

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**

**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 Monday, September 8, 2008 at 9:30 a.m.

APPEARANCES:

Earl Cherniak, Q.C.
Cynthia Kuehl

Independent Counsel appointed
pursuant to the *Complaints Procedure*

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for the Inquiry Committee

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1 Toronto, Ontario

2 --- Upon resuming on Monday, September 8, 2008

3 at 9:30 a.m.

4 THE CHAIR: Ms. Kuehl.

5 MS. KUEHL: Good morning, sir. I
6 believe that everyone now has been handed up a copy
7 of the evidence brief on disk. Each tab and, where
8 there is a sub-tab, each sub-tab is its own PDF
9 document, and it is updated as of the additional
10 materials put in the binders on Friday.

11 Each PDF document, when you open
12 it, is searchable in and of itself, so there is a
13 search engine attached to it, so you should be able
14 to look through, in some cases, 150 pages and
15 actually find the reference you are looking for.

16 THE CHAIR: Thank you very much.

17 MR. NELLIGAN: Do we give that an
18 exhibit number or just change it to the old number?

19 MR. CHERNIAK: I think it would
20 need an exhibit number, because the old one is the
21 evidence.

22 MS. KUEHL: The previous disk are
23 all of the transcripts. This is just your five
24 binders on CD.

25 THE CHAIR: Mr. Cherniak.

1 CONTINUED SUBMISSIONS BY MR. CHERNIAK:

2 MR. CHERNIAK: Thank you. Mr.
3 Nelligan, you will let me know if this device is
4 working as it should?

5 MR. NELLIGAN: So far.

6 MR. CHERNIAK: Thank you. I am
7 going back to the last tab in volume 2, particular
8 2(m).

9 THE CHAIR: Is that 29(n) as in
10 no?

11 MR. CHERNIAK: M as in mother, the
12 very last one. This was the tab that I skipped
13 over.

14 THE CHAIR: Thank you.

15 MR. CHERNIAK: Just so you
16 understand the background of what this particular
17 is about, the particular is very short:

18 "Justice Cosgrove ordered
19 disclosure to defence counsel
20 of a memorandum prepared by
21 Crown counsel on incidents of
22 bias by Justice Cosgrove."

23 This is a piece of a different
24 issue and that was the issue of the various
25 memoranda prepared by Crown Cavanagh sometime in

1 the late fall of 1998, apparently for the purposes
2 of assisting new counsel, who turned out to be Mr.
3 Strosberg and Mr. Humphrey.

4 There was an ultimate issue as to
5 whether Humphrey and Strosberg actually got that
6 information and when they got it, and what they
7 knew about, and whether their obtaining information
8 from previous Crown counsel was itself a breach of
9 the order forbidding any communication between
10 Crown counsel about the case.

11 One of the parts of -- one of the
12 five parts of the information that Cavanagh
13 prepared in the fall of 1998 was what could be
14 called a recusal summary; in other words, the
15 incidents that could lead to recusal. That was one
16 of the documents, and that is the issue here. I
17 can truncate some of the material here.

18 If we turn to the first page in
19 the document, it is events that occurred on March
20 1st, 1999, and there is a longish examination of
21 Debbie Walker -- she was the constable in charge of
22 liaison -- as to what she did with the memorandum
23 that Cavanagh had prepared.

24 What she did was -- there's a long
25 discussion about whether she read it and what

1 happened. What she did was give it to Pelletier,
2 Crown Pelletier, and, ultimately, as we will see,
3 Crown Pelletier got it to the Crown law office in
4 Toronto, Mr. Segal's office.

5 I am not going to take the time to
6 go through the cross-examination of Constable
7 Walker about what she knew and what she did, and it
8 is not germane to the point.

9 If I could take you to the next
10 tab, March the 5th, which starts at page 7840, you
11 will see that Mr. Cavanagh is in the witness box
12 and he is being cross-examined by Mr. Murphy on
13 this issue. Mr. Cavanagh is being cross-examined
14 on Ms. Walker's notes at page 7842, line 6:

15 "The next question she has
16 written here is: 'Do you
17 remember providing it?' And
18 her answer for you is: 'There
19 are a number of summaries
20 that were done. Some were
21 sent to Murray Segal. To my
22 knowledge nothing was given
23 to the new lawyers. I spoke
24 to someone, I can't recall
25 who, but they did not want

1 documents to Murray Segal is
2 what I was telling you."

3 At the bottom of the page, again
4 Mr. Murphy is reading some answers that he gave
5 that were noted by Constable Walker at about line
6 28:

7 "'Answer: There were a number
8 of summaries that were done.
9 Some were sent to Murray
10 Segal. To my knowledge,
11 nothing was given to the new
12 lawyers.'"

13 Over to page 7844, line 15:

14 "Okay. The next line it says
15 of your answer: 'I spoke to
16 someone, I can't recall who,
17 but they did not want them.
18 I still have them beside my
19 desk.' Then it says: 'I
20 faxed a chronology of case
21 and summary of strengths of
22 case.' -- and then slash -- '
23 or summary of incidents that
24 showed bias to Murray Segal.
25 Can't recall who asked,

1 Pelletier or Segal, or who
2 told me not to give it.'
3 What exactly are you
4 referring to when you say
5 'summary of incidents that
6 showed bias?'
7 "Answer: Okay. That's
8 -- that's one of the
9 documents that was sent to
10 Mr. Segal which I prepared,
11 showing a series of incidents
12 where I believe that the
13 court was showing bias."
14 Then over to page 7845, it says at
15 line 5:
16 "It was certainly my view
17 that, for some time, that the
18 court had showed a
19 significant amount of bias
20 against the Crown, and so it
21 may well have come from me,
22 but I had shared my views
23 with superiors that I spoke
24 to and discussed the case,
25 and so I don't know if, as a

1 result of my discussions they
2 said, 'well, prepare a
3 summary', or if I said, 'what
4 I should do here is prepare a
5 summary and give it to you'.

6 I can't recall the specifics
7 of that."

8 Then at the bottom page 7846,
9 about line 26, the witness gives this answer:

10 "The problem I have is that I
11 forward many documents to Mr.
12 Hoffman, I guess, or
13 Constable Walker's attention,
14 and I have no recollection,
15 you know, of a specific
16 incident on December 30th.

17 And when you say 'the
18 summary', I'm concerned
19 because my memory clearly is
20 that the new lawyers were not
21 going to get the summaries
22 which I have just referred
23 to."

24 On August the 5th, the issue
25 became as to whether that group of documents they

1 were eventually found, and I haven't taken you to
2 all of that, but they were eventually found. The
3 issue upon which Justice Cosgrove ruled on August
4 the 5th was whether those documents -- and for the
5 purposes of this particular, those documents
6 include the one concerning bias -- should be
7 produced to defence counsel.

8 Justice Cosgrove makes his ruling.

9 You will see at about line 25 on page 10379

10 Justice Cosgrove says:

11 " -- the complaint is that
12 the accused's rights have
13 been breached by the conduct,
14 i.e., non-production of that
15 memorandum by Mr. Cavanagh.
16 The response by Crown is
17 twofold; one, that for Mr.
18 Humphrey to be involved
19 potentially could be
20 contravention of the very
21 order which is the basis of
22 the complaint by applicant's
23 counsel in the first place,
24 and the second argument is
25 that this is work product and

1 is not therefore produceable.
2 I, on the first point, I
3 think it not a major concern
4 that is raised by Mr.
5 Humphrey. The corollary to
6 that would have been a
7 request by Mr. Humphrey that
8 the court's order with
9 respect to the communication
10 between counsel be lifted.
11 The court was requested and
12 acceded to a request that the
13 non-communication order of
14 witnesses, for example, be
15 lifted so that the RCMP could
16 continue or could begin
17 -- no, continue, I guess
18 -- continue with examinations
19 of officers of the Ontario
20 Provincial Police."

21 I just stop to say that we are
22 going to deal with that matter next.

23 "I would have responded to
24 such a request and I do now
25 respond that there is no

1 -- the order was not intended
2 to be a bar to the production
3 of that memorandum.
4 "On the second point argued,
5 that this is work product, or
6 in progress, or covered under
7 the umbrella of the so-called
8 privilege of exemption of
9 work product, I accept that,
10 in this case, there are
11 exceptional circumstances why
12 the memorandum ought to have
13 been produced. The first of
14 those exceptional
15 circumstances is the
16 retention by the Crown of
17 outside counsel -- and I'm
18 referring to Mr. Humphrey and
19 Mr. Strosberg, and assisted
20 by various other counsel; Ms.
21 Kelly in court, advised by
22 retired Justice of Appeal Mr.
23 Robins. I inquired at the
24 time of their appointment,
25 because it was that itself

1 was an exceptional happening,
2 that is, the retention 15
3 months into the trial of
4 outside counsel to represent
5 the Crown, whether there was
6 any precedent for such a step
7 taken by the Crown. Mr.
8 Humphrey, in review of the
9 cases, presented cases that
10 dealt with the retention by
11 the Crown of independent
12 counsel, but could provide no
13 case similar to this, that
14 is, 15 months into the trial
15 of a murder case, of outside
16 counsel being retained.
17 "In my view, this is -- the
18 retention of Crown and
19 circumstances with respect to
20 their retention is an
21 exceptional circumstance and,
22 for those reasons, I find
23 that absent that material,
24 which I will explain in my
25 view is relevant, it ought to

1 have been produced."

2 And this is on page 10382 at line

3 4:

4 "I also rule that absent its
5 production in the context of
6 conduct of various Crowns on
7 this stay application or in
8 this case -- and I refer, for
9 example, to one Crown
10 advising the court that he
11 would decide which of the
12 court's orders he thought
13 legal and therefore which he
14 would abide by -- I refer to
15 my already pronounced
16 findings that Crown counsel
17 were less than professional
18 in dealing with issues of
19 disclosure -- I'm referring
20 to Mr. Flanagan, Mr. Findlay,
21 on the issue of the police
22 officer from Ottawa."

23 I just stop there to say that in
24 the course of that ruling, Mr. Justice Cosgrove had
25 said on the earlier occasion -- it is in volume 5.

1 of the memorandum, the
2 preparation of the
3 memorandum, the delivery of
4 the memorandum, and the
5 failure of the Crown to
6 respond or attempt to explain
7 what appears to be actions
8 contrary to both the spirit
9 and the intent of the court's
10 direction that counsel have
11 no communication with
12 previous counsel is of
13 concern to the court.
14 "For those reasons, the court
15 finds a breach of the right
16 of the accused to prepare and
17 offer full defence. The
18 court is unable and is not
19 entertaining the significance
20 of the breach at this time,
21 however, the court is taking
22 the steps to order an interim
23 remedy, parallel to the
24 interim remedies directed,
25 for example, and ordered in

1 my order of March 18th
2 (sic) --"
3 I am sure he means March 16th:
4 " -- of last year, and the
5 court's order is that I am
6 directing that Mr. Cavanagh
7 and Mr. Pelletier attend the
8 court forthwith with the
9 original and copy or copies
10 of the memorandum, so the
11 court can ensure presentation
12 forthwith, that is,
13 production forthwith to
14 counsel for the applicant."

15 That indeed did occur. The page
16 reference, Justice Cosgrove's reference to the fact
17 that Mr. Ramsay might have legitimately
18 misinterpreted his order the other way, is on March
19 6th, 1998 at page 7728, and you will find that page
20 in tab C of volume 5. I don't think you need to
21 dig it up. It is just two lines.

22 Mr. Humphrey then makes
23 submissions on August 5th following that order, and
24 at page 10387 he says in the middle of the page, in
25 answer to an invitation to tell Justice Cosgrove

1 what he thinks about the order. Mr. Humphrey says
2 at line 24:

3 "This is a unique type of
4 order in the sense that where
5 a privilege is asserted, a
6 solicitor-client privilege, a
7 national interest privilege,
8 a work product privilege, the
9 problem is, is that where an
10 order of disclosure is made,
11 and the counsel who is
12 ordered to disclose objects,
13 their appeal remedy is
14 rendered moot if the order is
15 given immediate effect."

16 The discussion goes on. What Mr.
17 Humphrey wanted and what occurred was the order not
18 be put in immediate effect so that he could bring
19 an appeal, which he ultimately did.

20 Then Cavanagh is called, and I
21 don't think I need take you to Mr. Cavanagh's
22 evidence, because he again talks about what
23 happened with respect to the document.

24 At page 10394 the court, in the
25 middle of the page, wants the documents produced

1 and they will be sealed pending a ruling or further
2 opportunity for submissions by Mr. Humphrey.

3 Mr. Humphrey refers to the
4 allegation that is being made by Mr. Murphy. This
5 is on page 10395, and the allegation includes -- I
6 won't read the whole allegation, but it includes
7 the memorandum about the incidents of bias and that
8 the failure to disclose that, among other things,
9 was part of the basis for the stay application.

10 Mr. Humphrey at page 10401 asks
11 for and obtains the ability for himself to review
12 the material so he can see what it actually is
13 before he decides what he is going to do about it,
14 and Justice Cosgrove says that he has already done
15 so.

16 What I think I have to do is take
17 you to what happened next, and I have to take you
18 back to volume 1 to the ruling of Justice Chadwick,
19 August 6, 1999. You will find that just before tab
20 2. It is the last appendix in tab 1 just before
21 tab 2 near the beginning of the first tab. It says
22 "Appendix H, Reasons of Justice Chadwick", that's
23 the tab.

24 THE CHAIR: There was so much
25 shuffling, Mr. Cherniak, I am going to have to ask

1 you to direct me again to where --

2 MR. CHERNIAK: If you look at
3 volume 1, you will see that the first tab has a
4 number of white sub-tabs under it.

5 THE CHAIR: Yes.

6 MR. CHERNIAK: The very last one
7 says "Appendix H, Reasons of Chadwick J.", and it
8 is immediately before tab 2. This is the ruling of
9 Justice Chadwick, a very senior judge in Ottawa, on
10 Mr. Humphrey's appeal of the ruling that I just
11 read you, Justice Chadwick very properly, I think
12 the very next day.

13 I am sorry, Ms. Kuehl reminds that
14 I misspoke. It is not an appeal for the ruling.
15 What it was was an application for a stay of the
16 ruling so an appeal could be taken to the Supreme
17 Court of Canada, which is the process as I am sure
18 the members of the panel know, so I misspoke.

19 What Justice Chadwick says, you
20 will see from paragraph 5, page 2 of his ruling, he
21 refers to that the document includes the case
22 summary which itemizes incidents of bias.

23 Paragraph 6, he refers to the
24 order that I just read to you.

25 Paragraph 7:

1 "Counsel for the Crown is
2 seeking leave appeal to the
3 Supreme Court of Canada."

4 Paragraph 8, Justice Chadwick
5 says:

6 "On the application for stay,
7 I am satisfied that the crown
8 intends to seek leave to
9 appeal to the Supreme Court
10 of Canada and they have an
11 arguable issue as to whether
12 these summaries are work
13 product and therefore not
14 producible."

15 He says in paragraph 10:

16 "I am satisfied that if the
17 stay is allowed, the trial
18 will have to be adjourned
19 until after a ruling is made
20 by the Supreme Court of
21 Canada. Production of these
22 documents may have a bearing
23 on the cross-examination of
24 the witnesses especially in
25 the view of the fact there is

1 allegations of misconduct by
2 both the crown and police
3 officers involved in the
4 investigation."

5 Over to page 4, after reviewing
6 the relevant legislation and jurisprudence, Justice
7 Chadwick says at paragraph 16:

8 "I am satisfied on the facts
9 before me it is not a
10 frivolous or vexatious
11 motion, there is a serious
12 question to be tried as to
13 the right of the crown to
14 claim privilege."

15 Of course Justice Chadwick is
16 referring to the well known RJR-MacDonald test.

17 In paragraph 19 at line 3, after
18 referring to the fact that the memorandum may
19 outline the Crown's strategy, Justice Chadwick
20 says:

21 "In addition, it no doubt
22 contains comments made by the
23 crown counsel relating to the
24 alleged conduct of the trial
25 judge to support a possible

1 application requesting the
2 trial judge to recuse himself
3 as a result of alleged bias.

