the day being September 8, 1998.

There is a reference at the bottom of the page of Mr. McGarry sending a letter to Mr. Murphy, being the day that he was formally advised that the RCMP would be conducting an investigation.

Mr. Thompson, at the top of page 3571, refers to a disclosure letter of September 2, which was an exhibit.

Mr. Thompson, at page 3573, refers again to the evidence of Bowmaster on September 8 and the question of who was at that meeting, and the question about what notes he had of the events that took place on August 20 - the point being that

Bowmaster was there, and therefore could give evidence as to what transpired.

Mr. Thompson makes the submission, in the middle of page 3575, Line 20:

> "So, in my submission, the evidentiary hurdle of establishing tenable evidence of bad faith is absent here on the part of McGarry or Cavanagh."

And on the next page, he submits that they should not be required to testify.

On Thursday, October 15, Mr. Cavanagh is addressing the court. The issue is that in the event that Cavanagh and McGarry are required to testify, is there anyone else that can take over the case.

He says there is not in any convenient time, and he refers at some length on page 3675 to the efforts that have been made to that purpose, and he says:

> "Beyond what's included in the letter before Your Honour, Mr. Pelletier advised me yesterday that he had

attempted to contact the directors of the two other regions, central-west and west. They were both en route to Sault Ste. Marie for a divisional management meeting. Mr. Segal will be present there as well. Mr. Pelletier spoke, I'm told at length, with Mr. Segal yesterday about this issue and it's expected, of course, that Mr. Segal with those other two regional directors, will broach the topic of finding counsel who could appear before this court."

He then apologizes for not having a Crown ready who can continue at that time.

On page 3678, Mr. Cavanagh states:

"MR. CAVANAGH: I'm in Your Honour's hands on that, in the sense that I am present and there are witnesses present, and I have continued

with the motion up to this point. However, in view of the ruling, I think that there's some issues that the court would want to consider in terms of the appearance of the administration of justice, given the comments made by the court at page 8, I think, the finding that full and candid disclosure has not occurred, which puts counsel in a tenuous position in terms of continuing to appear on the motion, given the finding that's been made. That puts me, as counsel, in a tenuous position, but I'm here, I'm aware of the issues, the witnesses are outside. Subject to Your Honour's ruling, I'm prepared to be here and to assist as Crown counsel in the matter."

There is a reference as to whether

he will or will not be available for the trial proper, once the voir dire is over and Mr. Cavanagh says that that is a large question mark.

Mr. Murphy makes a submission at page 3679 about how long this case has gone on, and he says:

> "Now my friend tenders a letter this morning from Mr. Sotirakos, who was here last week to speak on behalf of the Ministry, and he had alluded in his comments to having spoken about this whole issue with Deputy Attorney General Murray Segal. We know, in addition to that, and prior to Mr. Sotirakos appearing as a surrogate Crown on this case, a "stop?gap" Crown, that Mr. Segal had been involved and consulted with respect to the difficulties that have arisen in this case. Mr. Pelletier's evidence, if I'm

not mistaken, was on that point."

Mr. Murphy then goes on to read part of the letter he refers to, and you will see that on page 3681.

At the top of that page -- this refreshes my memory -- that Justice Cosgrove ruled on October 13 that McGarry would be required to testify. The issue of Cavanagh at that time was still outstanding.

Mr. Murphy, at page 3682, after having referred to Mr. Sotirakos' letter says at Line 8:

"I can advise Your Honour and ask the court to recall when Mr. Sotirakos made submissions here on his appearance the other day last week, that he advised this court that when he spoke to Mr. Segal, the Deputy Attorney General, before appearing here last week, he spoke to Mr. Segal on a conference call with Mr.

MacDonald. Again, Mr. Segal is well aware of the outstanding problem here."

He goes on, on page 3683, to refer to the conversations with Mr. Segal, and other conversations that Mr. Sotirakos had.

On page 3684, Mr. Murphy is still arguing, and says at Line 13:

"Mr. Segal knew, by the evidence we've heard, by the submissions we've heard from Crown counsel - successive Crown counsel - and from the evidence we've heard from witnesses, including Mr. Pelletier, and from the submissions from my friend this morning - Mr. Segal knows and knew that this case was in serious difficulty from a prosecutorial point of view. He knows that. He is implicated, in my submission, in that situation."

Mr. Murphy goes on to submit that

Mr. Segal should be on the witness stand today, and that in his submission, Mr. Segal is a compellable Crown witness.

He says that Mr. Segal knew about the decision to involve the RCMP and, Mr. Segal according to disclosure received from Inspector Leo Sweeney recommended this case be adjourned until after the RCMP investigation was concluded.

> "This is a variation on Detective Inspector Bowmaster whispering to Mr. McGarry from the front row, giving evidence second-hand from Mr. - Detective Inspector Bowmaster and Mr. McGarry was doing that, in my submission, and we objected at that time, Your Honour, and expressed our concern, Bowmaster should be in the witness stand. In my submission, Mr. Segal should be in the witness stand."

Mr. Murphy continues:

> "This is a complete and

thorough abdication of prosecutorial duties, and the only polite way I can describe what my friend is saying this morning about - to find an able and experienced prosecutor - or words to that effect - to ensure a fair prosecution of the accused - that can only be reasonably seen in the light of the circumstances and the history of this case, and especially of recent events, to be nothing but fatuous lip-service. It is hollow. It is dishonest. It is a continuation of the attempts by the Attorney General's ministry to mislead this court as to its hidden agenda with respect to this case. It is "win at all costs" approach and to, quote/unquote, in Mr.

> McGarry's words, "ensure a successful prosecution", to withhold information about decisions that are made, to withhold the fact that Mr. Segal is involved in these decisions, he is implicated up to his prosecutorial neck and should be in this court as a witness. I am putting my friend on notice that we will compel him to appear."