4 Without considering the
5 balance of convenience, I am
6 satisfied that the crown will
7 suffer some irreparable harm
8 by the production of the
9 memorandums. Although the
10 crown is required to make
11 proper disclosure their trial
12 strategies make their
13 prosecution more difficult,
14 but not impossible. The
15 comments regarding the
16 alleged conduct of the trial
17 judge may be embarrassing to
18 them and make the trial more
19 difficult for crown counsel."

20 Justice Chadwick, however, on the
21 balance of convenience test finds that the balance
22 of convenience favours production and says at
23 paragraph 23:

24 "The crown's irreparable harm
25 is slight compared to the

1 possible harm to the accused
2 and the public."

3 So he did not order a stay and the
4 memorandum was indeed produced to defence counsel.

5 Justice Cosgrove ordered it sealed and he, as best
6 I can understand, Justice Chadwick, never himself
7 saw the memorandum, but it did go to defence
8 counsel. But defence counsel never made any use of
9 it.

10 MR. PALIARE: Can I rise for one
11 moment? In giving the summary of Justice
12 Chadwick's decision, and I know the panel will read
13 it, but my friend did skip over paragraph 21, and
14 Justice Chadwick says that:

15 "The delay in coming to trial
16 is not as a result of the
17 conduct of the accused but
18 the prosecution."

19 It deals with delay, and the delay
20 isn't at the feet of the defence, says Justice
21 Chadwick, but at the feet of the prosecution. In
22 any event, that paragraph is worth reading in its
23 totality, as is the entire decision. I just wanted
24 to make sure that it didn't get passed over.

25 MR. CHERNIAK: Of course. One

1 does have to remember that Justice Chadwick was
2 dealing with this matter on an urgent basis on the
3 day after this ruling, and whatever he knew or
4 didn't know about the basis for why the case had
5 taken as long as it did would come from whatever
6 rulings Justice Cosgrove had made.

7 The whole ruling is important. I
8 didn't think that particular paragraph was
9 significant, but I am glad my friend directed you
10 to it, and I offer -- and I have offered -- the
11 entire ruling there for what it says.

12 In regards to that particular,
13 that's the evidence on that particular.

14 I am sorry, Ms. Kuehl says that I
15 misspoke myself yet again, that it was Justice
16 Cosgrove who did not receive the -- he never looked
17 at the material, as best we can tell, but it was
18 produced to defence counsel who, as best I can
19 tell, made no use of it.

20 If I can take you then to volume
21 3, but please keep volume 1 in front of you,
22 because I'm going to take you now to particular P.
23 I want to refer you to something in volume 1 at the
24 same time, and I will do it first with respect to
25 particular P.

1 THE CHAIR: P as in?

2 MR. CHERNIAK: P as in Peter. If
3 the panel recalls, I ended on Friday about four
4 o'clock by reading the extract 20, so I am now go
5 to the next particular which is 2(p). Particular
6 2(p) reads that:

7 "On two occasions, Justice
8 Cosgrove refused to rescind
9 his non-communication orders
10 so that police witnesses
11 could feel that they could
12 speak to the RCMP without
13 being in breach of the order,
14 despite being advised that it
15 was delaying the RCMP
16 investigation. Justice
17 Cosgrove stated that --"

18 And I will come to where he states
19 this:

20 " -- that he was 'scandalized
21 at what professed to be the
22 professionalism of the RCMP
23 in coming to the court to ask
24 for an exception to that
25 order.' Justice Cosgrove

1 subsequently criticized the
2 RCMP for the delay in the
3 completion of its
4 investigation."

5 What I would like to do, so you
6 can see where this is all going as I review it, is
7 I would ask you to turn to Justice Cosgrove's
8 September 7th, 1999 ruling, which is in volume 1, I
9 guess the second tab under 1.

10 I want to refer you to a number of
11 findings that Justice Cosgrove made about the RCMP
12 in that ruling.

13 MR. PALIARE: Excuse me, could you
14 just repeat for me again what you are reading from?

15 MR. CHERNIAK: Yes, I am reading
16 from the September 7th, 1999 very lengthy ruling in
17 which Justice Cosgrove granted a stay, which was
18 the ruling that was the subject matter of the
19 appeal to the Court of Appeal. It is the second
20 tab under tab 1 in volume 1.

21 THE CHAIR: Paragraph?

22 MR. CHERNIAK: The first one I am
23 going to take you to is paragraph 12 on page 4, I
24 think. Yes, page 4. Justice Cosgrove says in
25 paragraph 12:

1 "The conduct of the
2 investigation by the RCMP of
3 the OPP investigation of this
4 case (referred to as the
5 Foster homicide in the terms
6 of reference between the two
7 police services) in relation
8 to then Det. Insp. MacCharles
9 was bizarre."

10 And he refers to the Terms of
11 Reference, and he refers in paragraph 13 to the
12 forensic testing of Constable Laderoute's notes and
13 the delay with respect to that, and he notes that:

14 " -- both tests were
15 inconclusive on the
16 controversial issue of fixing
17 the dates of the challenged
18 entries."

19 Paragraph 14 I am going to read,
20 because that it refers to extracts from evidence
21 that I am going to read.

22 "In one of its monthly
23 up-dates to the OPP, the RCMP
24 reported in March 1999, that
25 it was unlikely any

1 incriminating findings had
2 been identified to warrant
3 complaints as charges with
4 respect to the 'Foster
5 homicide.' When it became
6 apparent by the
7 cross-examination of
8 Inspector Nugent of the RCMP
9 who had over-all
10 responsibility of the
11 investigation in March, 1999,
12 that the RCMP lacked any
13 rudimentary understanding of
14 the issue respecting Cst.
15 Laderoute's notes, a number
16 of bizarre events occurred."
17 He then refers to -- I may as well

18 read it:

19 "The actual physical exhibit
20 of Cst. Laderoute's notes was
21 requested for forensic
22 testing; five new RCMP
23 officers were assigned then
24 (March, 1999) to interview
25 approximately seventy

1 witnesses; counsel in the
2 Dept. of Justice, Canada,
3 appeared in Court after Insp.
4 Nugent had given testimony
5 for a day claiming privilege
6 with respect to the
7 investigation file and
8 requesting an 'O'Connor'
9 process for its production.
10 The cross-examination of
11 Insp. Nugent was adjourned
12 pending completion and
13 production of the final
14 Report."

15 Paragraph 15:

16 "The appearance of Federal
17 Crown counsel at this point
18 of the proceedings was all
19 the more bizarre as the Court
20 had advised the RCMP officers
21 early in the investigation
22 that they should seek legal
23 advice (presumably from the
24 RCMP legal services) as to
25 whether they could speak to

1 persons who were witnesses on
2 the voir dire in light of a
3 witness non-communication
4 order. What is even more
5 bizarre, the RCMP officers
6 decided to delay their
7 interviews of OPP officer
8 witnesses because of the
9 non-communication order after
10 consulting with Ontario Crown
11 officers who themselves were
12 witnesses on the voir dire!"

13 You will note the exclamation
14 mark.

15 Can you turn to page 52, please,
16 and you will see paragraph 297:

17 "I have concluded that the
18 RCMP investigation as it
19 relates to this trial was
20 co-opted by the OPP officers
21 and Crown prosecutors and
22 that it lacks the basic
23 characteristics of an
24 'independent' investigation -
25 free from any influence by

1 the Crown and OPP. The
2 so-called independence of the
3 investigators was undermined
4 the following: --"

5 You will see that he refers in (a)
6 to advice provided them by Crown attorneys in the
7 Ministry of the Attorney General, and then a
8 meeting in the office of Crown Pelletier on October
9 28th, 1998:

10 "(c) continuing
11 correspondence by way of
12 'updated' progress reports--"

13 "(d) the sudden revival and
14 drastic expansion of the
15 'suspended' Elliott Homicide
16 aspect of the 'independent
17 investigation' almost
18 immediately following the
19 appearance and
20 cross-examination of
21 Inspector Nugent.

22 "(e) the advice given by
23 Senior Crown Pelletier
24 respecting the suspension of
25 the investigation in late

1 October 1998 was buttressed
2 by similar opinions and
3 advice offered by Crown
4 Hoffman and OPP General
5 Counsel Mark Sandler."

6 The panel knows Justice Cosgrove
7 misspoke. Mr. Sandler is an independent well-known
8 and highly respected criminal defence counsel who
9 regularly appears on behalf of the Ontario
10 Provincial Police when matters concerning them are
11 under consideration, but he is not their general
12 counsel.

13 Then at page 53 he refers to:
14 "The false and misleading
15 statement by the assistant
16 lead investigator, Det. Cst.
17 Churchill RCMP Insp. Nugent
18 that 'the notes that Cst.
19 Laderoute wrote pertaining to
20 the traffic stop of Julia
21 Elliott do not make or break
22 this case since there are a
23 number of civilian witnesses
24 who without a vested interest
25 in the investigation provided

1 us the same information and
2 actually allowed us to better
3 qualify the time factor of
4 the accused on the night I
5 believe that Lawrence Foster
6 was murdered.'"

7 Then he says, after reference to
8 his invitation to the RCMP to obtain legal advice,
9 he says:

10 "I have concluded, on the
11 balance of probabilities,
12 that the professed reluctance
13 of OPP officers to be
14 interviewed by the RCMP was a
15 sham and an attempt to delay
16 or detract from the worth of
17 the investigation. In this
18 context, Det. Cst. Churchill,
19 who I find misled Insp.
20 Nugent, volunteered his
21 statement notwithstanding the
22 non-communication order - as
23 did Crown Pelletier who also
24 was himself a witness.
25 "It was apparent in the

1 evidence of Insp. Nugent in
2 his first appearance in
3 April, 1999, that he had no
4 grasp of the significance of
5 the evidence of Cst.
6 Laderoute's notes respecting
7 licence plate number 301 HOM
8 or of the allegation
9 respecting their origin. The
10 value of his opinion or the
11 reliability of his
12 investigative work to that
13 point was completely
14 shattered by his
15 cross-examination so that it
16 is apparent, as a result, a
17 rushed and expanded
18 investigation was mandated
19 with five additional officers
20 being assigned to do witness
21 interviews. Nor do I believe
22 it was coincidental that at
23 that point interim updates by
24 the RCMP to the OPP ended
25 when, during the

1 cross-examination, the
2 so-called 'independence' of
3 the investigation was the
4 subject of pointed
5 cross-examination of Insp.
6 Nugent by applicant's
7 counsel."

8 Justice Cosgrove concludes at the
9 bottom of page 53:

10 "As a result of the above, I
11 find that the conduct of the
12 Ministry of the Attorney
13 General in meeting with and
14 conferring with the RCMP
15 'independent investigator' on
16 numerous occasions from its
17 commencement on October 13th,
18 1998, to its 'suspension' two
19 weeks later and thereafter -
20 including at the meeting held
21 in Regional Crown Pelletier's
22 office on October 28th, 1998,
23 at which a decision was
24 reached to suspend the
25 investigation of the

1 applicant's case - despite
2 prior representations to the
3 Court that the investigation
4 would be 'independent' and
5 free from any influence by
6 the Crown and OPP is a breach
7 of the applicant's Charter
8 rights."

9 MR. PALIARE: Can I rise again? I
10 need to mention that what my friend left out when
11 he was reading through sub (f) is the key aspect of
12 that paragraph, which are the last three lines,
13 that the statements -- the position of the RCMP,
14 Justice Cosgrove says, were incorrect and resulted,
15 and because of that incorrectness:

16 " -- resulted in the decision
17 to suspend the Elliott
18 investigation."

19 By leaving those out those three
20 lines, it distorts what his finding was, in my
21 respectful view.

22 MR. CHERNIAK: I am grateful to my
23 friend. I am happy to read it all. The reason I
24 didn't read it was that I am trying to paraphrase,
25 to some extent, but it is all there. The last four

1 lines read, and this is (f):

2 " -- together with the advice
3 that witnesses were ordered
4 by the court not to speak to
5 RCMP Insp. Nugent - both of
6 which were incorrect -
7 resulted in the decision to
8 suspend the Elliott
9 investigation."

10 I am reading all of this because I
11 am going to come back to the evidence that relates
12 to these findings.

13 THE CHAIR: Mr. Cherniak, just
14 while you are dealing with the judge's ruling, the
15 way it is organized and the various headings and
16 sub-headings and so on, it looks like it was
17 prepared in response to particulars presented by
18 the defence on this application; is that right?

19 MR. CHERNIAK: There was notice of
20 motion that contained literally hundreds of Charter
21 breaches, and I believe that -- my recollection is
22 -- as I say, I haven't reviewed the defence notice,
23 but I believe that the organization responds to the
24 list of Charter breaches that the defence prepared.

25 THE CHAIR: For example, if you

1 look at paragraph 296, it says, "(I), (ii), (iii),
2 I find no breach attaches", and I am assuming that
3 those are references to some other document. I
4 don't know what.

5 MR. CHERNIAK: It may help if you
6 turn back to paragraph 19. Yes, I think paragraph
7 19 answers your query, Chief Justice, under the
8 heading "Findings":

9 "I intend to respond to each
10 of the alleged breaches of
11 the applicant's Charter
12 rights contained in the
13 following renewed Notices of
14 Application for Stay
15 Proceedings relied upon by
16 counsel for the applicant."

17 That's Mr. Murphy, and then he
18 lists various applications starting in November
19 23rd, 1998, January 5th, 1999, January 15th, 1999,
20 March 29th, 1999, July 14th, 1999, and the further
21 written submissions on August 23rd, 1999.

22 THE CHAIR: Thank you.

23 MR. CHERNIAK: That is where the
24 organization comes from, as a direct response to
25 the literally hundred of Charter breaches alleged,

1 and Justice Cosgrove finds that some of the
2 allegations were Charter breaches and some were
3 not.

4 THE CHAIR: Thank you.

5 MR. CHERNIAK: I am now back at
6 the bottom of page 53:

7 "As a result of the above, I
8 find that the conduct of the
9 Ministry of the Attorney
10 General in meeting with and
11 conferring with the RCMP
12 'independent investigator' on
13 numerous occasions from its
14 commencement on October 13th,
15 1998, to its 'suspension' two
16 weeks later and thereafter -
17 including at the meeting held
18 in Regional Crown Pelletier's
19 office on October 28th, 1998,
20 at which a decision was
21 reached to suspend the
22 investigation of the
23 applicant's case - despite
24 prior representations to the
25 Court that the investigation

1 would be 'independent' and
2 free from any influence by
3 the Crown and OPP is a breach
4 of the applicant's Charter
5 rights."

6 And then over to page 58 under the
7 heading "Full Answer in Defence and Fair Trial",
8 paragraph 326(I):

9 "I find that the conduct of
10 the RCMP 'Project
11 Audition' --"

12 And that was Elliott investigation
13 name:

14 " -- investigators in
15 advising Crown witnesses
16 during their 'structured
17 interviews' in April, May and
18 June 1999 that the RCMP's
19 'independent investigation'
20 had been brought about as a
21 result of the 'allegations
22 raised by defence counsel'
23 during the applicant's trial
24 created the inaccurate,
25 misleading and prejudicial

1 impression on the witnesses
2 that the applicant's defence
3 counsel was unnecessarily and
4 improperly protracting the
5 court proceedings in order to
6 delay the applicant's trial,
7 I find a breach of the
8 applicant's Charter rights
9 attaches."

10 Then B, "Further Unreasonable
11 Delay", 327(I):

12 "I find that the Crown's
13 conduct in referring the
14 applicant's case for a
15 purportedly 'independent
16 investigation' on August
17 20th, 1998 has resulted in
18 further unreasonable delay in
19 the proceedings through no
20 fault of the applicant or her
21 defence counsel of nearly six
22 months while the court
23 awaited completion of the
24 RCMP investigation and
25 disclosure arising from that

1 investigation, including the
2 results of the RCMP
3 interviews with 70 Crown
4 witnesses in April, May and
5 June 19. A breach attaches."

6 Then Justice Cosgrove goes on to
7 find certain other matters were not a breach.

8 That's the findings. Now I would
9 like to go back to deal with some of the evidence
10 that relates to this matter and go to page 4364 on
11 October 22, 1998.