I can interject here that he was never called.

Mr. Murphy goes on:

> "It is completely unconscionable for the Ministry of the Attorney General, knowing the history of these proceedings and being involved and implicated in the way I suggest, to take this position that it's acceptable for Mr. Sotirakos to simply write a letter to

> Mr. Pelletier, who's a witness, and simply say: 'Sorry, we couldn't come up with anybody.' Now, that leaves aside what my friend is saying this morning. This is a totally different spin, in my submission, to what the letter literally says, and Mr. Cavanagh is apparently giving further evidence because, apparently, some of what's in this letter has been interpreted or at least editorially augmented by Mr. Cavanagh's submissions this morning."

The Court then says, "Well, I requested those submissions."

Mr. Murphy goes on in the middle of page 3687 to ask a number of questions at Line about why they are continuing to abdicate responsibility, mislead the court, and the like.

The court goes on at the bottom of the page to indicate that he did ask Mr. Cavanagh

that and according to the letter, and Mr. Murphy, on page 3688, continues and at Line 24 he says:

Mr. Murphy continues on page 3688 at Line 24:

"I am not prepared, on behalf of Miss Elliott who's been receiving these completely misleading, hollow, if not deliberately dishonest responses from the prosecutors on her case, to say nothing of the police, to say nothing of the corruption and criminality of the investigators that is continuing, the complete flagrant breach by the police investigators of court orders not to communicate, the behind-the-scenes scurrying about, the rat-like collusion of these officers attempting to salvage their stinking, rotting prosecution - that's what we're watching here,

Your Honour; I can't think of stronger words to use. It is completely despicable to the administration of justice that this is being allowed to continue."

He goes on to speak about vague assurances, and he notes at Line 20 that Mr. Segal would have been copied with the letter.

"Mr. Segal, to use the vernacular is in the loop; he controls the loop. He is abdicating his duty as the Deputy Minister, the Deputy Attorney General responsible for the administration of justice in this province, for the administration of Canadian Criminal Law, for the upholding of the Charter of Rights, for ensuring that there are fair trial interests that are protected by the Attorney General, that they aren't sacrificed, as

they clearly have been, on the altar of, quote/unquote, "ensure a successful prosecution" - Mr. McGarry's motto, if not his epitaph as prosecutor in this case. It may well be the theme song of this whole corrupt prosecution and investigation: "to ensure a successful conviction". And now we have the Crown of this province, representing the Queen, telling us today, 'Sorry guys, couldn't come up with anybody.'"

At Line 19:

"One can infer the cynical manipulation that is going on with respect to this abdication of responsibility."

He goes to talk about the Crown manipulating matters by having the family in attendance on that day.

At Line 20, page 3690, Mr. Murphy says:

> "I only note that what we are watching is not only an abdication of the prosecutorial duty by the Deputy Attorney General, we're also watching a continuation of what we've been seeing for more than a year by police and Crown."

He then refers to Mr. Lindsay's representations that I referred you to earlier, and he says that Mr. Lindsay maybe votes with his feet, and says that Mr. Lindsay was misled by Segal, Berzins and Pelletier as to the extent of their knowledge of the evidence for which they were sought to be compelled.

At page 3692, Mr. Murphy goes on to speak about Mr. Thompson's submissions, and he speaks of the terms of:

> "The Crown has taken this inconsistent, transparent strategy, this tactical approach which has been to

deny that these Crowns have any involvement, knowing, as Mr. Segal must clearly know, and, in my submission, when we have him - when we hear further evidence, including his own evidence, it will be confirmed beyond a reasonable doubt that he himself was aware of the machinations and Machiavellian decision-making that was going on in the background with respect to these Crowns."

And then down a few lines:

"That's an artifice that's deliberately misleading, and Mr. Segal is hiding - the Ministry is hiding behind procedural dodges in order to avoid doing its responsibility. I also ask Your Honour to consider what my friend is also gingerly stepping around. He said it,

but it's sort of left there as a kind of an ominous implication, perhaps in the hope that it won't be explored or elaborated upon further or responded to. Well, I have to respond to it and that's this: Mr. Cavanagh says: 'Even if we do get somebody by next week, they're going to need more time to prepare.' So we're looking already at the possibility, at least, of a further lengthy period of unconscionable and unreasonable delay in this case, again, because of the conduct of the Attorney General, the Ministry of the Attorney General, from the Deputy Attorney General level right down to this region. It is not surprising to find a paucity of prosecutors who

are willing to become mired in this sinking ship, if that's not a mixed metaphor. It recalls the last days of the Third Reich when generals and members of the S.S. were scrambling, literally like rats deserting a sinking ship, to make arrangements for themselves to escape the collapsing Nazi regime. What they fear, in my submission, Your Honour, and what Mr. Segal should face up to, is further evidence on this voir dire, regardless of which Crown appears to take the bow, further evidence of illegality, of criminality, of lying to the court, denying the existence of information, of denial of the involvement of the highest levels of the OPP and of the Ministry of the Attorney

General in these subterfuges and deceptions."

His Honour then says: "What is your motion, Mr. Murphy?"

Mr. Murphy goes on to deal with that, and His Honour says on page 3694:

"No, I don't - I don't want to be filibustered and I don't want you to repeat what you've said. If you have something new that is relevant, that might assist the court --"

In the middle of page 3695, Mr. Segal is mentioned again:

"THE COURT: But had the court learned yesterday - or at least it was alleged yesterday that you learned from the notes of Officer Sweeney of some involvement of the Deputy Attorney General.

MR. MURPHY: Yes, sir. He has a note indicating Murray

Segal recommends that the trial - it's in the context of a discussion of both Toy - Project Toy/Cumberland and this case, which is interesting in and of itself but, in any case, he indicates in his note that Murray Segal wants, recommends - I think my friend has the passage; it's on page 125-6 of his notes. It's interesting. Unless they're misnumbered, they go from 124 to 126 - but in any case, it says: "Murray Segal wants adjournment until RCMP complete their investigation."

I believe we will see later that it was the Cumberland Toy case that Mr. Segal wished to have adjourned.

Mr. Murphy then goes on, on page 3697, to make submissions about one of the victim's family should be removed from the courtroom,

because they shouldn't hear the argument because he had given evidence on a previous occasion.

He then makes a number of submissions about that, and Ms Pender mentioned here is the sister of the victim.

On page 3701, Mr. Murphy goes on to talk about how long he thinks he will need for certain witnesses on this voir dire, and he lists them on page 3701.

At Line 21, Mr. Murphy says:

> "Mr. Segal, I would estimate, a half a day to a day; Detective Inspector Grasman, a half a day, if that; Mr. Cavanagh, if we get to that stage, I would estimate perhaps a day, as with Mr. McGarry."

At page 3705, the Court makes some comments about Mr. Cavanagh's continuing involvement.

At page 3709, Line 15, Mr. Cavanagh says:

> "Thank you. Much of my friend's filibuster, if I can

put it that way, was directed to what he describes at the Crown abdication of its responsibility in this case. I just state for the record that that misstates how things have developed here in the court before Your Honour. The defence brought a motion --"

Mr. Murphy then goes on to accuse Mr. Cavanagh of defending the Crown's conduct, and what the court should take from that.

At page 3710, Mr. Cavanagh goes on to say at Line 21:

"Now, he stands up and says: 'I subpoenaed them, they can't be witnesses, and there's no counsel; the Crown has abdicated.' It's an illogical and nonsensical argument to be made before this court, when the court has had before it Mr. Sotirakos, a regional

director from the central east region, and Mr. Thompson, who my friend conceded made very responsible, very capable and professional submissions."

The judge confirms that he was impressed with Mr. Thompson, and Mr. Cavanagh goes on to say on page 3711 that steps are being taken to find experienced, capable Crown counsel who can carry on the matter.

Mr. Cavanagh says at the bottom of the page:

"And even a person unacquainted with the case can understand that the court would want before it prepared and capable counsel, given the length, history and complexities of this case. It's simply obvious, on its face, most of my friend's rant simply were a nonsensical venting, ad hominem insulting comments

that, I suppose, gave him some form of release. He additionally tried to tell the court that Mr. Segal had said that this case - he wanted an adjournment with regard to this case and, when he read the note, he resiled from that position."

That note does not specify whether it was this case or the Cumberland matter that Mr. Segal is referring to.

At page 3716, Mr. Murphy again refers to Mr. Segal, and then he says:

"Now, we've also heard what is the tired refrain that we heard from Mr. Stewart, who bounced into court in Brockville at the beginning of February, introduced himself in front of the accused in the courtroom, to the victim's family members and advised them, assured them in a jaunty manner that

he would be here for four weeks and not to worry about anything --"

I will be dealing with the issue relating to Mr. Stewart in due course.

At page 3718 -- I won't take the time to read it, but Mr. Murphy responds to Mr. Cavanagh's suggestion that the submissions are being made -- that the requirement of Crown counsel being needed is being made for the sole purpose of having the Crowns taken off the case.

Dealing with that issue, at page 3719, Mr. Murphy says at Line 6:

"It is also an unprofessional allegation against the defence counsel and I say this, Your Honour, without wishing to seem that I'm defending myself. It's not the fault of the defence counsel in this case that the Crowns have failed to do their duty, successively, repeatedly, deliberately. That's not the fault of the

defence, that's not the fault of the accused. That's the fault of, at the highest level of the Attorney General, of Deputy Attorney General Segal, of regional Crown Pelletier, of senior Crown Berzins, of Crown attorneys McGarry and Cavanagh."

Mr. Murphy goes on for some length, at page 3721, Line 10:

"The fact is there is not a level of this investigation that isn't in some way corrupted, and there isn't one level of, unfortunately and tragically, of the Attorney General's Ministry that hasn't in some way been touched, either through failing to do its duty or knowingly looking the other way and being wilfully blind to what their duties are as

> prosecutors. I think Mr. Cavanagh is in a completely untenable position and he should withdraw immediately, and he should retract and apologize, both to the court and to counsel, for his insulting comments that this is somehow a ploy. Those comments are a contempt. It implies that Your Honour is simply --"

The Court then says, "That is a repetition, Mr. Murphy.

At page 3722, at Line 30, Mr. Murphy says:

> "I'm simply saying now at this juncture, Your Honour, the Crown is faulting defence for bringing to light improprieties on the part of the Ministry of the Attorney General and it is accusing us of doing something in breach of our duty. In fact, as I

> said in February, when Mr. Flanagan asked for you to censure and rebuke me for making comments that he was misleading the court, I said at that time and I repeat it, I've repeated it since, I don't resile from my duty, I don't resile from any allegations I've made against the Crowns on this case, against the Ministry and, as far as I'm concerned, we are doing our duty and the Crown is not, and Mr. Cavanagh, given that he has apparently lost his perspective in this matter, should withdraw forthwith."

The Court responds to this -- you will find this page in Volume III, Tab 3(G). It is the next page of transcript, and it should have been here, page 3722.

Here the court responds:

> "I want to indicate to

counsel that a lot of time has been taken this morning on what is classically described as ad hominem argument and comment. I have been a lawyer for 35 years, and I can tell you that about a half an hour of the presentations this morning went right over my head, because they just came at me as ad hominem. So you are wasting your breath, counsel. If I can't persuade you to be civil and to follow the rules of professional conduct, which is to demonstrate some civility to one another, at least I can alert you to the fact that if it is exercise you are engaged in, well that's one point, but it is not persuasive to the court. Ad hominem arguments are not persuasive to the court."