12 HON. MACDONALD: I am sorry, Mr.
13 Cherniak?

14 MR. CHERNIAK: I am going right
15 back to the beginning -- I am sorry. I am back in
16 volume 3 now. If I said -- I again misspoke and I
17 mean tab P. At the bottom of page 4364, Mr.
18 Cavanagh raises this issue:

19 "Your Honour, if I may
20 address the court on
21 something which was brought
22 to my attention. It's in
23 relation to the RCMP
24 investigation that we've
25 heard so much about into

1 Detective Inspector
2 MacCharles and Snider and
3 Dougherty --
4 "The Court: Yes.
5 "Mr. Cavanagh: The
6 investigator for the RCMP --
7 now, how should I put this?
8 Some of the witnesses who are
9 witnesses on this trial, do
10 not want to speak to him
11 until they're released by the
12 court from the non-
13 communication order, for the
14 purposes of cooperating with
15 the investigation. They have
16 a concern, because the
17 persons on the investigation
18 could become witnesses in the
19 matter, and they don't want
20 to discuss their evidence
21 until it is put before the
22 court that they will in fact
23 be doing so."
24 The court calls on Mr. Murphy:
25 "I think we should hear the

1 source or sources for that
2 submission by my friend. If
3 it's a Crown, I'd like to
4 hear -- I'd like it to be
5 given under oath. And if
6 it's an RCMP investigator, I
7 would like to hear him so
8 that we can get sworn
9 evidence on this very
10 important point."

11 Mr. Murphy goes on and he wants
12 the specifics, "so we can determine", at the top of
13 page 436 (sic):

14 " -- in the first instance,
15 determine who he's been --
16 who he's got this information
17 from, so we know
18 specifically.

19 "And obviously, the biggest
20 general concern is this is
21 the very mischief that, if I
22 can use that term of art,
23 that's created or raised by
24 the involvement of the RCMP."

25 Over to the next page, Mr. Murphy

1 expands on his concern and he says at about line
2 17:

3 "I think, in my previous
4 submissions, I've made
5 reference to the implications
6 of that for the matter before
7 the court in this sense: If
8 the RCMP is going to become
9 involved, and apparently now
10 has become involved in
11 contacting witnesses before
12 -- I have concerns about the
13 impact on the process -- not
14 necessarily, Your Honour, the
15 propriety, because we don't
16 know the details. I guess
17 I'm saying the concern seems
18 to be crystalizing in my
19 mind, at least, as to the
20 impact, possible impact that
21 this investigation may have
22 on witnesses who are before
23 the court on this voir dire
24 who have been before the jury
25 in February, and I think it's

1 a matter that has to be
2 explored or put on the record
3 because it -- because of the
4 issues that have arisen in
5 this case about 'witness
6 preparation' --"

7 And he wants to know, at the top
8 of page 4368, who the RCMP has spoken to. At the
9 bottom of page 4368, Mr. Murphy says:

10 "My position would be -- I am
11 very --"

12 Maybe I should read what the court
13 says that Mr. Murphy is responding to, line 20,
14 Justice Cosgrove:

15 "Well, let's assume we do and
16 we have it, and he comes or
17 she comes and says, 'Before I
18 started, I was advised of a
19 non-communication order and I
20 felt I should have the
21 court's direction'. Now,
22 with that assumption, what
23 would your position be?

24 "Mr. Murphy: My position
25 would be I'm very concerned

1 about the fact of any contact
2 between an RCMP investigator,
3 presumably for the purpose of
4 asking if -- or inquiring or
5 investigating the extent of
6 any -- I think the word
7 that's been used is
8 'tampering or influencing' by
9 MacCharles of those or other
10 witnesses. Because, in
11 effect, given there's a
12 witness exclusion order, in
13 effect, it signals,
14 potentially at least, those
15 witnesses to evidence before
16 the court and that, again, I
17 don't know if part of Your
18 Honour's assumption speaks to
19 whether or not that officer
20 -- what information that RCMP
21 investigator has that he's
22 approaching these witnesses
23 with, if indeed he has any."

24 The court says at line 22:

25 "That may be so, but this is

1 an RCMP investigation into
2 potential criminality. I'm
3 not sure I can tell officers
4 what to investigate and not
5 what to investigate or when.
6 I'm not sure --
7 "Mr. Murphy: There may not
8 be an issue as to your
9 jurisdiction or authority
10 with respect to preventing
11 them or not, Your Honour, I
12 agree with that, but I think
13 the concern is if they go and
14 speak to -- the RCMP speaks
15 to witnesses who are subject
16 to recall --"
17 Over to 4370:
18 " --the fact of contact and,
19 depending on what's
20 discussed, may interfere with
21 full answer and defence to
22 the extent that they are
23 alerted in some sense as to
24 what the focus of that RCMP
25 investigation is and they're,

1 in effect, forewarned and
2 forearmed -- they have some
3 sense, presumably of what the
4 concerns the RCMP is
5 addressing and they can
6 simply package their -- or
7 organize their responses in
8 cross-examination on the
9 trial, on the motion, by
10 downplaying things that they
11 would, at that point,
12 presumably know were of
13 concern to the RCMP."

14 Then Mr. Murphy refers to his
15 concern arising out of matters that are going on
16 with respect to the APEC Inquiry in B.C., which I
17 am sure Chief Justice will recall. He says at the
18 bottom of page 4370 and top of 4371 that:

19 " -- the RCMP is potentially
20 jeopardizing our defence even
21 further by going and
22 contacting people, police
23 officers and witnesses with
24 respect to their involvement
25 with MacCharles, when we're

1 engaged in a parallel
2 investigation --"

3 Mr. Murphy then goes to the other
4 end of the country and speak to the problems in the
5 Westray Inquiry that Chief Justice MacDonald will
6 remember and says at line 16:

7 " -- the impact of a parallel
8 RCMP investigation into
9 allegations that now clearly
10 touch upon the Crown
11 attorneys and the police in
12 our case. In my submission,
13 it is fraught with danger,
14 because the matter is before
15 the court and the fact that
16 this investigation was
17 initiated by the parties
18 themselves who are now
19 implicated, as it were, in
20 this voir dire before this
21 court, it, in effect -- it is
22 potentially, if not actually
23 now, interfering with this
24 court's jurisdiction and with
25 the cross-examination and

1 full answer and defence --"

2 And the like. Mr. Murphy goes on
3 in that vein, and he says at about line 10 on the
4 next page, 4372:

5 " -- they're now in the
6 position where they have set
7 into motion an investigation
8 which now threatens to
9 interrupt and compromise the
10 ability of the defence to
11 find out the true extent of
12 Crown and senior police
13 involvement beyond what we've
14 already learned."

15 Mr. Cavanagh responds at line 24:

16 "I think it comes down to
17 this: this court has made an
18 exclusion order for witnesses
19 and a non-communication order
20 to witnesses before the court
21 and many of the police
22 officers, as I have seen and
23 as I understand have been
24 -- have experienced rather
25 wide ranging cross-

1 examinations touching on
2 many, many areas of their
3 evidence, of their note
4 taking, just a multitude of
5 the aspects of the
6 investigation, and so their
7 evidence comprises a wide
8 spectrum and they're now
9 being approached by the RCMP
10 to be asked questions about
11 the investigation and, as I
12 understand it, they have a
13 concern because of the order
14 the court has made and,
15 therefore, do not wish to
16 discuss really anything about
17 the investigation with the
18 RCMP until they are reassured
19 that doing so will not be a
20 violation of this court's
21 order, and I've been asked, I
22 guess, to relay that to the
23 court and to make application
24 to Your Honour to vary the
25 order that was made by this

1 court to allow the officers
2 to speak with the RCMP about
3 the investigation.
4 "The Court: Who made that
5 request of you?
6 "Mr. Cavanagh: It was
7 Detective Inspector
8 Bowmaster, is the person who
9 brought that to my attention
10 yesterday evening, I believe,
11 was the first time I heard of
12 it, and I meant to bring it
13 to Your Honour's attention
14 this morning and forgot -- I
15 understand my friend is
16 saying that he feels that the
17 RCMP approaching witnesses
18 may jeopardize the defence in
19 this case. Now, if that's my
20 friend's position, I would
21 perhaps wish to relay that to
22 the RCMP and the OPP, and I
23 don't know what they're
24 position will be in terms of
25 whether they want to continue

1 with the Elliott branch of
2 this investigation, if it's
3 the defence position that it
4 jeopardizes the defence in
5 this case. But, that's the
6 nature of the application I'm
7 making, that's the nature of
8 the extent of my knowledge.
9 "The Court: No, I must say I
10 thought that you had been
11 contacted by the RCMP, but
12 now we've got that
13 straightened around -- For
14 the time being, the order
15 will remain as is, and just
16 -- my instincts tell me that
17 the police will do what the
18 police will do, and I think
19 their jurisdiction is to
20 investigate, and I don't
21 think courts can tell the
22 police not to investigate.
23 This is just my impression
24 but --"
25

1 Mr. Cavanagh says:

2 "I think Your Honour is quite
3 right about that, but I think
4 the concern was the ambit of
5 the order --

6 "The Court: Right.

7 "Mr. Cavanagh: --and they
8 just wished to be reassured.

9 "The Court: Now, on the
10 issue of whether the order
11 should be changed in these
12 proceedings to facilitate the
13 investigation and to provide
14 some direction to the
15 officers, on that question, I
16 am going to put that over
17 until tomorrow --"

18 Mr. Murphy does have some
19 submissions on that matter before tomorrow, and
20 about line 8 on the next page, Mr. Murphy says:

21 "I will take advantage of
22 Your Honour's offer to speak
23 again tomorrow morning, but
24 just while it's fresh in my
25 mind -- Detective Inspector

1 Bowmaster, you have indicated
2 your intention to cite him
3 for contempt -- for breach of
4 a witness exclusion order --
5 The first question that pops
6 to mind is why is he
7 trenching in this area which
8 may -- and again I wish we
9 had the facts in evidence on
10 the stand -- but how does he
11 come to be involved in either
12 conveying these requests,
13 most innocently perhaps, or
14 more insidiously, that he
15 would involve himself in
16 initiating this type of
17 request. It is a self-
18 serving request --"

19 I pause to remind the panel
20 Detective Inspector Bowmaster is the case manager:
21 "It is a self-serving
22 request, based on the
23 information my friend has
24 given, obviously. It is a
25 self-serving request, given

1 that he's been cited for
2 breach of witness exclusion
3 orders that he's now asking
4 you to vacate them in
5 effect --"

6 Justice Cosgrove responds to Mr.
7 Murphy starting at line 6 on page 4376:

8 "My main concern is the
9 impact upon the trial of an
10 investigation. There are
11 really two -- I think there
12 are two issues: Do I have
13 jurisdiction to tell the RCMP
14 not to talk -- I guess I do
15 have jurisdiction to amend my
16 own orders, and that is what
17 the request is, so that's the
18 second part of it."

19 Then we go over to the next day,
20 October 23rd, and at the bottom of page 4481, this
21 matter is revisited and Mr. Cavanagh says at line
22 22:

23 "And that is the matter Your
24 Honour indicated we might
25 revisit this morning, with

1 regard to the order for non-
2 communication -- which, as I
3 understand, now impinges upon
4 the RCMP investigation, or
5 the proposed RCMP
6 investigation, because
7 various OPP officers do not
8 wish to speak at all about
9 this matter for fear that
10 they will be held in contempt
11 of this court's order of non-
12 communication -- And what I
13 understand is being asked is
14 that the order be varied that
15 they have no communication
16 -- however the order is
17 phrased, that there be an
18 appendix, 'except for the
19 purposes of speaking to' -- I
20 understand it's Dan Nugent of
21 the RCMP, in respect to the
22 independent investigation now
23 being carried on by the
24 RCMP."

25 The court calls on Mr. Murphy, who

1 says at line 16:

2 "I don't think Your Honour
3 should vary the order. I am
4 opposed to any delay --"

5 At line 18:

6 "I am opposed to any
7 variation of anything arising
8 from this case being -- I'm
9 against this case being
10 affected in that way, in
11 particular, and in general
12 terms as well, not least when
13 we learned yesterday that
14 it's Bowmaster who's asking
15 Your Honour to vacate -- in
16 effect, vacate your previous
17 order -- It is self-serving,
18 the request. It's unnerving,
19 to the extent that we have no
20 idea of which officers
21 Bowmaster is talking about.
22 Maybe it's just himself --
23 "I'm opposed to him having
24 any involvement --"

25 He goes on at length about Mr.

1 Bowmaster having any involvement in dealing with
2 these witnesses. He wants them, at line 17, not to
3 be phoned or tipped off. He goes on at some length
4 about the RCMP investigation, and in the middle of
5 page 4484, about the middle, he wonders who the
6 RCMP might have talked about. And at line 22 Mr.
7 Murphy says:

8 "Now they come back to us,
9 the same officer involved in
10 that decision who deceived
11 this court, in my submission,
12 about when the decision was
13 going to be reached, knowing
14 that it had already been
15 reached, now comes back,
16 through Mr. Cavanagh, who
17 himself may become a witness
18 about that meeting, and is
19 asking the court for the
20 court's indulgence to in
21 effect vacate its order. It
22 stinks to high heaven -- I've
23 used that term before in
24 these proceedings, I'm sure
25 I'll have occasion to use it

1 again."

2 Mr. Justice Cosgrove asks Mr.
3 Cavanagh to respond, "Mr. Cavanagh":

4 "I think Your Honour has my
5 request. If the court
6 chooses not to vary the
7 order, I'll relay the -- I
8 will relay that to the RCMP
9 and the OPP and they can
10 -- they can seek an audience
11 before the court if they
12 wish --"

13 Then Justice Cosgrove makes a
14 ruling at page 4488. I will read the ruling
15 starting at line 9.

16 "The request communicated by
17 Mr. Cavanagh really raises
18 two concerns for the court.
19 One, is that the non-
20 communication order was
21 concerned about information
22 leak by witnesses. Secondly,
23 the request involves the
24 potential for delay to the
25 trial, this trial. Both of

1 these concerns or issues have
2 been live issues for the
3 court through the trial from
4 the very outset and,
5 accordingly, the court is
6 most reluctant to interfere
7 with this trial process,
8 which will detract, that is,
9 detract from the court's
10 process on the issue of
11 information leak or
12 potentially detract in the
13 context of occasioning delay
14 by outside events, and I,
15 therefore, am not going to
16 change the court's order of
17 non-communication."

18 Then we go to January 18th, 1999.

19 Mr. Hoffman says at the bottom of line 26 on page
20 7689 --

21 MR. PALIARE: Excuse me, Mr.
22 Cherniak. I just point out to the court that you
23 see at the top of that page, and when it comes to
24 our turn, I will get the page before, but you will
25 see that there is a fairly abject apology by Mr.

1 Murphy, that he is apologetic about the language
2 that he used and will try to refrain from using it
3 again. I just wanted to point out that we will
4 deal with that, but that is set out at that page.

5 MR. CHERNIAK: I think that that
6 was dealing with earlier submissions that I had
7 read I think on an earlier occasion, not germane to
8 this point, but it is there and I'm happy to
9 provide you any pages in the evidence that my
10 friend asks for.

11 Well before this hearing started,
12 I asked him to supply me with any additional pages,
13 other than what was in this book, that he wished me
14 to bring to your attention, and he did in volume 5.