He then goes on to deal with Mr. Cavanagh's position, and --

MR. PALIARE: You might read in the next paragraph.

MR. CHERNIAK:

> "On the issue of Mr. Cavanagh's position, I will not repeat, except this one last time. This is the third time I have ruled that Mr. Cavanagh, in the court's opinion, is entitled to, and properly represents the Crown at this point. My decision with respect to Mr. Cavanagh on the motion to give evidence and the challenge to the subpoena has not been made."

Mr. Cavanagh then responds, and I should refer you a few pages down to the conclusion of this exchange at page 3727, Line 17:

> "Your Honour, before I call Detective Inspector Grasman, I'd like to make a comment to

the court. I've had occasion, over the break, to consider some comments I made by way of an analogy drawn between the conduct of the Crown and the OPP and the Third Reich and I think, on reconsideration of my comments, I think although the analogy may - any kind of a quantitative proximity in terms of the evils that one notoriously associates with the Third Reich to the misconduct, and even criminal misconduct that is the subject of the motion before the court. I'm sensitive to the fact that such comments, as made by me, may be seen by some as trivializing that horrific period of history, and I just want it to be clear on the record of this court, I don't wish to leave

> that impression. I know better than to suggest that the extent and degree of the evil and the misdeeds that are associated in the minds of the world with respect to the Nazi Regime are in no way comparable - or I should say the other way around - the actions of the officers and the Crown in this case are in no way comparable in terms of the severity. I just want to make that clear, because I think it may count otherwise as hyperbole, and I also say that in response to Your Honour's admonitions concerning ad hominem submissions by the court - to the court by counsel."

That is the bulk of the evidence with respect to Mr. Segal, with respect to the findings that were made that I referred to at the outset of this submission.

I repeat that Mr. Segal was not called, and no notice was given to him.

There was another finding with respect to Mr. Segal that was made in -- I would ask you to turn to Tab 1 of Volume I --

THE CHAIR: I am sorry, where are you, Mr. Cherniak?

MR. CHERNIAK: I am in the early part of the books, which is the September 7, 1999, ruling of Justice Cosgrove on the stay motion.

It is at page 63 in my copy, and if you go down to Paragraph 349 -- the issue here is that Crown Cavanagh was ultimately removed, as was Crown McGarry in the fall of 1998.

It was ruled they could not continue, or they decided that they could not continue because they were both giving evidence.

THE CHAIR: That was the ruling of the judge?

MR. CHERNIAK: Yes, and as you will hear, there had been other former Crowns that had been removed from the case at an earlier stage.

In December 1998, the Ministry of the Attorney General retained Mr. Strosberg, the then-Treasurer of the Law Society and well-known

civil counsel, and David Humphrey from Toronto, also a very senior defence.

The Attorney General retained those two to take over the response to the stay motion which was still ongoing, and continued into the summer of 1999.

There was an issue about the various witnesses that were excluded, not only excluded from listening to any evidence but from any contact whatever with anyone who was or could have been a witness to the case.

In the case of the Crown attorneys, as you will see, they were excluded from having any communication whatsoever with the new Crown attorneys who were brought on to argue motions or replace them, even to instruct them.

There will be considerable evidence I will be referring to with respect to those rulings and their effect.

Apparently, Crown Cavanagh prepared some summaries of evidence that had gone on while he was one of the Crown attorneys. He and Crown McGarry were appointed when the case came to Ottawa in the spring of 1998, and continued until the late fall of 1998.

It appears that those summaries that Mr. Humphrey and Mr. Strosberg took -- Mr. Strosberg was out of the picture, but Mr. Humphrey took over the matter with other assistants.

Apparently Mr. Humphrey saw something which may well have been the Cavanagh summaries, and that is what this finding is dealing with, the issue of the witness summaries, and also perhaps a five-page recusal summary.

At Paragraph 349, Justice Cosgrove speaks to those matters, and on page 64, Justice Cosgrove goes on to the recommendations of the new counsel, their knowledge of the non-communication order and says:

> "In fact, unknown to them, that is, to Mr. Cavanagh or Mr. Strosberg, they had already perused case summaries, including the recusal summary prepared by Mr. Cavanagh before they made their request. In my view, the summaries which were read by Mr. Humphrey were not simple recordings of

proceedings, as are transcripts; these were the result of choices and judgment decisions, culling what Crown Cavanagh considered to be irrelevant from the relevant (in his opinion) on the issue of recusal. I am not in a position on the material before me to judge if this material had any influence on the new Crowns. I do find, however, that there is the potential for influence (enunciated in R. v. Deslauriers (1992) 77 C.C.C. (3d))I find that Crown Segal or Crown officers subject to his authority (other than the new Crowns) knew or ought to have known that the transfer of these summaries prepared by Crown Cavanagh was contrary to the

non-communication order and ought not to have been provided to the new Crowns. From its context, the non-communication order prohibited indirect contact as well as direct contact. The device of employing the Crown Law Office as a conduit for contact clearly breached the intent of this order. The non-communication order of the court was designed in part to attempt to ensure candid testimony of witnesses where issues of credibility were at the fore; in short, it was a procedure ordered in an attempt to ensure the fairness of the trial. The breach of this order by the release of Crown Cavanagh summaries to the new Crowns detracted from the fairness of the trial and I find it a

breach of the applicant's Charter rights."

The relevant extracts from the proceedings with respect to that finding are in Volume 1, Tab 2(A), in a sub-tab marked "Segal".

The transcript is found starting at page 5512 from August 23, 1999.

Now what we have here is not evidence; it is all argument on the stay motion. It is within two weeks of the reasons being given in the stay motion, September 7, 1999.

So the court and counsel are in the finding stages of argument on the issue, and Mr. Humphrey is --

THE CHAIR: Perhaps before you start this, Mr. Cherniak, we should take our break?

MR. CHERNIAK: Certainly.

--- Recess at 3:16 p.m.

--- Upon resuming at 3:31 p.m.

THE CHAIR: Mr. Cherniak?

MR. CHERNIAK: There are three housekeeping matters we might address.

There is a suggestion that the panel might prefer to have a one-hour lunch break, and then we will sit until four. That is certainly

agreeable to us.

MR. PALIARE: That is fine by us, as well.

MR. CHERNIAK: The second thing is that it was indicated that the panel would like to have the five volumes of evidence on disk, so that it can be accessed electronically.

We can certainly do that. Would it be convenient if we left that to the weekend, as there will be less of a rush to do it.

THE CHAIR: That would be fine.

MR. CHERNIAK: We will have it for you on Monday morning.

The third matter is using the disk that we have supplied as Exhibit No. 9, and I think it would be better if Ms Kuehl addressed you on that point.

THE CHAIR: We would prefer to have the best advice we can get.

MS KUEHL: The disk originates from the appeal, and we received a copy and got permission from the court reporters' office to make multiple copies of their transcripts.

Every volume is its own separate document, and they are available in a Word,

WordPerfect or an RTF format.

Because it was done on a document by document basis, the pages don't match the hard copies. Every document starts at page 1, so that is why it doesn't match up.

There is an electronic guide that was prepared by the Crown's office for the Curt of Appeal, and it will explain how to install the "Search Transcripts" function.

You will see a reference in the guide to searching transcript and facta. Originally the facta for the Court of Appeal was on the disk, but that is not evidence before you, so we have removed those documents. But the reference is still in the guide.

THE CHAIR: It would be helpful if counsel could provide us with a sort of roadmap of a cast of characters and the dates in which they participated.

MR. CHERNIAK: We can provide you with a cast characters, which we recently drew up for our own use. Adding to the dates to it might take a bit longer, but we will do our best to provide that to you overnight.

THE CHAIR: Yes, a chronology

would be very helpful to us.

MR. CHERNIAK: I have to do the same thing in my mind, who everyone is and where they fit in.

MR. PALIARE: Just on that point, my partner, Mr. Stephenson, wanted to make some comments that will hopefully assist you, because we had some difficulty ourselves.

MR. STEPHENSON: I just wanted to give you the benefit of the experience we have had, because it doesn't work perfectly.

We started the case with the hardbound transcripts, and subsequently got Mr. Cherniak's brief of extracts.

As we went through the brief and tried to find surrounding pages, we discovered that the page numbering in the extracts do no coincide with the official transcript.

They are out by a half page, two pages, five pages, seven -- it depends.

We got the electronic transcripts last week, and those pages don't coincide with either of the other two versions.

Some volumes are bang-on; others are off. So if you are looking for something you

have in the brief, and you want to go to the electronic version, it may not be on that page.

I picked a volume at random and in Mr. Cherniak's brief, the passage appears on 6537. In the official transcript, it appears on 6549, and in the electronic version it appears on page 6541.

THE CHAIR: Do you have any advice for us on how to develop a concordance, or does this have to be done page by page?

MR. STEPHENSON: Well, patience helps. The advantage of the electronic transcript is that it is searchable across the board.

You do the same thing you would with any search, you find some word that seems a bit idiosyncratic and look for that.

MR. MACDONALD: You can search by phrase, or just by word?

MS KUEHL: No, you can search by phrase.

THE CHAIR: Thank you very much.

MR. CHERNIAK: When we left off, I was referring to the transcripts dealing with the argument on August 23 and 24, 1999.

It starts at page 10513, and the court speaks about Justice Chadwick's decision as

to whether certain of these documents were subject to cross-examination or not, and ruled that they were not. Therefore, they were not produced.

At the bottom of page 10515, Mr. Murphy states --

THE CHAIR: We are in Volume I, Tab 2(E)?

MR. CHERNIAK: There is a tab labelled "Segal", and the transcript is behind that tab.

At page 50515, Mr. Murphy states:

> "Without getting into specifics, the import of what I am conveying to Your Honour as a result of the discussion that Mr. Meleras and I had with Crowns Humphrey and Walsh before court is as follows: apparently Mr. Humphrey has indicated to us or he has indicated that apparently he was in possession of and read the materials in question. The date on which he received it

from the Crown law office in Toronto, Mr. Segal's office presumably, is not clear. That I don't think - the specifics of that wasn't discussed. I'm now dealing with the issues raised in the stay of proceedings application as distinct from the contents of the document in question."

Over the page, Mr. Murphy continues:

"I believe he advised the court that at the end of the day, it would be found to be an innocent state of affairs with respect to the request made by Mr. Strosberg on behalf of the Crown on December 23rd of last year, specifically seeking the court's direction as to his ability or - as to whether he could communicate with

> previous Crowns, including Mr. Cavanagh and subsequent disclosure confirmed in evidence that Constable Walker was asked and indeed obtained this document in question from Mr. Cavanagh that it was personally picked up by Mr. Pelletier and thereafter, according to Mr. Cavanagh, conveyed to Mr. Segal. And I reiterate again, I would like to look at the transcripts but it's my submission that what we have here is an admission by the Crown of a breach, as alleged in the notice of application."

On page 10519, the court deals with a request to adjourn as a result of the productions, and if we go to page 10527 -- now you don't have this page here.

But if we go Tab 2(A) of Mr. Paliare's book, you will find the subsequent pages

there.

Mr. Murphy is speaking of the necessity of calling Mr. Humphrey as a witness, Mr. Strosberg as a witness, because he says he examined certain materials without names, titles, identification.

At line 24, Mr. Murphy says:

> "The other person we might want would be the recipient of those documents, Mr. Segal himself.