15 I am at the bottom of page 7689.
16 Mr. Hoffman says "Perhaps" -- you remember that Mr.
17 Hoffman was a Crown. He was still involved, to
18 some extent, at the same time as Mr. Humphrey and
19 Mr. Strosberg:

20 "Your Honour, perhaps I
21 should say this: Your Honour
22 indicated two concerns --
23 this was just before the
24 break, and I'm not sure I
25 completely understood the

1 second concern about delay,
2 but the first concern Your
3 Honour indicated 'there's
4 still the outstanding RCMP
5 investigation', and I think,
6 because Your Honour indicated
7 that, it's incumbent upon me
8 to say this: In the notes
9 that my friend, Mr. Murphy,
10 read on Friday from Constable
11 Walker, there was one passage
12 he read involving Inspector
13 Nugent of the RCMP attending
14 at the regional director's
15 office, and I believe the
16 passage of the notes -- and
17 this is in fact how it
18 happened -- Inspector Nugent
19 and I left Constable Walker
20 and went into another office,
21 and Inspector Nugent just
22 wished to discuss his RCMP
23 investigation with me. He
24 did not discuss any of the
25 substantive details of the

1 content of his investigation
2 but it was rather a matter of
3 process.
4 "He told me that he decided
5 to do the Cumberland part of
6 the investigation first, that
7 he is working on the -- or at
8 least complete the Cumberland
9 part of the investigation
10 first -- of course, he was
11 taking notes of this
12 conversation -- and that he
13 was working on the Elliott
14 portion of the investigation.
15 "Among the issues he raised
16 was a concern that he had
17 about who he could talk to,
18 both in light of any rulings
19 the court had made, and in
20 light of concerns he had
21 about being seen to influence
22 witnesses who had yet to
23 testify on this trial, and we
24 discussed that concern.
25 "And one of the suggestions I

1 offered to him was he may
2 wish to appear before Your
3 Honour with lawyers for the
4 RCMP to deal with that issue;
5 that was one of the
6 possibilities raised with
7 him. But, in any event, he
8 was going to, I understood,
9 continue with that
10 investigation. I don't know
11 who he has talked to or was
12 still going to talk to, and
13 he didn't tell me --"

14 Justice Cosgrove responds to that
15 and he says at about line 18:

16 "Unfortunately again, I think
17 it's because you haven't been
18 in court when we've dealt
19 with the RCMP matter -- For
20 example, a request was made
21 by the RCMP to provide an
22 exception to one of the
23 orders with respect to
24 witnesses who were -- who had
25 testified and so, I am

1 surprised -- well, perhaps
2 Officer Nugent wants to re
3 -- wants to review or discuss
4 other things about that order
5 but, as I say, that matter
6 has been before the court at
7 the motion of other Crown in
8 this case, and the court has
9 dealt with argument and made
10 a ruling."

11 Justice Cosgrove goes on to refer
12 to the RCMP investigation on the next page, and he
13 says about line 16:

14 " -- and I thought, for the
15 sake of counsel who yet are
16 fresh on the case, that
17 nobody should be surprised
18 that there are -- that that
19 is one area that potentially,
20 when I think of all other
21 things, could have some
22 bearing on the resumption of
23 the stay application.
24 "Mr. Hoffman: I have
25 -- since I met with Inspector

1 Nugent, I have since read the
2 transcript involving the area
3 Your Honour refers to, where
4 Your Honour made comments to
5 the effect of, 'I take the
6 position that I don't have
7 authority over the RCMP', and
8 I also must have read that or
9 have been aware of that when
10 I spoke to Inspector Nugent,
11 because I told him at that
12 point that I didn't have the
13 transcript reference but I
14 had a recollection that the
15 court was not making any
16 orders in that regard and his
17 concern to me was beyond
18 that. It was, as Your Honour
19 says, something different.
20 The concern he expressed to
21 me was: if the RCMP comes in
22 and a witness then feels like
23 for some reason that the
24 police want them to change
25 their evidence -- that was

1 his concern, and that's when
2 I suggested to him that if he
3 had concerns like that, one
4 possibility was to come
5 before the court with a
6 lawyer for the RCMP and, if
7 the court wished to make any
8 direction in that regard,
9 they would."

10 Mr. Hoffman again refers to the
11 earlier transcript. Mr. Murphy then responds with
12 his recollection about certain evidence and the
13 RCMP investigation, and he refers on page 7694 at
14 about the middle of the page:

15 "Without going down the
16 slippery slope of
17 compellability and what went
18 on, I'm racking my brains
19 trying to understand why Mr.
20 Hoffman and Inspector Nugent
21 have any need to meet with
22 each other, apart from the
23 moot issue of whether the
24 officers under investigation
25 by the RCMP are permitted to

1 speak to the RCMP and, as is
2 clearly indicated in Your
3 Honour's rulings -- because I
4 read it over when the
5 transcript became available a
6 few weeks ago or a week ago
7 -- it was decided clearly
8 that that wouldn't be
9 appropriate. So I'm not sure
10 -- I accept my friend, Mr.
11 Hoffman, saying that
12 Inspector Nugent may come
13 before the court and Your
14 Honour may infer that to be a
15 restating of the request or
16 that some change has occurred
17 that requires an exemption
18 under the order, but I have
19 real concerns, because this
20 was sold to those -- to the
21 audiences who were hearing
22 it, as an independent
23 investigation by both the
24 police and an external non-
25 involved Crown attorney --"

1 And down a couple of lines:

2 "I am just concerned that Mr.
3 Hoffman is meeting with Dan
4 Nugent of the RCMP and the
5 question I have to ask why."

6 Mr. Murphy then goes on and
7 continues his submissions and his concerns about
8 the RCMP, at the bottom of page 7696, conferring
9 with a Crown on the case the provincial Crown.

10 Mr. Hoffman responds to that at
11 the top of page 7697:

12 "Mr. Hoffman: Inspector
13 Nugent asked to speak to me."

14 He says at about line 17:

15 " -- this is what Inspector
16 Nugent said: 'I'm going to be
17 approaching witnesses on
18 Elliott and I'm concerned
19 that it may be seen as trying
20 to influence what they say if
21 the RCMP, the national police
22 force, comes in, when they've
23 already given statements'.
24 So he was seeking some, I
25 suppose, assistance from me

1 on that point, and I told him
2 that my recollection was that
3 the court had decided not to
4 intervene in what the RCMP
5 could and couldn't do. But,
6 as I said, his concern was
7 not whether -- not only
8 whether he'd be violating a
9 court order, but whether the
10 court would look dimly on him
11 contacting witnesses,
12 especially the concern being
13 if a witness felt like they
14 were being pressured to
15 change -- to change their
16 statement. And it's with
17 respect to that point that I
18 suggested to him that he
19 approach the court perhaps
20 through an RCMP lawyer."

21 Justice Cosgrove says at page

22 7698, line 20:

23 "Well, you really touched
24 upon the one point that I was
25 making when I talked about

1 the RCMP investigation. I
2 did not say that the RCMP
3 were to report to the court,
4 I don't think that's anywhere
5 in the --"

6 Justice Cosgrove says at the
7 bottom of 7698 and over to 7699:

8 "Well, as Mr. Murphy now
9 reminds, it was Mr.
10 Pelletier, the senior
11 regional director who, in his
12 evidence, said that the
13 report would go to a Crown
14 out-of-province."

15 Further down at line 9, the court
16 says:

17 "Well, I appreciate you
18 bringing that to the court's
19 attention. If the RCMP
20 retain counsel to come to
21 court, I will deal with that
22 if and when the matter
23 arises. I suspect that he
24 probably should seek, not
25 only counsel, but advice from

1 counsel -- I would think that
2 the RCMP either has a legal
3 department or do seek legal
4 advice now and then."

5 Then we go to Thursday, March 25,
6 1999, and what happens now is that Inspector Nugent
7 is then under cross-examination, as you will see,
8 for about the next three days, and this is how that
9 occurred. Mr. Humphrey says on Thursday, March 25,
10 1999:

11 " -- Inspector Nugent of the
12 RCMP entered the courtroom
13 and introduced himself to
14 myself and Mr. Murphy and Mr.
15 Meleras, and he is here ready
16 to give evidence before Your
17 Honour.

18 "Before he does so, I wanted
19 to raise one issue with Your
20 Honour, respecting the
21 existing witness exclusion
22 order and the ban on
23 communication between
24 witnesses."

25 And Mr. Humphrey refers to the

1 March 16th ruling and the reiterations of it, and
2 then over to page 8380:

3 "Your Honour indicated the
4 order was that witnesses be
5 excluded and that there be no
6 communication between
7 witnesses who have testified
8 and those who will testify in
9 the future -- Your Honour
10 will recall that on October
11 the 22nd of last year, Mr.
12 Cavanagh indicated to you
13 that some of the witnesses
14 who were being contacted by
15 the RCMP, as part of the RCMP
16 investigation, did not wish
17 to speak to the RCMP until
18 they were released from the
19 court's non-communication
20 order."

21 Mr. Murphy then wants Inspector
22 Nugent excluded, and Mr. Humphrey says:

23 "Something of a difficulty,
24 your honour, and I raise this
25 now, so that all interested

1 parties can know the nature
2 of the order."

3 And he indicates that he wanted to
4 raise the matter with Justice Cosgrove in the
5 presence, on the top of page 8381, of Inspector
6 Nugent, the nature of the existing order.

7 Justice Cosgrove says:

8 "I appreciate your concern
9 and I appreciate there are
10 complications arising from my
11 order but, as I indicated in
12 October of last year, if
13 there are any complications
14 or problems arising from the
15 order, surely the RCM Police
16 have legal counsel at their
17 disposal that they can retain
18 or that are either employed
19 by them --"

20 And he points out that that has
21 not been done. Justice Cosgrove says at line 22:

22 " -- if you want to continue
23 with your presentation, it
24 will be in the absence of the
25 officer. But, if it's for

1 the purpose of assisting the
2 officer, he should have
3 obtained that assistance
4 elsewhere prior to today."

5 Inspector Nugent is excused. Mr.
6 Humphrey reiterates the issue on page 8382, and at
7 about line 17:

8 " -- if I could put it this
9 way, an added aspect of
10 concern, which was that the
11 RCMP themselves were
12 concerned about creating an
13 appearance of interference
14 with the Elliott matter by
15 them approaching and
16 interviewing witnesses in the
17 case. Their concern was that
18 there might be perception
19 that they were attempting to
20 influence witnesses who were
21 yet to testify on the trial.

22 And Your Honour clearly
23 indicated on that occasion
24 that the order would stand
25 but that, if the RCMP wished

1 to retain counsel to come
2 before the court, you would
3 deal with the matter --"

4 Mr. Humphrey says at about line
5 10, the next page:

6 "I raise the issue for this
7 reason: Your Honour
8 appreciates the RCMP are
9 conducting an important and
10 serious investigation, and
11 the last thing I would want
12 is for this officer to take
13 the stand and then, by
14 reason of an existing order,
15 to be precluded thereafter
16 from speaking to any of the
17 other witnesses who have
18 testified on any of the voir
19 dire proceedings. And Your
20 Honour appreciates from the
21 evidence you heard yesterday
22 from Detective Constable
23 Walker, regarding her
24 interview with Inspector
25 Nugent, that he has

1 experienced difficulties in
2 interviewing witnesses in the
3 Foster homicide
4 investigation, and presumably
5 that's something that he can
6 elaborate on in evidence
7 today."

8 Then Mr. Murphy is called upon,
9 and Mr. Humphrey goes on at page 8384 and Mr.
10 Murphy has objected to Mr. Humphrey's spin.
11 Justice Cosgrove says, "You will have opportunity
12 to reply." Mr. Humphrey continues at about line
13 13:

14 "I was actually referring to
15 the evidence that was given
16 before Your Honour yesterday.
17 But, in my respectful
18 submission, there is already
19 that one issue and Your
20 Honour, as I was indicating,
21 may hear more of that when
22 the inspector testifies.
23 But, in addition to that,
24 there is the concern that if
25 and when this officer appears

1 before Your Honour and gives
2 evidence, he would be subject
3 to the witness exclusion and
4 non-communication order and
5 he would thereafter be
6 precluded from communicating
7 with other witnesses on the
8 voir dire --"

9 Mr. Murphy then responds, and at
10 line 25 Mr. Murphy says on page 8385:

11 " -- the RCMP govern
12 themselves accordingly,
13 they're supposed to be or are
14 purported to be an
15 independent investigation
16 agency in this matter, and
17 simply put, if they want to
18 conduct an investigation,
19 they can retain their own
20 legal advice. Presumably,
21 from what I've been provided
22 in the way of the tape
23 yesterday, some -- there was
24 some -- and what we know from
25 the prior disclosure of all

1 the documents pertaining to
2 this investigation, and how
3 it was set up and the
4 memorandum of understanding
5 between the two agencies --"

6 At line 12:

7 "The RCMP undertook this task
8 knowing the pitfalls."

9 And at line 22, Mr. Murphy says:

10 "It's problematic, in my
11 submission, that Mr.
12 Humphrey, on behalf of the
13 Crown, the Attorney General
14 of Ontario, from whom this
15 investigation is supposed to
16 be independent, at least with
17 respect to the RCMP -- the
18 OPP investigation, and that
19 is among the questions I am
20 going to ask this
21 investigator. In my
22 submission, it's problematic
23 that these representations
24 are being made this morning.
25 I think I understand what

1 Mr. Humphrey is getting at."

2 Mr. Murphy's submission goes on
3 and I won't go through it, but he does say at the
4 bottom of page 8388, line 18, and page 8389 that he
5 does not have problem with the inspector being
6 excluded from the witness exclusion order.

7 The court addresses Mr. Humphrey
8 at the bottom of page 8389:

9 "Mr. Humphrey, in the event
10 that -- what I propose is
11 that the officer would
12 testify and then we could
13 deal -- before he's released,
14 I would deal with this issue
15 again in the event that after
16 his evidence, if he's going
17 to give evidence -- I don't
18 know whether he is going to
19 give evidence or not -- but
20 assuming that he gives
21 evidence, to meet the
22 potential complication that
23 we see as a result of the
24 witness exclusion order,
25 defence says that probably --

1 defence would have no
2 objection to the court
3 excepting the officer from
4 the order. Would you have
5 any objection to me excepting
6 him from that order?"

7 Mr. Humphrey says:

8 "That would address the
9 immediate concern that I've
10 raised."

11 Justice Cosgrove says:

12 "Well, I go back to my first
13 reaction, which is: I don't
14 know whether I have the
15 jurisdiction to prevent this
16 officer, having given
17 evidence or not having given
18 evidence, from continuing
19 with his investigation --"

20 And Justice Cosgrove does exempt
21 Inspector Nugent from the order. Mr. Humphrey says
22 at page 8391:

23 "Your Honour, in my
24 respectful submission, is
25 right that you don't have

1 jurisdiction to tell a police
2 officer or a police agency
3 how to conduct their police
4 investigations, but once an
5 officer appears before you,
6 qua-witness, then you do have
7 jurisdiction over
8 communications by the witness
9 about his evidence, and
10 that's the difficulty --"

11 Then Inspector Nugent is told to
12 give evidence, and, as you will see, his evidence
13 goes on at some very great length. Perhaps this
14 would be a convenient time, before we get into
15 that, to have the morning break, sir.

16 THE CHAIR: All right.

17 --- Recess at 10:56 a.m.

18 --- Upon resuming at 11:14 a.m.

19 THE CHAIR: Sir.

20 MR. CHERNIAK: Thank you, Chief
21 Justice. I am at page 8391. You will see that on
22 March 25th, 1999, the cross-examination of Mr.
23 Nugent starts and he's been an inspector -- he's
24 been in the RCMP for 22 years.

25 I will simply tell you, so you

1 know where we are going, the cross-examination of
2 Inspector Nugent goes on for the rest of March
3 25th, all of March 26th, and then there is a
4 weekend that intervenes, and it goes on again on
5 March 29th.

6 The last page -- not the last page
7 of that day, but the last page that we have in the
8 book -- is 8702. You will see that Inspector
9 Nugent's cross-examination went on at some
10 considerable length.

11 If we turn the page, I am at page
12 8468, still on March 25th. Mr. Murphy is
13 cross-examining, and at line 18, what Mr. Murphy is
14 doing is going through Inspector Nugent's notes of
15 his meetings with various Ontario police and
16 Crowns, Ontario Provincial Police and Crowns in
17 October, and the question at about line 18:

18 "To cut to the chase, you
19 ultimately decide -- and I'll
20 jump ahead to October 28th,
21 a week later -- at 12:40 you
22 meet -- 'Met in Mr. Pelletier
23 office', correct"

24 He agrees. He is reading from the
25 notes.

1 "'With Bob Pelletier, Glen
2 Bowmaster, Constable Andréé
3 Rivard' -- you're --"

4 I guess Rivard is Inspector
5 Nugent's assisting officer:

6 "' -- and with Detective
7 Superintendent Larry Edgar--"

8 And the panel will remember he's
9 with the OPP:

10 " -- 'via speaker-phone' --
11 your notes says: 'Mr.
12 Pelletier updated Detective
13 Superintendent Edgar on
14 developments to date in
15 respect of the court's
16 decision not to vary the non-
17 communication order. He
18 explained that the order
19 should expire with the
20 defence's preliminary motion
21 which should hopefully have
22 been dealt with by mid-
23 November. Pelletier told
24 Edgar we would be well
25 advised to go to the judge if

1 we wished to continue the
2 Foster aspect of the
3 investigation at this
4 juncture --"

5 Then Mr. Murphy refers to "other
6 notes about a brainstorming session", and then at
7 about line 18 on page 8469, Mr. Murphy is again
8 quoting from Inspector Nugent's notes:

9 "My feeling is though' --
10 'the practical reality is
11 that witness' --"

12 Must be witnesses:

13 "'Will continue to be
14 reluctant to speak with us
15 while the non-communication
16 order is in force. It was
17 therefore decided the
18 investigation will now
19 concentrate on the Project
20 Toy matter. We will have the
21 new prosecutor in this
22 matter, Mr. Mitch Hoffman,
23 approach the court for
24 direction' --"

25 Mr. Murphy continues:

1 "Before I get to the next
2 entry for that day. In
3 effect, you reach a
4 conclusion that you aren't
5 precluded from interviewing
6 any persons, apart from the
7 issue of their reluctance,
8 there's nothing to prevent
9 you, as an investigator in
10 this independent
11 investigation, from speaking
12 to these persons
13 independently as an
14 investigator?

15 "Answer: That's what I
16 felt."

17 On page 8470 at about line 20:

18 "What witnesses, apart from
19 George Ball, expressed
20 reluctance to speak to you?

21 "Answer: Mr. Ball, and Mr.
22 Churchill did in -- at the
23 beginning of our interview,
24 he was -- expressed
25 reservation in speaking to me

1 about it and, my
2 interpretation. And I guess,
3 at that point in the process,
4 I told him I didn't feel I
5 was a witness and I guess
6 reassured him that there
7 wasn't any issue in speaking
8 with me."

9 Over to page 8471 at about line
10 14:

11 " -- with respect to
12 Churchill, you had operated
13 on the assumption that there
14 wasn't anything barring you
15 from proceeding, right?

16 "Answer: That's right.

17 "Question: And with respect
18 to Ball, there different in
19 that instance was that he
20 objected to speaking with
21 you?"

22 At line 20:

23 "My question would be: Given
24 that you'd already applied
25 your thinking to Churchill

1 successfully, why would you
2 not simply go ahead and
3 interview whatever other
4 witnesses you wanted to speak
5 to? And notably, the ones
6 that you'd been referred to:
7 Dave Cook, or indeed any of
8 the other persons.
9 Answer: Again, for the
10 reasons, first of all, that
11 there was a practical
12 reluctance on their part to
13 speak to me at all. One had
14 declined --
15 "Question: Well, you've only
16 asked two people --
17 "Answer: Yes, sir, that's
18 right. And both -- both of
19 which had told me they were
20 reluctant to speak to me, and
21 really brought the issue of
22 the order to my attention."
23 Then over on page 8472, Mr. Murphy
24 asks him about the issues on the Elliott aspect at
25 about line 18:

1 "There's Ron Laderoute and
2 the licence plate notation,
3 correct?

4 "Answer: Yes, sir.

5 "Question: And there's: Did
6 MacCharles have any direct
7 influence or indirect
8 influence or contact with any
9 other witnesses -- of witness
10 tampering --"

11 Then the cross-examination
12 continues over the next number of pages. I am not
13 going to read that to you, but there are a number
14 of quotations from a memo. I think it is from
15 Inspector Bowmaster, but I am going over to page
16 8479 at line 4:

17 "Why, in the first instance,
18 are you having regular
19 meetings with Glen Bowmaster,
20 if this is a truly
21 independent investigation?

22 "Answer: I'm having regular
23 meetings with Glen Bowmaster
24 to find out who was
25 investigating what and where

1 they lived and -- and who the
2 people's names are."

3 And a few lines down:

4 "Question: Now, your
5 investigation, you've said,
6 lasted about two weeks before
7 it was put on hold.

8 "Answer: No, I think I could
9 probably expand that quite a
10 lot actually beyond two
11 weeks, because there's some
12 -- other events taking
13 place."

14 At about line 24:

15 "Well, my -- at varying
16 levels. The last actual
17 interview or the -- when I
18 went back to Mr. Pelletier
19 with -- my questions about
20 the communication -- or the
21 non-communication order was
22 some time in the latter part
23 of October."

24 He says at the top of page 8480
25 that:

1 "And then -- my notes
2 continue through November and
3 through December and January
4 in researching more
5 background or reading
6 transcripts and talking to
7 more people about this
8 investigation. But as far as
9 actively interviewing
10 witnesses, that would have
11 been the right, the last one
12 would have been in October--"

13 The cross-examination on the
14 nature of the investigation goes, and then at the
15 bottom of page 8482, Mr. Murphy says "The bottom
16 line of all this", about line 25 in 8482:

17 " -- is that there's two
18 people you spoke to. The
19 first was Cary Churchill, in
20 any formal sense, right?

21 "Answer: No, there were
22 quite a number of other
23 people that I spoke to.

24 "Question: Well, as far as
25 this -- you've just sort've

1 expended in investigation of
2 events surrounding the so-
3 called Foster homicide,
4 including examination of
5 court document and interview
6 of various witnesses.' And
7 then it says: 'The police
8 witnesses however expressed
9 reluctance to speak with us
10 out of fear of potential
11 contempt of court finding
12 should they run afoul of a
13 March 1998 judicial
14 prohibition on communication
15 among witnesses. The court
16 declined to vary the order or
17 to give specific permission
18 for the witnesses to
19 communicate with
20 investigators who may very
21 well become witnesses in this
22 matter. That being the case,
23 a decision was made on 98-10-
24 28 to proceed with the
25 Project Toy aspect of this

1 investigation --'"

2 Over to page 8505, we are still on
3 March 25th, and Mr. Murphy asks him at the bottom
4 of the page if there was any ever suggestion that
5 defence counsel should be contacted.

6 And it looks like -- it appears on
7 the next page that there was a consideration of an
8 approach, and at page 8507, Mr. Murphy is
9 cross-examined again on his notes at line 13:

10 "And then it says: 'Perhaps
11 offer in writing'?"

12 "Answer: Yes.

13 "Question: What is that
14 referring to?"

15 "Answer: That was, we
16 discussed, Inspector Evans
17 and I, discussing options,
18 and Mr. Hoffman and I
19 discussing various options.
20 We discussed perhaps writing
21 a letter to you specifically.

22 "Question: To ask what?"

23 "Answer: To name specific
24 witnesses and to invite any
25 commentary or any objection

1 to my interviewing of those
2 witnesses.

3 "Question: Was that ever
4 done?

5 "Answer: No, sir.

6 "Question: Why not?

7 "Again, it was -- the
8 investigation, just the
9 dynamics of the Toy
10 investigation sort of focused
11 us in that -- in that
12 direction."

13 On the next page, Inspector Nugent
14 says at line 7 that they didn't get around to it
15 and they reconsidered it later.

16 8594 is on March the 26th. Page
17 8594 is the next page. Inspector Nugent answers at
18 line 7:

19 " -- our investigation right
20 now is concentrate -- excuse
21 me -- concentrating on
22 Project Toy. This
23 investigation, it just has
24 not advanced beyond that
25 point in early December.

1 "Question: Well, I'm glad
2 we're getting into that,
3 because it is the last area I
4 want to deal with today.
5 Replete, in your notes, from
6 October 22nd onward, is a
7 series of meetings that you
8 are having with chief
9 regional -- as you call it
10 -- regional chief Crown
11 Pelletier on October 23rd,
12 the following day. You've
13 got: '16:45 regional --'
14 -- I'm talking about the non-
15 communication order, and how
16 that plays into this very
17 thing that you're saying
18 about, 'we haven't finished
19 the investigation'."

20 The notes are quoted at length
21 about the request made by Crown Cavanagh with
22 respect to the judge's order. Mr. Murphy again
23 quotes from his notes about that meeting at the top
24 of page 8595:

25 "Question: The

1 interpretation Crown put on
2 his comments' -- the judge's
3 that is -- 'was the Judge --'
4 quote 'advises', unquote,
5 'that witnesses not speak
6 with me. Pelletier will get
7 a transcript of the judge's
8 comments and will advise on
9 Monday 98-10-28 when I can
10 pick same up. In view of
11 this foregoing, since Crown
12 prosecutor Flanagan has been
13 ruled compellable in this
14 matter, I indefinitely
15 postpone my scheduled
16 interview with him.' "

17 Later on on that page, Mr. Murphy
18 at about line 23 says:

19 " -- it was Pelletier's
20 advice to you that you, an
21 independent police
22 investigator, that he had in
23 effect commissioned for an
24 independent --"

25 And then over to page 8596:

1 "He's telling you that his
2 interpretation of Judge
3 Cosgrove's order is that you
4 shouldn't speak to witnesses
5 either?
6 "Answer: That's what I
7 understood from the
8 conversation I had with him
9 on that day.
10 "Question: Does that make
11 sense on its face?
12 "Answer: No, sir. It was
13 -- it made -- certainly made
14 things much more difficult,
15 which is why we decided to go
16 with the Toy investigation --
17 "Question: Please explain to
18 His Honour what in his order,
19 as you understood it,
20 prevented you or your
21 investigators with the RCMP
22 from doing anything?
23 "Answer: -- my
24 interpretation of the order
25 was that it didn't apply to

1 me, because I was not a
2 witness in these proceedings.
3 When I spoke with the
4 investigators, the first one
5 I spoke to, Mr. Churchill,
6 raised that issue. It became
7 an issue with my talking to
8 Mr. Churchill. I was alerted
9 to that and I said to him 'I
10 don't believe I'm a witness',
11 and on the basis of that, we
12 went on with the -- with the
13 statement taking. The next
14 contact I had with an OPP
15 member, or one that I wished
16 to speak with at least, was
17 Mr. Ball, Detective Constable
18 George Ball. He declined to
19 speak with me for those same
20 reasons. Then, on the
21 strength of those two
22 conversations, I then went to
23 Mr. Pelletier and asked him
24 for the background and what
25 had come out of that order."

1 Inspector Nugent goes on on the
2 next page as to why he went on with Project Toy,
3 and he is asked at length about his meeting with
4 Pelletier and the question of the transcript, and
5 then over to page 8598 at about line 13:

6 "And there isn't anything in
7 that order, is there, that
8 says that anybody other
9 -- apart from witnesses, is
10 prevented from speaking to
11 witnesses?

12 "Answer: I think the only
13 issue was that if someone who
14 could become a witness, I
15 think, was the issue that was
16 the sticking point.

17 "Question: Who could become
18 a witness?

19 "Answer: Me, specifically.

20 "Question: He told you that
21 you couldn't speak to other
22 witnesses lest you become a
23 witness yourself?

24 "Answer: Nobody ever forbid
25 me from speaking to anyone,

1 but I made the decision to go
2 on the Toy matter on the
3 basis of those conversations,
4 yes.

5 "Question: With Bob
6 Pelletier?

7 "Answer: That's right. With
8 Bob Pelletier and other
9 people."

10 At the top of page 8599 line 4:

11 "Question: You read the
12 transcript of Mr. Sandler
13 when he was here on the
14 morning of Mr. Ball's
15 contempt proceeding, or you
16 were aware of it, because you
17 had --

18 "Answer: Yes, sir, I was,
19 yeah.

20 "Question: And you were
21 aware that he asked His
22 Honour for clarification?

23 "Answer: Yes.

24 "Question: And essentially,
25 he agreed with what I had --

1 he attributed my
2 characterization, which was
3 that it's not the order per
4 se which is unusual, it's the
5 category of witnesses that it
6 covers; namely, unusual
7 witnesses, crowns and police,
8 as distinct from ordinary
9 types of cases, right?
10 "Answer: Yes --
11 "Question: What's preventing
12 you at that point?
13 "Answer: Mr. Sandler said
14 exactly that, and during my
15 conversation with Mr. Sandler
16 at the beginning -- at the
17 opening part of that
18 conversation, I had the same
19 impression. Before we
20 completed the conversation,
21 he told me that the cautious
22 approach was the best. What
23 he felt was the best approach
24 was to proceed with the Toy
25 issues and await the

1 -- essentially, do the same
2 thing; not to talk to any
3 witnesses until the motions
4 had been dealt with."

5 At line 14 on page 8600, Mr.

6 Murphy says:

7 "Question: Well, I'm
8 suggesting to you, sir, that
9 it seems like a convenient
10 pretext, and really nothing
11 more than for abandoning a
12 further investigation beyond
13 two people, really -- in
14 effect, Cary Churchill, who
15 has a vested interest in the
16 matter, and specifically and
17 practically gave you a list
18 of witnesses, though you're
19 not aware he was the origin
20 of it, but those -- that's
21 number one -- and he's
22 decrying the relevance of
23 what you're investigating
24 explicitly from the word go
25 anyway, and, secondly, is

1 MacCharles, who you approach
2 with insufficient or complete
3 lack of apprehension of the
4 facts, when you do meet with
5 him; do you agree with that?"

6 Inspector Nugent says "No."

7 Over to page 8601, the witness
8 says at line 12 that:

9 "If these people don't want
10 to talk to me, there's little
11 future in proceeding with an
12 investigation."

13 Then there is a reference to the
14 conversation the witness had on December 3rd with
15 Mr. Sandler, who Mr. Murphy seeks to characterize
16 at the bottom of page 8601 as, in effect, the
17 general counsel for OPP management:

18 "Answer: I didn't know. I
19 wasn't aware of it."

20 Then that examination goes on, and
21 at line 10 he was simply talking about -- this is
22 page 8602 -- what he said officers can do and
23 cannot do:

24 "That's not a reference to
25 me, other people I'm talking

1 about."

2 Line 18, and again quoting from
3 notes, "Especially contempt issue", and then it
4 says, quote:

5 "And then it says 'especially
6 contempt issue', then it says
7 'Murphy conventional order,
8 prevent discussing order, no
9 super added order, also
10 raised with Cosgrove,
11 confirmed Wayne --'
12 -- meaning Frechette 'can
13 fully inform' and then it
14 says: 'Did discuss with
15 Pelletier', and then you have
16 noted -- and this is
17 attributed to him, I assume,
18 Mr. Sandler, 'feels Bob
19 Pelletier probably right, the
20 interest of the
21 administration of justice
22 would probably favour an
23 early and independent
24 investigation, but
25 practically, Judge Cosgrove's

1 order of non-communication
2 prohibits an effective
3 investigation' --"

4 Then we are over to March 29th.
5 This is the third day of the cross-examination. We
6 are over to page 8613, and Inspector Nugent is
7 still under cross-examination. At about line 20,
8 he is being cross-examined on some notes that he
9 had. I understand they are the October 27th notes.

10 I just have a note here to remind
11 you that I read significant parts of the March 29th
12 transcript under the heading 20 at the end of
13 Friday. The pages I read were from page 8640 to
14 8669, and 8698, 9 and 8710 to 8725.

15 We are not there yet, but I am
16 going to do my best not to repeat what I have
17 already read to you. As I understand, it the
18 middle of page 8613. This is an October 27th note.

19 It is a meeting with some provincial Crowns and
20 police, and the witness says at line 19:

21 " -- 'At 3:30 in the
22 afternoon, the same day,
23 spoke to chief Crown Bob
24 Pelletier and explained our
25 current status, i.e., we need

1 to know how the court views
2 our continued investigation
3 of the Foster matter and
4 whether we can tell interview
5 subjects that they are safe
6 prosecution for disobedience
7 of a court order. Mr.
8 Pelletier understands our
9 dilemma and told me he will
10 try to make the transcript
11 available as soon as may be
12 possible. Mr. Pelletier then
13 gave some background
14 information has [sic] to how
15 the order originally came
16 about, following Detective
17 Inspector MacCharles'
18 admissions' --"

19 Mr. Pelletier then gave some
20 background information as to how the order
21 originally came about following Detective Inspector
22 MacCharles' admissions.