MR. NELLIGAN: May I help? In Volume I, page 10534 is identical to your page 10537.

MR. CHERNIAK: I obviously got this wrong. This is part of the transcript numbering problems I was talking about earlier.

The three pages my friend has put in as extracts as indeed already in here. I am sorry I hadn't picked that up.

I am referring to the pages in Exhibit No. 4.

It is Mr. Humphrey speaking in the middle of the page, and he says:

> "I wanted to clarify what I

previously received, personally received, and the materials produced to Cavanagh."

He speaks of the Elliott chronology of nine pages, the factual chronology, and the court asks Mr. Humphrey when he got it exactly, and he says that it was sometime during the initial preparation phase -- Mr. Humphrey was retained in December 1998.

He says:

"A volume of material was provided to myself and Mr. Strosberg, including transcripts, a number of -- it would have been November or December of 1998. It was prior to our first appearance before the court. We were given a number of summaries and transcripts. And then exhibit 5-W is the material that was produced by Mr. Cavanagh when he last appeared before the court,

and it consists of five parts."

On page 10530, Mr. Humphrey says that the first document is five pages long, and he indicates when he received it. "The next document goes from page 6 to 11, et cetera."

So Mr. Humphrey indicates what he got, and when he saw it.

Mr. Murphy, on page 10531, indicates his concern, and his concern with respect to the prior testimony of Cavanagh, concerning the documents he prepared and on March 5, the issue of all the materials were all completed and submitted to Mr. Segal.

Mr Cavanagh's evidence is extracted on page 10532, where he indicates it was a month or two months before Christmas.

Mr. Murphy notes, at the bottom of page 10532, the identified swath of papers:

"The difficulty that I'm having, Your Honour, is that Mr. Cavanagh quite explicitly identified or confirmed that these were transmitted, that the incidents of bias summary

was transmitted by himself to Mr. Segal - and Your Honour will also recall his testimony concerning the fact that he discussed this whole issue with Mr. Segal prior to sending it, and I'm very concerned that Mr. Cavanagh would come before this court when specifically requested to do so and to produce those documents, having previously alluded to the fact that the dates on which the documents were sent, of which he could not be himself clear on March the 5th of this year, could be confirmed by fax cover sheets, that he would appear before Your Honour, tender those documents, yet not provide the fax cover sheets, leaving again, the court and counsel completely in the dark, left

to the assurances given by Mr. Humphrey who is himself implicated to that extent - I say with great respect - involved, I should say, in this whole issue, and we are now left to plumb the depths of the Crown's procedures and operations rather than having a forthright disclosure from Mr. Cavanagh of all of the documents that he himself prior to this disclosure being made on his last appearance has admitted was available, namely a fax cover sheet saying exactly when he sent the material to Mr. Segal. Why we should have to plod along on what appears to be a lack of forthright disclosure, a continuing non-disclosure on something that is admittedly already available to the court."

At page 10534, Mr. Murphy goes on:

> "One has to wonder, without wishing to advance my argument before the court, just in closing, Your Honour, how, on this issue, how are we to avoid the necessity of, for example, compelling Mr. Humphrey as a witness, or indeed Mr. Strosberg who he has now admitted or confirmed was in receipt of this volume of materials as well, or it was provided to both."

At the bottom of the page, Mr. Murphy says at Line 25:

> "*The other person that we might logically be compelled to subpoena, Your Honour, would be the recipient of those documents, Mr. Segal himself. And I leave that on the record because, in my submission, this pattern of conduct clearly with the

strength perhaps of a Saturn rocket, if I can use that metaphor, projects this case clearly into the realm of extraordinary and exceptional and even indeed unprecedented non-disclosure and circumventing of a court, a court order and court proceedings by the senior law enforcement officer for the Crown in this province. And we are now compelled, in order to get an answer that should be provided, and arguably would be tendered as an alternative, if we were to compel Mr. Segal and Mr. Humphrey, they'd would be the first, through other counsel presumably, to argue that we should get the information."

The Court says, "Well, that's going pretty far afield," and Mr. Murphy goes on.

On page 10538, the Justice

requires the reattendance of Cavanagh as soon as possible. Inquiries are made, and it turns out that Cavanagh is not available at that time.

There is further discussion on page 10540, and there is a discussion about this recusal summary in the material, and on page 10541 and 10542, Mr. Murphy states:

> "If I can remind the court, November 20th, the date on which this recusal issue summary was apparently, now we know was sent from the Crown's office here to Mr. Segal's office in Toronto, was the date on which Your Honour ruled that Mr. McGarry and Cavanagh would not be able to resume carriage as Crowns on the voir dire, and it would have been seven days' hence from your November 13th ruling of last year compelling Mr. Cavanagh to testify on the voir dire, and indeed he testified on

> the 17th, 18th, 19th of November and indeed Crown Berzins returned to testify again on the 19th, after Mr. Cavanagh, and there were submissions by Mr. McGarry - sorry, excuse me - submissions by counsel as to when - whether they could resume as Crowns on the motion, and Your Honour --
>
> THE COURT: I didn't want to go into the merits of the argument, really, what I was inquiring of you was on the procedure. Is the information that Mr. Humphrey has provided with respect to the fax transmission date of a sufficient basis for you, in order to conclude your written argument?"

The Court goes on to say that he is going to direct that Cavanagh be recalled, and he then talks about when he will be able to give

his judgment.

As best I can tell, nobody else was called, and certainly not Mr. Segal, Mr. Humphrey, or Mr. Strosberg, and the finding that I referred to against Mr. Segal follows on September 7th.

That is the evidence I wish to put before the panel with respect to Mr. Segal.

I would now like to take you to the Perry case and the Lovelace case; they have a relationship to each other, and you will see these two cases are reported consecutively.

The bench in the two cases is the same: Justices Finlayson, Labrosse and Laskin, and the reasons were delivered on the same day, June 5, 1997.

The extracts from the Perry case that may have some relevance to this matter, and they are found at pages 720 to 722.

At letter (f) of page 720, the court comments on a refusal to Ontario's request for an adjournment, and at letter (g) Justice Cosgrove refused to allow any latitude to Ontario or any other party who sought an indulgence, other than the Respondents Perry and the AAFNA,

notwithstanding there was objection to matters of procedure and substance.

Between (b) and (c) on page 721, the court says:

> "In short, as counsel for Perry acknowledged in argument, the original application of September 30, 1995, for limited Charter relief snowballed into a wide-ranging examination about the legal and fiduciary obligations of the province of Ontario concerning the rights of all the aboriginal peoples in Ontario under s. 35 of the Constitution Act, 1982, that result in a judgment and order of appeal that contained the most comprehensive and intrusive prosecutorial remedies."

On page 742, the court says:

> "We will deal with the remedies ordered by Justice

> Cosgrove later. But it must be evident that his heavy-handed approach to highly principled matters is totally unsatisfactory, and his rush to judgment is purported to solve, with the stroke of his pen, matters that have been the subject of negotiations since 1991 that resulted in turmoil. A more delicate treatment of these issues might have been far more productive."

He goes on to say that Ontario is not without fault in these matters.

> "Justice Cosgrove has denied procedural fairness, and for this reason alone, the appeals must be allowed."

In the Lovelace case, which is just past the blue divider, on page 747, under the heading "Errors of the Motion Judge", the court refers to what occurred in Perry, and you can see the extract from the transcript from Justice

Cosgrove to the counsel for the Government of Ontario.

On page 748, we have the court's comment about what transpired:

> "The motion judge's remarks to counsel for Ontario, made at the outset of her argument, did not give the appearance that he was approaching this application with an open mind. Although he stated that this application differed from those in Perry, he appears to see the present case and Perry as a package, and to rely on his knowledge of Perry to make factual findings in this case, and guide his decision in this case through his conclusions in Perry."

The court gives an example, which I won't bother with, but after the quotation of the judge's reasons, the court says:

"For the motion judge, based on his previous knowledge, this was another case of Ontario engaging in improper conduct against Aboriginal people. It was an error to treat this case and Perry as a package and, from the very beginning, this case was considered on an improper basis. Among the many distinctions between the two, this case does not involve Aboriginal or treaty rights under s. 35 of the Constitution Act (1982) whereas Perry did. This fundamental error of a motion judge seems to have influenced his findings on other aspects of the case. Most notably, it is manifested in a suspicious attitude towards the government that caused him to

misapprehend some of the evidence before him."

The court goes on to give examples, and at letter (e), page 749, the court says:

"Those conclusions of the motion judge demonstrate that he misapprehended the evidence."

Page 766, near the end of the Court of Appeal reasons, "Disposition of Costs by the Motion Judge", letter (f):

"The motion judge stated in his reasons that he was hesitant to categorize the tactics of counsel for Ontario as reprehensible, scandalous, or outrageous. However, he stated 'they are sharp tactics nonetheless, and I would not expect that by counsel employed by the Respondent government.' In our view, the remarks of the motion judge were an

> unwarranted attack on counsel for Ontario. The application involved difficult issues that were hotly contested and forcefully argued. We saw no evidence of 'sharp tactics' by counsel which would represent conduct tantamount to impropriety or dishonesty. On the contrary, we found that their conduct, along with all other counsel in these proceedings, exemplified the best standard of the profession. The motion judge's conclusion with respect to counsel for Ontario seems to be another indication that his findings in the Perry case influenced his findings in the present case."

Now I turn to the particular dealing with Constable Nooyen, which you will find at the tab with her name at Tab 2, in particular

2(A).

At page 57, there are certain pages from the September 7 ruling with respect to Constable Nooyen --

THE CHAIR: Can you relate this to a particular in your notice, Mr. Cherniak?

MR. CHERNIAK: If you look at particular 2(A), just before the tab dealing with Constable Nooyen, we have examples, by reference to names.

I have already dealt with the one aspect with respect to Mr. Segal, and I have others with respect to Nooyen, Laderoute, Scobie and that are examples of this particular.

With respect to Constable Nooyen, there were two findings that related to her. In Paragraph 307:

> "I find that the evidence of Constable Cathy Nooyen about when she went and spoke to Detective Inspector MacCharles of the OPP on August 26, 1995, before her role in the interrogation of the applicant, untruthful and

> unreliable, and given with the intent to protect Inspector MacCharles, the case, and mislead the RCMP and the court. Her statement to the RCMP was the first time this was made, and was contrary to her previous court testimony. Constable Nooyen was unable to sustain her statement under cross-examination."

Paragraph 318 is really the same finding.

The murder of Mr. Foster took place around August 19, 1995, and we will see that on the evening of August 18, a Friday, Laderoute stopped a car driven by a black woman in Kemptville, and he made a note.

Around August 24, certain body parts were found in the river, including a head.

MR. PALIARE: I thought one of the issues in this matter before Justice Cosgrove was whether he did in fact make the note when he stopped her, or whether he made it later.

MR. CHERNIAK: I am sorry, I am going to deal with Laderoute at a later point. I am trying to get the context of who Constable Nooyen was, and why she was there.

The issue with Laderoute was not whether he made a note, but was with respect to whether a license plate was noted down.

Later that week, August 24 or 25, Julia Elliott was arrested and taken to the police station, and that followed a certain involvement of Constable Laderoute had the investigation that was on because of the finding of the body parts, which were identified to be Mr. Foster, and the evidence was put in -- I will elaborate on how that came about.

Constable Nooyen happened to be in the police station when Ms Elliott was taken there, and she was asked to do certain things.