23 Then the cross-examination goes on
24 at some length about the inspector's notes about
25 other meetings on October 27th. At line 18 on page

1 8615, Mr. Murphy says:

2 "And we will then go ahead to
3 page 20, and the entry in
4 your continuation report for
5 October 28th --, could you
6 read that --?"

7 The witness notes that he met in
8 Mr. Pelletier's office with Pelletier, Bowmaster
9 and Rivard and Edgar on the speaker phone, and this
10 is the same telephone call that was referred to
11 earlier.

12 You will see at the bottom of page
13 8615 that Inspector Nugent's notes of that meeting
14 are read, and I believe I have already read to you
15 in an earlier part of this examination those notes,
16 so I won't repeat them.

17 Then at the bottom of the page,
18 looking at those notes -- maybe I will go to the
19 top of page 8617. These are from the same notes:

20 " -- 'It was therefore
21 decided the investigation
22 will now concentrate on the
23 Project Toy matter. We will
24 have the new prosecutor in
25 this matter, Mr. Mitch

1 Hoffman, approach the court
2 for direction on Foster when
3 the preliminary motions have
4 been disposed of.'"

5 I think I had read that earlier.

6 Over to page 8618, there is a long
7 extract put to the witness from his notes starting
8 at the middle of the page 8618. I think I have
9 read you some of those notes already. This from, I
10 believe, October 28th.

11 The witness again refers to the
12 notes about the reluctance of the witness to
13 interview. I apologize for the repetition, but the
14 repetition is in the transcript. The witness is
15 being cross-examined on the same notes several
16 times, apparently.

17 I think we go to something new
18 here at the bottom of page 8619. The witness is
19 being asked about notes on November 17th, 1998, and
20 Mr. Murphy is quoting from the notes:

21 " -- constable Rivard and I
22 met with Detective
23 Superintendent Larry Edgar at
24 his office in Orillia. D.I.
25 Edgar expressed some

1 discomfort in discussing our
2 investigation in terms of
3 findings to date, as well as
4 future strategy, in view of
5 the communications ban out of
6 the Cosgrove court' -- in
7 capital letters -- 'he told
8 us that both Dougherty and
9 Snider have been subpoenaed
10 for Foster/Elliott as has he'
11 -- in brackets -- '(Edgar).
12 That being the case, he
13 wondered if it might handcuff
14 our investigation should we
15 be at some point called as
16 witnesses. D.I. Edgar
17 telephoned Detective
18 Inspector Glen Bowmaster and
19 discussed the issue with his
20 participation via speaker
21 phone. All things
22 considered, we felt it best
23 to continue to include
24 Detective Superintendent
25 Edgar in a facilitative role

1 but to avoid discussion of
2 substantive issues.' Is that
3 what it says?"

4 The cross-examination about his
5 conversation with Edgar goes on. At the bottom of
6 page 8621, Mr. Murphy is cross-examining him on
7 that conversation. At line 29:

8 "Did he tell you that in fact
9 he'd been more than just
10 subpoenaed, he'd gone and
11 testified?"

12 "Answer: I don't remember
13 his having told me that.

14 "Question: Would that have
15 caused you any concern as an
16 investigator?"

17 "Answer: I don't believe at
18 that point it would've, as we
19 hadn't discussed -- I didn't
20 know that he had been
21 involved in that issue at
22 all, so I hadn't discussed
23 the investigation to any
24 degree with him.

25 "Question: And then in the

1 middle of this he's saying to
2 you -- he's wondering out
3 loud, is he, 'that this might
4 handcuff', as he puts it,
5 'our investigation should we
6 be --' that's your
7 investigation, the RCMP
8 investigation, right?
9 Answer: That's right.
10 "Question: The independent
11 investigation?
12 "Answer: That's right.
13 "Question: Edgar is saying
14 this communication order may
15 handcuff the RCMP independent
16 investigation, right?
17 "Answer: Yes, sir."
18 Over the page later on March 29th,
19 Mr. Murphy says at the middle of the page 8669:
20 "Inspector Nugent, I'm going
21 to ask you if you can refer
22 to a note for 10:43 hours on
23 January the 8th of this year,
24 1999. And the first entry
25 beside 10:43 is in

1 handwriting, is 'Mitch
2 Hoffman', and then it says
3 'Foster/Elliott'."

4 The cross-examination goes on. I
5 won't read it, except the part on page 8671 about
6 line 22. This is a question, quoting from notes:

7 "It says 'Mr. Hoffman and I
8 discussed a number of
9 alternative approaches', is
10 that it?

11 "Answer: That's right.

12 "Question: ' --and their
13 possible effect on the trial,
14 e.g., possible effect of
15 police interview of
16 witnesses, personal interview
17 or meeting with defence' --
18 is that talking about
19 proposals that defence be
20 consulted?"

21 And the like. At the bottom of
22 the page, Mr. Murphy asks if they were followed up,
23 and the meeting with Inspector Evans apparently
24 was. Then we go to later on page 8690.

25 I am trying to get the date, but I

1 think we are back in October and the conversation
2 with Mr. Sandler, and the notes are referred to,
3 1535, and I think this is October, but I will
4 confirm that date. This is about line 22:

5 "'Gist of conversation is
6 Judge Cosgrove order of non-
7 communication effectively
8 bars our investigation.
9 Notes follow.' Is that his
10 -- that's the gist of what he
11 told you as you've noted it?
12 "Answer: As I interpreted
13 the conversation, yes, sir."

14 The witness says he was taking
15 these notes, and there is a reference to Officer
16 Bowmaster, and then on page 8693 at the top on to
17 the next page, the next note under that these notes
18 say:

19 "The next note under that M.
20 Sandler, these notes that
21 you're taking during the
22 conversation says: 'Feels Bob
23 Pelletier probably right' --
24 and is this almost a
25 quotation here -- 'the

1 interest of the
2 administration of justice
3 would probably favour an
4 early and independent
5 investigation but
6 practically, Judge Cosgrove's
7 order of non-communication
8 prohibits an effective
9 investigation' --"

10 Then let me clarify the date at
11 line 20. This is a question of Mr. Murphy:

12 " -- these conversations that
13 you had were preliminary to
14 your meeting with Mr.
15 Pelletier, right? You met
16 with the deputy commissioner,
17 you met with Mr. Lenton, you
18 discussed these issues, you
19 called Mark Sandler, and it's
20 all surrounding the concerns,
21 what Mr. Pelletier, you
22 described as saying when he
23 understood your dilemma at
24 the end of October when you
25 decided all of you to suspend

1 the investigation of this
2 side of the matter of
3 MacCharles, you then go on
4 and outline all of this
5 -- you're revisiting the
6 issue of this so-called non-
7 communication order --"

8 Then there is a reference on page
9 8694 to notes of December 7th, and over to page
10 8695 there is cross-examination on those notes in
11 the middle of the page, again quoting from the
12 notes:

13 "Then it says: 'Brief' then
14 it says 'priority with
15 Foster', then 'Current court
16 orders preclude follow up
17 now.'"

18 And then its says:

19 "And then it says: 'Will
20 continue close contact with
21 Crown counsel Pelletier.' --
22 Will consult but we will make
23 investigative decisions' --"

24 Then there's the notes for
25 December 9th two days later, and there is a meeting

1 with Bob Pelletier, and then Mr. Murphy comes to
2 the January 7th note.

3 Then there is page 8698, and this
4 was read in connection with Ms. Proulx under O. I
5 will just remind you the court asks the witness
6 about his observation that he had a conversation
7 with Ms. Proulx in the courtroom, and Justice
8 Cosgrove says:

9 " -- and I'd like you to tell
10 me what was the gist of that
11 conversation and before you
12 answer the question, if you
13 wish to consult with her
14 before you answer the
15 question, you can do that."

16 On the next page, I have read this
17 before, as well. The witness gives his answer as
18 to what his conversation with Ms. Proulx was.

19 Page 8702, there is a reference to
20 his conversations with Crown Pelletier in October,
21 and I'm not going to read it, because it seems to
22 be quite repetitious of what I have already read
23 about the October 23rd and October 27th notes.

24 I should have said this goes on on
25 March 30th, as well, but I have read the March 30th

1 transcript under 20, but maybe I can just refer
2 back to that, 20 on March 30th.

3 I read a lot more of March 29th.
4 20 on March 30th starts at page 8726 and it goes to
5 8830. Then I read, as well, from March 31st. I
6 read pages from March 31st. Nugent is still under
7 consideration and there is a ruling, and that goes
8 to page 8860.

9 So the matter of Inspector Nugent
10 resumes on April 6th, 1999 and Inspector Nugent
11 comes forward again. You will recollect that the
12 parts under O have dealt with the file that he had
13 and his investigation file copies being put under
14 seal.

15 That's what much of the previous
16 days deal with. Inspector Nugent is called back on
17 April 6th. The court says, and this is in camera:

18 "Inspector Nugent, since you
19 were last in court, I, as you
20 recall, took possession of
21 copies of the file which you
22 have brought with you this
23 morning, with the exception
24 that, I believe, the court
25 registrar returned to you a

1 number of cassettes which
2 were in their original
3 condition and which have not
4 been transcribed, or at least
5 were not transcribed and I
6 directed that they be
7 returned to you. I began a
8 review of the file documents
9 after the last court
10 appearance. I haven't
11 completed my review of the
12 complete file. I have noted,
13 however, that you have made,
14 as has been apparent in the
15 evidence thus far, ongoing
16 reports, progress reports to
17 the OPP. As a result of my
18 review of the file to this
19 point, I have made the
20 decision to adjourn my review
21 of file pending a final
22 report prepared to Project
23 Audition. What I will do now
24 is to reseal the file, which
25 will be held under court

1 seal in the interim. In
2 other words, the file will be
3 secure and the issue of
4 whether you will be required
5 to disclose any or further
6 contents -- I guess any
7 contents of the file -- the
8 letter which has been
9 introduced as an exhibit was
10 identified in your notes
11 previously -- the file will
12 be under seal in court
13 security until such time as I
14 return to it, after
15 completion of a final
16 report."

17 There is a discussion on page
18 8895. At the top there is a discussion of the time
19 and at line 19, Justice Cosgrove says:

20 "The first day that you were
21 in court, the court began on
22 the issue of the request for
23 production of your file, on
24 the issue of the order of
25 this court for non-

1 communication of witnesses.
2 After canvassing that issue
3 with counsel, I have come to
4 the conclusion that you
5 should be exempted from that
6 order, so that the order
7 would not bind you in terms
8 of communication or
9 completing interviews with
10 other witnesses -- witnesses
11 who have testified or who
12 have been identified as
13 potential witnesses in these
14 proceedings.
15 "Do you have any questions as
16 a result or with respect to
17 the issue of the order of
18 non-communication, inspector?
19 "The Witness: I would ask
20 for clarification, Your
21 Honour, as I would need to
22 know what witnesses have
23 testified and whether or not
24 the court differentiates
25 between someone who has been

1 identified as a future
2 witness or someone who has
3 already testified and whether
4 or not I'm free to speak to
5 either of those or both of
6 those categories.

7 "The Court: I suppose I
8 could make it easy by saying
9 that you are not bound with
10 -- the order does not apply
11 to you and you may continue
12 with your investigation free
13 of the order.

14 Then there is a discussion as to
15 whether it will apply to his other investigators,
16 and the court says at the bottom of the page that
17 it will.

18 Mr. Humphrey raises -- notes that
19 this issue, and this is on page 8897, came up on
20 October 22nd and 23rd of last year and again on
21 January 18th. Mr. Humphrey notes at line 22:

22 "And you have made it
23 perfectly clear that
24 Inspector Nugent and the
25 officers working with him as

1 part of the RCMP
2 investigation are exempted
3 and they are free to
4 interview witnesses who have
5 been called on the voir dire,
6 and those who are potentially
7 witnesses on the voir dire.
8 I don't know whether Your
9 Honour wants to address the
10 practical problem that the
11 officer has been
12 encountering, and that is the
13 witnesses' reluctance to speak
14 to him because of their
15 concern about the effect of
16 your order that they not
17 communicate with other
18 witnesses or potential
19 witnesses."

20 Mr. Humphrey expands on that on
21 page 8898 with respect to Churchill and Ball, and
22 notes again at the bottom of the page, line 24,
23 that are other officers that appear to be reluctant
24 to speak to Inspector Nugent and submits that it's
25 an important investigation, and the inspector

1 should be free to fully investigate cooperate with
2 the investigation.

3 And Mr. Humphrey at line 4 on page
4 8899:

5 " -- in my submission, it
6 would be of assistance if
7 Your Honour could give some
8 direction to those witnesses
9 that they should be free to
10 speak to Inspector Nugent as
11 part of his investigation,
12 including speaking about
13 matters that may have been
14 the subject of their
15 evidence."

16 Mr. Humphrey goes on to give
17 reasons. The court calls on Mr. Murphy for his
18 response to that submission of Mr. Humphrey. Mr.
19 Murphy says at the bottom of page 8899:

20 "Your Honour's position
21 should stay the same. With
22 respect to the court making
23 directions to the police, in
24 my submission, that is wholly
25 inappropriate and I think

1 it's a matter of fundamental
2 logic."

3 Mr. Murphy goes on at some length
4 to elaborate on that submission. At line 22, he
5 says:

6 "I'm not sure how appropriate
7 it is to then have the judge
8 on this matter in effect
9 endorse the virtue of those
10 people communicating with
11 Inspector Nugent or not."

12 At line 29:

13 "-- presumably it may be of
14 confusion and indeed a
15 slippery slope for the court
16 to be seen to be telling Mr.
17 MacCharles or any other
18 potential witness that they
19 should be cooperating. I
20 mean, this is the whole
21 slippery slope of the SIU
22 scenario, where officers are
23 directed or required to
24 respond to investigation."

25 At line 13:

1 "So to have the court invited
2 to make some sort of an
3 endorsement of the
4 possibility of speaking with
5 this gentleman is not
6 appropriate. These people
7 can retain counsel."

8 At page 8904, Mr. Murphy goes on
9 in that vein at line 15:

10 "It is not appropriate to
11 give direction to a judicial
12 comment to the witnesses."

13 Page 8905, Mr. Justice Cosgrove
14 gives a ruling in the middle of the page:

15 "I don't believe that the
16 court should have direct
17 -- should offer directions to
18 potential witnesses in an
19 investigation by any police
20 force. I think that my
21 direction already to the
22 police officers conducting
23 this investigation, who are
24 authorized, because of the
25 record which I have already

1 spoken, were authorized to
2 advise potential witnesses
3 that they are exempt and free
4 from potential judicial
5 sanction as a result of my
6 order of non-communication.
7 In some sense, as Mr.
8 Humphrey -- we may be arguing
9 about how many angels on the
10 head of a pin because, in
11 some sense, what I have just
12 said may be what you have
13 asked for, which is direction
14 to the witnesses, but it is
15 through this direction by the
16 -- or communication by this
17 officer that he can
18 communicate the record of the
19 court and the decision of
20 court that no witness
21 communicating with him or the
22 others in his investigation
23 will be subject to the
24 communication order.
25 "Part of the reason for my

1 decision not to go any
2 further is the court's
3 conviction, now after hearing
4 discussion by counsel that
5 the exclusion order does not
6 and did not imperil any
7 person, such as Officer
8 MacCharles or Officer Ball or
9 Officer Churchill, or any of
10 them of the hazard of
11 contempt by speaking to the
12 RCMP as a result of the order
13 as it now stands in the first
14 place.

15 Then we go to July 23rd, 1999, and
16 there is a discussion about the RCMP document
17 examiner. The court expresses some concern, which
18 we later see in his ruling at page 9562, with
19 respect to the release about the exhibits.

20 The court expresses some surprise
21 at the bottom of page 9562:

22 "I'm pleased to hear this
23 morning that this can be
24 given high priority. What
25 perplexes me is why it took

1 "I believe he had contacted
2 me at this time.