The issue apparently seems to be whether she did or did not have a conversation with Detective Inspector MacCharles on that evening in the course of what she did.

The first extract I have is from her evidence on July 20, 1999, near the end of the stay application and following the RCMP

investigation which was brought to the court in June 1999.

This is a cross-examination on a statement that Constable Nooyen made to the RCMP investigator on May 19, 1999. The investigator was Andre Rivard of the RCMP.

Mr. Murphy is cross-examining her on her statement to the RCMP, and at page 9309, Mr. Murphy is quoting from that statement, and the answer at Line 11 is:

> "I was investigating a sudden death, and there was a female in custody in regards to this investigation, and I was asked if I could come in and search. I was the only female available."

At the top of page 9310:

> "Your recollection of what you are talking about here is the fact that you would have been called into the Kemptville OPP detachment in the early morning of August 26, 1995, at the request of

Detective Staff-Sergeant McCallion?"

ANSWER: "Yes, I was already working at that time."

Mr. Murphy goes back to the statement to the RCMP:

"Did you deal with him," meaning MacCharles, "did you talk to him throughout?"

ANSWER: I think he was the one that oversaw the investigation. Of course, he was the detective, and I guess he was the one who told everyone what to do and what not to. He was here that evening when the young lady was brought in to be searched -- I can't remember his name. He was a staff sergeant, a big guy -- McCallion, a big guy with red hair."

And then he says:

"But did you have to deal yourself with Inspector --"

"Oh, yeah, he called me and asked the inspector what I -- you know, what I should be doing."

From the statement:

"I was never involved in a homicide investigation, and he said to just take good notes. Go ahead and talk to her. Just go ahead and take good notes."

Then there is a further reference to the statement, and Mr. Murphy at Line 26:

"Where did that conversation with MacCharles take place?"

ANSWER: "I think it took place somewhere in the detachment. I can't say specifics. I just asked him, because I had never been involved in anything like this, what I should do. He said to just take notes. I think I said to him, 'Am I allowed to talk to her?' He

said, 'Oh, yeah, go ahead and talk to her, just make good notes.'"

Then at page 9314, Line 20:

"MacCharles is basically telling you that you can talk to her as much as you like and ask her any questions?"

ANSWER: "Yes."

"And he was leaving that to you, as something you understood what to do, or are you saying what you wanted him to do because he wanted to tell you what you should do?"

ANSWER: "No, I just wanted to know if I could talk to her and what I should do. He just said to make notes and to turn them in."

On page 9315:

"Did to say to make good notes, or make them --"

ANSWER: "Make good notes,

just make good notes."

On page 9317, Line 15, Mr. Murphy says:

"Okay, I am going to suggest to you that this is the first time in almost four years that anybody, aside from yourself at least, has disclosed the fact that MacCharles was present on August 26 in the Kemptville Police OPP detachment when you were writing down your conversation with Julia Elliott."

ANSWER: "That is not what I said, though, sir."

Then Mr. Humphrey makes an objection on page 9318, and Mr. Humphrey says that Mr. Murphy has crafted the question differently than the assertion he made yesterday that there was a major league disclosure:

"The fact of the matter is that this witness testified before Your Honour on

> September 9, 1997, and she described having a conversation with Ms Elliott in a cell during the early morning hours of the 26th, and that sometime not long before 7:25 in the morning, she went outside and had a conversation, she believes, with Inspector MacCharles in the parking lot."

And Mr. Humphrey, at page 9320, refers the court to the Crown disclosure of the inspector's materials and the notations in the diary he kept between Friday the 25th and Saturday the 26th.

Mr. Humphrey then gives the times on page 9321. For August 26, he starts at zero hours, "Compilation of general warrant re search. 1:40 George Street, Kemptville. 0300 proceed to Kemptville investigation; Julia Elliott incarcerated at Kemptville cells."

And then there is mention of a search of 140 George Street, which I believe was the Foster residence.

Mr. Humphrey says:

> "In my respectful submission, those notations of Inspector MacCharles there is an indication he was at the Kemptville detachment on August 25."

He says it is not exactly clear when he was there on the 25th, and when he was there on the 26th.

Then Mr. Murphy makes submissions at page 9323, and in the following there seems to be some question about that, and that MacCharles was at the Project Jericho office, which was another case.

Mr. Murphy says it has never been disclosed that there was a conversation between Constable Nooyen and Inspector MacCharles concerning the interrogation of the applicant and, in his submission, whether it is a non-disclosure breach or not, the crux of the matter is MacCharles is a person materially connected with the matter.

The court then deals with the objections to the question, and the court indicates to Mr. Murphy that he can rephrase the question,

and then says:

"As the court indicated yesterday, this is the first time I was aware that MacCharles purportedly -- the witness may be wrong, but purportedly spoke to Inspector Detective MacCharles on that evening. I am totally surprised, and I have been the presiding judge for the motions of this trial, and of course this is significant because I reserved on the issue of the absence of Detective Inspector MacCharles from the court during the stay proceedings because, quite frankly, I found it strange to begin with. And so I have been alerted in my mind and put on the record my concern about the absence of Detective Inspector

MacCharles from the outset. As I say, I am very surprised to learn this witness told the RCMP that she spoke to him that evening."

And Mr. Humphrey says his objection to the question -- this goes on for some time, and I note that it is four-thirty.

It would take quite some time to finish with this, so this would be a convenient time to end for today.

THE CHAIR: All right, we will resume tomorrow at 9:30.

--- Whereupon the hearing was adjourned at 4:32 p.m., to be resumed at 9:30 a.m. on Wednesday, September 3, 2008.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Shorthand and transcribed therefrom, the foregoing proceeding.

Catherine Southworth, Computer-Aided Transcription

and

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Stenomask and transcribed therefrom, the foregoing proceeding.

_____

Nancy Greggs, CCR