3 "Question: Sorry. He had
4 contacted you, being
5 Inspector Nugent of the RCMP?

6 "Answer: Yes. I recall
7 telling Detective Inspector
8 Sweeney that if I was
9 contacted by the Mounted
10 Police, I was not going to
11 discuss the case, not grant
12 an interview until I had
13 received formal permission
14 from Justice Cosgrove to
15 speak to them."

16 At line 20:

17 "Was it a situation where
18 Detective Inspector Sweeney
19 was telling you whether or
20 not you should speak to the
21 RCMP?

22 "Answer: No, I told him how
23 I felt and, as I recall he
24 said, 'Well, do -- what you
25 feel comfortable with' --"

1 Over to page 9653, Mr. Humphrey is
2 still examining:

3 "Do you recall there being
4 discussion about you telling
5 the RCMP that you could not
6 talk to them at that time
7 without permission from the
8 court?

9 "Answer: I probably did say
10 to him at some point that,
11 yes, I have it in my notes
12 that I did not want to talk
13 about the matter and that I
14 wanted to get permission from
15 the court before I spoke to
16 RCMP.

17 "Question: And that was your
18 attitude at the time? I
19 just want to understand if
20 I've got that right, that you
21 were prepared to participate
22 in an interview with the RCMP
23 but before doing so you
24 wanted to make sure you
25 didn't transgress any orders

1 from the court?

2 "Answer: That's correct."

3 Inspector Nugent is called on July
4 26th by Mr. Humphrey at the bottom of page 9691,
5 line 27:

6 "If I can just direct your
7 attention to your notes for
8 October 23rd --"

9 And there is a reference to the
10 Pelletier conversation, which we have heard about
11 at an earlier time. At the top of page 9692:

12 "And that related to whether
13 or not His Honour, Mr.
14 Justice Cosgrove, had made
15 any variation to the witness
16 non-communication order, is
17 that correct?

18 "Answer: That's right.

19 "Question: And your
20 understanding, as a result of
21 your discussion with Mr.
22 Pelletier on the 23rd, was
23 that the order remained
24 unvaried, is that right?

25 "Answer: That's right."

1 Then there is a reference at about
2 line 20 to the witnesses October 28th, 1998, which
3 is read in in some detail and I won't read it,
4 because I have already read you most of that note.

5 Mr. Humphrey at the top of page
6 9694 refers to the decision to suspend that side of
7 the investigation and focus on Toy. Inspector
8 Nugent says that was his decision at about line 7:

9 "Were you encouraged into
10 that decision by Mr.
11 Pelletier or anyone else?
12 "Answer: Only by the
13 information I gained from all
14 of these people that led me
15 to that. But nobody
16 suggested or led me into that
17 decision, if you will.

18 "Question: During that
19 discussion or brainstorming
20 session, did anyone suggest
21 that you should permanently
22 abandon your investigation
23 into any of the Foster
24 homicide issues?

25 "Answer: No. In fact the

1 apprehension at that time or
2 the expectation at that was
3 that the communication order
4 would lapse in a matter of
5 weeks, or a month.
6 "Question: And the effect of
7 that in your mind would be to
8 free up the witnesses then to
9 speak with your
10 investigators?
11 "Answer: That's right.
12 "Question: And during the
13 course of your investigation,
14 did a situation ever arise
15 where you felt a need to get
16 advice from independent Crown
17 counsel who had been assigned
18 to the case?
19 "Answer: No, sir.
20 "Question: So I take it from
21 that you didn't have any
22 communications with Dan
23 Mitchell?
24 "Answer: No, sir. Excuse
25 me, I just recalled a

1 conversation I had with Mr.
2 Sandler in Toronto, who I
3 asked for an opinion in
4 respect of the non-
5 communication order, pursuant
6 to this conversation with Mr.
7 Pelletier."

8 Over at 9695, he refers to the
9 conversation with Sandler and that he had a
10 conversation with Sandler about the reluctance of
11 OPP witnesses. Line 9:

12 "And did he give you some
13 advice?

14 "Answer: Initially during
15 that conversation he was of
16 the opinion also that myself
17 and -- that I and the other
18 investigators were not
19 -- didn't fall under the
20 -- under the ambit of that
21 order, that non-communication
22 order. However, through the
23 course of the conversation,
24 as we spoke, he formed the
25 opinion I believe that

1 practically speaking it would
2 be -- it wasn't -- I have a
3 note here to that effect --
4 that practically speaking it
5 wasn't advisable then to go
6 to the OPP investigators or
7 any witnesses while the order
8 remained as it was stated at
9 the time or understood at the
10 time.

11 "Question: And I take it
12 when you were speaking with
13 Mr. Sandler, you weren't
14 viewing Mr. Sandler as an
15 independent legal adviser to
16 you as an RCMP investigator?

17 "Answer: No, sir.

18 "Question: It was your
19 understanding that he was
20 counsel for the OPP or
21 counsel for Superintendent
22 Frechette of the OPP?

23 "Answer: My -- at the time I
24 had been advised that he had
25 represented Mr. Frechette,

1 Chief Superintendent
2 Frechette."

3 On page 9696, there is a question
4 on the January 8th conversation with Mitch Hoffman,
5 January 8th, 1999, and the witness says at about
6 line 10 -- I will start earlier, about line 7:

7 "Do you recall the purpose of
8 you speaking with Mr. Hoffman
9 on January the 8th --"
10 " -- Yes, again I -- this is
11 my first conversation I had
12 with Mr. Hoffman and it
13 related to the non-
14 communication order and the
15 effect on any witnesses of a
16 police interview and any
17 effect that might have on the
18 ongoing trial.

19 "Question: And did you make
20 a request of Mr. Hoffman that
21 he canvass with the court,
22 raise with the court a
23 request by you to vary the
24 witness non-communication
25 order?"

1 "Answer: Yes, I believe I
2 did.

3 "Question: And were there
4 some other issues that were
5 discussed between you and Mr.
6 Hoffman?

7 "Answer: In general terms,
8 whether or not the -- the
9 process or the trial might be
10 affected in any respect by
11 the police or the RCMP
12 contacting any witnesses --"

13 And the like. Then Mr. Humphrey
14 continues on on the questioning of Mr. Nugent at
15 page 9698:

16 And then it continues on:
17 'Upshot of conversation was
18 we agreed a letter to defence
19 counsel was appropriate
20 asking if objects to --'

21 "Answer: 'If he objects'.

22 "Question: ' --to interview
23 with named witnesses'?

24 "Answer: That's right.

25 "Question: Now, one of the

1 things you had been asked
2 about previously by Mr.
3 Murphy was your contact with
4 Susan Mulligan, counsel for
5 one of the accused in the
6 ongoing Toy/Cumberland
7 prosecution?

8 "Answer: Yes, sir.

9 "Question: Okay. And you
10 were asked whether she had
11 influenced or attempted to
12 influence the course of your
13 investigation?

14 "Answer: Yes, sir.

15 "Question: Okay. Was it
16 your view that she had
17 influenced your
18 investigation?"

19 Answer at line 25:

20 "No, sir. I'm sorry, to
21 answer more accurately, I
22 guess every input you have by
23 everyone you speak to will to
24 some extent influence the
25 course of an investigation."

1 simple. There's no other
2 accurate honest way to
3 describe it. It was
4 concocted and designed by the
5 OPP with the Ministry of the
6 Attorney General. It was
7 carried out under the
8 hospices --"

9 I think it means auspices:

10 " -- of senior Crown
11 Pelletier and Inspector
12 Nugent meeting on a regular
13 basis. Any attempt to
14 suggest on the basis of the
15 evidence were heard from
16 Inspector Nugent that this
17 was somehow carried out at
18 arms length, stretches to the
19 point of breaking the
20 definition, the ordinary
21 meaning of the word
22 independent. In that regard,
23 it will be the second time in
24 these recent proceedings,
25 where the word independent

1 has been spuriously invoked
2 to describe something that is
3 completely dependent and
4 completely -- almost to the
5 point of being incestuous, in
6 terms of an investigation or
7 a review. And, of course,
8 I'm referring to the
9 purportedly independent
10 review that was carried out
11 by the new team of Crowns, or
12 at least was heralded as such
13 in December of last year,
14 which did nothing other than
15 occasion further delay, as
16 did the RCMP investigation.
17 In any event, the --
18 "The Court: Are you saying
19 that the decision to engage
20 the RCMP in an investigation,
21 in fact, was a device to
22 delay the laying of charges
23 against MacCharles or others?
24 "Mr. Murphy: It may -- yes,
25 Your Honour, I would say

1 that's a fair inference. I
2 can't say that -- it may
3 ascribe too much to the
4 Crowns acting in the flurry
5 of circumstances that
6 occurred in August when these
7 initial revelations about
8 MacCharles, which had
9 apparently been on the books
10 for some time, were finally
11 honed --"

12 That must be owned:

13 " -- up to. The flurry of
14 activities involving the OPP
15 senior management in the
16 Crown's office and the
17 ministry of the Attorney
18 General leads one into the
19 area of speculation as to why
20 they would have made this
21 decision and done it in
22 secret. I think it's a fair
23 inference that it was an
24 attempt to forestall the
25 adverse consequences of any

1 allegations about MacCharles
2 as they might pertain to this
3 case or to the Project Toy
4 case. I think it's a fair
5 inference that the ministry
6 of the Attorney General, if
7 only from a purely
8 administrative self-
9 interested political
10 standpoint was simply
11 interested in salvaging two
12 expensive and large-scale
13 homicide investigations."

14 At the bottom of the page, about
15 line 27:

16 "Why they would go ahead and
17 do that, leaves it open to a
18 lot of speculation, but I
19 think it's fair, Your Honour,
20 to say that there was an
21 attempt to forestall
22 consequences being visited on
23 MacCharles."

24 Justice Cosgrove in the middle of
25 page 9819, about line 12:

1 "But I learned, I thought,
2 yesterday -- I didn't learn,
3 I heard yesterday --"

4 This is about line 12:

5 " -- that the Crown always
6 has a discretion, in the
7 public interest, whether it
8 should lay charges. And if
9 I'm not wrong, the Crown also
10 has the discretion as to
11 when to lay charges. So
12 presumably, the Crown, in the
13 public interest, could decide
14 that charges ought not to be
15 laid, or that charges ought
16 to be delayed pending
17 completion of two
18 homicides --"

19 Mr. Murphy responds to that. At
20 the bottom of 9820, Justice Cosgrove says, line 29:

21 "I've heard from some
22 witnesses, in the latest
23 evidence before the court,
24 that the RCMP had two areas
25 that they were looking at;

1 the incident of note taking
2 by Officer Laderoute, and
3 then the involvement of
4 Detective Inspector
5 MacCharles with other
6 officers."

7 The court says at page 9821 at
8 about line 10:

9 "Well, that takes me to my
10 next question. Assuming that
11 it is, and I'm sure Mr.
12 Humphrey will reply, and I'd
13 be interested in his
14 response, if one of the
15 issues is, again, the
16 Laderoute note taking and my
17 finding in March of last
18 year, then I wondered why it
19 took from October until April
20 or May for the RCMP to decide
21 to look at what was supposed
22 to be the main subject of the
23 so-called independent
24 investigation, i.e., the
25 exhibit being the notes by

1 or who's afraid to testify,
2 or whether it's just a farce
3 that there's just further
4 delaying of process. I would
5 have thought -- the forensic
6 analysis of the notes didn't
7 -- the notes didn't stand up
8 and say 'I'm worried about
9 tested, because the judge
10 made an order'. They could
11 have been tested the day
12 after the RCMP were given the
13 mandate."

14 The court says the same thing at
15 the bottom of page 9823 and the top of page 9824.
16 Mr. Murphy goes on at some length about that, and I
17 won't refer to it, except to say that Mr. Murphy
18 thinks it is suspicious.

19 Mr. Murphy goes on on page 9825 to
20 9826, and at the middle of the page he says:

21 "The RCMP were invited to
22 conduct a supposedly
23 independent investigation and
24 they, right from the outset,
25 were involved in regular

1 ongoing meetings with the
2 very people from whom they
3 were supposed to be
4 independent. It's a joke,
5 there's no other way to
6 describe it. It's a joke.
7 Mr. Humphrey can write realms
8 about how -- he can speak
9 volumes, if he likes, about
10 this investigation, it's a
11 joke. Even by RCMP
12 standards, Your Honour, and
13 without being too personal, I
14 grew up in the era of the
15 RCMP dirty tricks and RCMP
16 McDonald Commission Inquiry,
17 any even by some of the most
18 ridiculous standards that
19 were set by the RCMP with
20 respect to their own conduct
21 during the seventies and
22 eighties, including barn
23 burnings and stealing voters'
24 lists and all the rest of it,
25 this is a tour de force of

1 farcical investigative
2 incompetence."

3 Mr. Murphy goes on in that vein.
4 On the August 4th, Mr. Humphrey responds to some of
5 this at page 10286:

6 "With respect to whether or
7 not the reluctance of
8 witnesses was specious, back
9 in October of 1998, when the
10 Crown, I believe it was Crown
11 Cavanagh, approached the
12 court on October the 22nd of
13 1998 to request a variation
14 of the witness non-
15 communication order, it's
16 necessary first to appreciate
17 what the atmosphere was like
18 at that time. That was not
19 long on the heels of the
20 contempt citation of
21 Detective Inspector Bowmaster
22 for the, to use the
23 vernacular, the tipping off
24 of a future witness in the
25 proceedings, Constable

1 Alarie."

2 I just pause to say that is one of
3 the allegations and I am going to come to that. I
4 am not sure whether it will be today or tomorrow:

5 "Now, I say 'future witness',
6 he was identified at the time
7 as a future witness the
8 defence wished to hear from.

9 So he wasn't at the time
10 some purely speculative
11 future witness, he was an
12 identified future witness
13 whose evidence was being
14 sought and whose attendance
15 was being arranged. But
16 there was that aura of
17 concern, if I can put it that
18 way, in the air after the
19 contempt citation that the
20 witness non- communication
21 order would rightly be very
22 strictly interpreted and
23 enforced, and the witnesses
24 may well have been advised or
25 had in mind what was said by

1 Your Honour on March the 16th
2 of 1998, following delivery
3 of your ruling that day.

4 "Your Honour may recall there
5 was discussion amongst
6 counsel about progress of the
7 stay of proceedings'
8 application and the
9 discussion included
10 discussion about whether the
11 Crown could have any contact
12 with three witnesses who the
13 defence wanted to hear from.

14 I am just looking for the
15 names of the witnesses."

16 Mr. Denis, I think he was a police
17 officer, and Marino was a lay witness. I think
18 that had to do with the carpet in the car issue:

19 "And if I might, Your Honour,
20 I will read a significant
21 passage just so that the
22 passage I rely on is in
23 context. I don't mean to be
24 too lengthy in this but Your
25 Honour said:"

1 Mr. Murphy reads from that order,
2 and the first paragraph deals with the question of
3 Denis, Marino and LaRouche, and then at line 25:

4 "The court's order is that
5 with respect to those three
6 persons there will be no
7 contact prior to those three
8 witnesses giving evidence on
9 the issues which have already
10 been identified with respect
11 to their evidence before this
12 court on this voir dire. It
13 is the court's intention that
14 those witnesses be subject to
15 the same procedure as other
16 witnesses, for example, other
17 officers where defence first
18 cross-examines and then the
19 Crown has the opportunity of
20 cross-examination, but apart
21 from that, the court's
22 direction is that there be no
23 witness preparation in
24 respect of those three
25 particular witnesses ordered

1 to be in attendance for
2 examination on this voir dire
3 in this trial.'" "

4 Mr. Humphrey goes on:

5 "So that's the direction to
6 the Crown that there be no
7 preparation in relation to
8 those three witnesses. And
9 then Your Honour
10 continues: --"

11 And again quoting from the March
12 16th discussion following the ruling:

13 "'The court's order with
14 respect to all other
15 witnesses who have testified,
16 of course, continues. I
17 don't think we have to
18 reinvent that order. The
19 order was that witnesses be
20 excluded and that there be no
21 communication between
22 witnesses who have testified
23 and those who will testify in
24 the future.'" "

25 Mr. Humphrey goes on:

1 "So there is in that form an
2 order of the court that, in
3 my respectful submission,
4 could be interpreted by
5 witnesses as being a
6 direction that they are not
7 to discuss their evidence on
8 the abuse of process motion
9 with other witnesses or with
10 those who will testify in the
11 future. The reason I made
12 the earlier submission about
13 the aura and the atmosphere
14 back in October of last year,
15 is the witnesses would
16 rightly be concerned that
17 they strictly comply with
18 Your Honour's order,
19 particularly given the
20 citation of Detective
21 Inspector Bowmaster on
22 October the 7th.
23 "And then, it has to be
24 remembered, that --
25 "The Court: Well, you have a

1 difficult argument, Mr.
2 Humphrey. Quite frankly,
3 whenever two witnesses got
4 together outside the court
5 door the order was honoured
6 in its breach, I despaired
7 that my order meant anything,
8 and you'll find in the record
9 that Officer Laderoute,
10 Officer Nooyen, I forget
11 how many times the first
12 question was: 'Officer,
13 outside you were with so and
14 so?' 'Yes.' 'Did you
15 discuss this?' 'Yes.' -- I
16 despaired that they paid any
17 attention to the order. So
18 in that context, the argument
19 that you make that there was
20 some concern about the court
21 order affecting the officers
22 is a difficult argument.
23 "Mr. Humphrey: Well, in my
24 respectful submission, that
25 was the atmosphere back then.

1 The Crown, James Cavanagh,
2 came before the court seeking
3 a variation of the order so
4 that the witnesses could
5 speak to the RCMP without
6 fear that they would be
7 interpreted as being in
8 breach of the court's non-
9 communication order for the
10 purposes of cooperating with
11 the investigation, and at
12 page 148 --"

13 And I would have read you the page
14 in the evidence:

15 "Mr. Murphy expressed
16 concerns about there being
17 any contact between the
18 witnesses and the RCMP. And
19 he was opposed to any
20 variation of the order, and
21 the matter was put over until
22 the next day, and on October
23 23rd, the request for
24 exemption to the non-
25 communication ban was

1 declined and Your Honour's
2 ruling was on page six --"
3 And I have read you this ruling.
4 The court, after having his
5 October 23rd ruling read, says this at the bottom
6 of page 10290:

7 "Yes, when I had a Crown
8 attorney tell me he only
9 obeys legal orders --"

10 That would be Ramsay:

11 "I realized I had an uphill
12 battle and therefore I felt
13 that all I could do was make
14 orders and stick to them,
15 that once I started making
16 exceptions from orders when,
17 in my opinion, the exemption
18 required was unnecessary and,
19 secondly, I was somewhat
20 taken aback that the RCMP
21 were so underfunded that they
22 couldn't get their own legal
23 advice. I shouldn't say
24 'taken aback', I was
25 scandalized at what professed

1 to be the professionalism of
2 the RCMP in coming to the
3 court to ask for an exception
4 to that order, in order that
5 they could conduct a criminal
6 investigation. I'm
7 scandalized, I have to say
8 that."

9 That was August the 4th, and a
10 month and a few days after that, the rulings that I
11 read to you to start this discussion were made, and
12 that completes that tab.

13 I see we are about one minute or
14 so from 12:30, so perhaps that would be a
15 convenient time to adjourn.

16 THE CHAIR: Thank you. We will
17 come back at 1:30.

18 MR. CHERNIAK: Thank you.

19 --- Luncheon recess at 12:28 p.m.

20 --- Upon resuming at 1:30 p.m.

21 THE CHAIR: Mr. Cherniak?

22 MR. CHERNIAK: Thank you, Chief
23 Justice.

24 I wanted to take you now to
25 particular 5(C):

1 "Justice Cosgrove threatened
2 to sanction a federal Crown
3 for contempt for an allegedly
4 unsatisfactory explanation of
5 why one federal Crown was
6 sent as opposed to another to
7 court that day."

8 If you turn to page 8984 of April
9 29, you will see the discussion involved Mr. Ward,
10 a Department of Justice counsel.

11 The issue here is the scheduling
12 of the return of Inspector Nugent with the Elliott
13 investigation report for an O'Connor application.

14 The discussion goes on to page
15 8985, and Mr. Ward says:

16 "So, as I understand then,
17 Inspector Nugent will be back
18 before this court on June
19 21st and presumably have a
20 report to give to the court.

21 MR. WARD: So, as I
22 understand then, Inspector
23 Nugent will be back before
24 this court on June 21st and
25 presumably have a report to

1 give to the court, and
2 because it's an O'Connor
3 application, it will go to
4 Your Honour, together with a
5 version - assuming that there
6 are still concerns about
7 releasing the full document,
8 the Crown at that time would
9 present to the court, as
10 well, a suggested
11 editorialized or edited
12 version for release and, at
13 that point, according to the
14 O'Connor procedure, as I
15 understand it, a sanitized
16 summary should be given to
17 the defence of what has been,
18 if anything, edited out. And
19 then I take it - and the
20 reasons for the editing would
21 be given to the court and at
22 that point then there would
23 be submissions on what, if
24 anything, would go to the
25 defence and Your Honour would

1 have to make the decision in
2 accordance with O'Connor."

3 Justice Cosgrove then says:

4 "Will you be counsel
5 continuing?"

6 Mr. Ward says:

7 "Either myself or Chantal
8 Proulx will be back again.
9 She's the one - I prefer it
10 to be her because she knows,
11 she's read the file, she
12 knows what's in it and, of
13 course, it was Your Honour's
14 order that she not
15 communicate the contents of
16 the file.

17 So the matter is adjourned to June
18 21, which you will find on the next page.

19 Mr. Ward identifies himself and
20 says:

21 "Inspector Nugent is outside
22 of the courtroom. He has this
23 morning a report to give to
24 Your Honour for the purposes
25 of the second phase of the

1 O'Connor motion, which Your
2 Honour may then wish to read,
3 consider and determine
4 whether it, all of it, some
5 of it, none of it should be
6 produced. This report is
7 in the possession of
8 Inspector Nugent, as I speak
9 right now. Now, the file
10 itself - if I can just
11 recapitulate. My
12 understanding for the record
13 is that the file itself, at
14 some point, was photocopied
15 and was sealed in the
16 presence of the court, and I
17 believe that Your Honour had
18 moved through the first phase
19 of O'Connor and ruled that
20 there was potential relevance
21 to the file. Although the
22 report is new material and so
23 technically, I suppose,
24 should be subject to a ruling
25 again, of the first stage -

1 I'm assuming that if the file
2 was deemed to be potentially
3 relevant by Your Honour that
4 also the report, which is
5 based upon that file, would
6 also be deemed to be
7 potentially relevant, and
8 that's the reason I'm
9 speaking of it in terms of
10 the second phase."

11 The discussion continues, and
12 Inspector Nugent is called to give evidence, and
13 the Court says:

14 "Inspector Nugent, we had
15 anticipated that a report or
16 reports respecting the
17 involvement of the RCMP at
18 the request of the OPP would
19 be available for today. Is
20 that report or reports - has
21 it been completed?

22 THE WITNESS: Yes, Your
23 Honour."

24 At the top of the next page,
25 Justice Cosgrove says at Line 6:

1 "So is it - do I take it then
2 it's a matter of convenience
3 that you've separated the
4 part of your investigation
5 dealing with other than
6 Elliott into one part and the
7 Elliott into another part?
8 THE WITNESS: I'm not
9 sure that understand "a
10 matter of convenience", Your
11 Honour. They were basically
12 treated as separate issues
13 from the onset in the
14 investigation."

15 There is further discussion
16 between the Court and the witness, and at page 9019
17 Justice Cosgrove says this:

18 "The next phase of the
19 O'Connor application, when I
20 have had an opportunity to
21 look at the reports, then I
22 would propose that I would
23 have discussion with counsel
24 for the Inspector as to the
25 nature of the completion of

1 the O'Connor application. I
2 can foresee that counsel for
3 the Inspector might want to
4 have the opportunity of
5 further submissions on the -
6 on whether parts of the
7 report, all of the report,
8 parts of the file, all of the
9 file which is presently in
10 the possession of the court,
11 should be produced.
12 Normally, on an O'Connor
13 application, material - my
14 experience has been the
15 material is left with the
16 court, the court then takes
17 it, makes a decision and
18 announces the decision. In
19 this case, I seem to recall
20 that counsel did indicate
21 that it wished to have the
22 opportunity of addressing
23 certain of the matters that
24 were in the file. And
25 getting back to basics, I

1 suppose, Mr. Ward, will you
2 be arguing that, or will Miss
3 Proulx be arguing that?

4 MR. WARD: It all depends
5 on the timing, because part
6 of the background in this - I
7 believe Your Honour will
8 recall that you made an order
9 limiting access to the
10 material in the file, so I
11 have not seen it.

12 Miss Proulx, I believe, under
13 the terms of that order, went
14 through the contents of the
15 file as it was at that time.

16 I don't know what subsequent
17 materials there may be on it,
18 because I believe that the
19 copy that was provided to the
20 court was photocopied
21 obviously at a particular
22 point in time and, therefore,
23 will reflect that file at
24 that time, and will not
25 contain anything that's been

1 subsequently added to it.
2 Similarly, with the case of
3 Miss Proulx, she went through
4 that file, as I understand
5 it, with the Inspector,
6 within the terms of the
7 court's order, and she made
8 numerous notes. That aspect
9 of it makes it - leads to my
10 second comment that Miss
11 Proulx is now doing the semi-
12 annual tour of agents in
13 northern Ontario and is
14 expected back, I believe, a
15 week Wednesday, so that it
16 all depends on the timing of
17 when Your Honour decides to
18 schedule these submissions
19 and whether I am able to have
20 a look at the materials, or
21 whether we're going to
22 continue with the order as it
23 is. If the order continues,
24 then I would be put in the
25 difficult position of making

1 contract between the OPP and
2 the RCMP. The terms of
3 reference did not have in
4 mind production of anything
5 to him or his client. It's
6 this court's order, pursuant
7 to a motion under O'Connor
8 that governs the procedures
9 here. The - my friend
10 speculates that perhaps he
11 should be entitled to a copy.

12 In my respectful submission,
13 that would entirely usurp
14 Your Honour's function in the
15 second stage of the O'Connor
16 motion, which is to determine
17 whether my friend should get
18 a copy."

19 Mr. Ward continues on page 9026,
20 and reminds the court that he has not seen the
21 contents of the file, but Ms Proulx has, and there
22 will be matters in there that the Crown and the
23 witness will be certifying under Section 37 of the
24 Canada Evidence Act.

25 Mr. Ward goes on to reiterate that

1 he has not read the report, and on page 9027, Line
2 3, he says:

3 "But, in relation to his main
4 point, the very purpose of
5 this motion is to determine
6 whether he should get a copy,
7 and it would be undoing Your
8 Honour's function in this
9 whole inquiry to give them a
10 copy first and then - well,
11 what would be the point of
12 having the second phase at
13 all, if he has a copy of it?
14 THE COURT: Mr. Humphrey.
15 MR. HUMPHREY: I agree with
16 the submissions you've been
17 given by Mr. Ward."

18 At the bottom of page 9028,
19 Justice Cosgrove says at Line 25:

20 "I will take the two reports,
21 please, madam registrar. I
22 intend to read these reports
23 tomorrow. Wednesday, I will
24 be attending a funeral in
25 Toronto of a former mayor of

1 Scarborough who was the mayor
2 after I was. Thursday, we
3 will resume, and Thursday I
4 am ordering that Miss Proulx
5 attend the court. I am
6 offended that in light of the
7 seriousness of the issues
8 before the court and the
9 development of these
10 proceedings on the stay
11 application dealing with the
12 RCMP, that counsel for the
13 RCMP would think, or for the
14 Crown acting for the RCMP,
15 would think it more important
16 that they be on tour dealing
17 with annual reports rather
18 than before the court to
19 continue with this process,
20 in light of the fact that it
21 is an ongoing homicide
22 investigation. I am ordering
23 that Miss Proulx be here
24 Thursday morning prepared to
25 proceed with the motion.

1 Mr. Ward, would you
2 communicate the court's
3 dissatisfaction with the
4 attendance of the Crown and
5 the acceptance of
6 responsibility of the Crown
7 in this matter on behalf of
8 Canada, representing the
9 witness in the witness box.
10 MR. WARD: If I can defend
11 Miss Proulx for a second.
12 This is a matter that she is
13 assigned by her superiors and
14 not something that she does
15 of her own accord.
16 THE COURT: Would you
17 communicate the court's
18 direction and the court's
19 opinion to her superiors
20 then.
21 MR. WARD: I certainly will
22 do that. As far as getting a
23 hold of Miss Proulx, she is
24 travelling by car and I will
25 attempt --

1 THE COURT: Then she can
2 park her car and get on an
3 airplane and be back here
4 within four hours, counsel. I
5 will not permit the car
6 travel excursion of Crown as
7 a priority over these
8 proceedings. Can you tell
9 me, who is her superior?
10 Who is the superior to whom
11 you report?

12 MR. WARD: Eugene Williams.

13 THE COURT: Would you have
14 Mr. Williams here at two
15 o'clock this afternoon,
16 please."

17 At 2:05 p.m. that afternoon, court
18 resumes and Justice Cosgrove says:

19 "Mr. Ward, did I understand
20 you to indicate that Miss
21 Proulx objects to the
22 production of some of the
23 material which is in the file
24 lodged with the court by
25 officer - or Inspector Nugent

1 at the court's request?
2 MR. WARD: I wasn't there,
3 Your Honour, but I understand
4 that at the last - at one of
5 the proceedings an order was
6 made that only she could look
7 at the file, and I understand
8 that she did go through the
9 file with the officer."

10 And further down:

11 "So that the correct
12 phrasing, I guess, would be
13 that she has made a
14 preliminary go-through the
15 materials that she had at the
16 time, and made note of
17 privileged materials. So that
18 to the extent that that will
19 form the basis for an
20 objection, the answer is
21 yes."

22 Justice Cosgrove, at Line 26:

23 "And you were to convey a
24 message to her supervisor or
25 person who had authority for

1 her schedule to return to the
2 court this afternoon?

3 MR. WARD: I was.

4 THE COURT: Yes. And what is
5 the result of that?

6 MR. WARD: That person is
7 present in court, Your
8 Honour.

9 THE COURT: Yes. The name,
10 please.

11 MR. WARD: Williams. Eugene
12 Williams, Q.C.

13 THE COURT: Mr. Williams,
14 would you come forward to the
15 witness box, please."

16 Justice Cosgrove asks about Mr.
17 Williams' occupation and responsibilities, and Mr.
18 Williams replies:

19 "Your Honour, I am a
20 barrister and solicitor, and
21 I am employed by the
22 Department of Justice as the
23 group head of Ottawa-Hull
24 prosecutions.

25 THE COURT: In that area of

1 responsibility, do you have
2 authority over directing
3 scheduling and attendance of
4 Miss Proulx, who has been
5 involved in these
6 proceedings?

7 THE WITNESS: Yes, I do."

8 There is a discussion about the
9 history, and on page 9034, Justice Cosgrove says:
10 "I believe it was Miss Proulx
11 who argued that the court was
12 really in the position of an
13 O'Connor application and,
14 because the material in the
15 possession of the RCMP was
16 not in the possession of the
17 OPP, that it was in effect a
18 third party record."

19 There is then a discussion about
20 the O'Connor matter, and on page 9035, at Line 9:

21 "I'm not sure if Mr. Ward
22 attended that day, or if he
23 attended subsequently, but
24 he did, when coming to court,
25 on one of the adjournments

1 awaiting the report from the
2 RCMP, advise the court that
3 Miss Proulx was on vacation
4 but that he expected that she
5 would return to continue with
6 the application.
7 Today's date was set after a
8 number of interim days and it
9 was my full expectation that
10 the Crown, or should I say, I
11 guess a solicitor employed by
12 the government of Canada
13 representing an officer of
14 the RCMP here, asked to make
15 argument on the stay in the
16 process of a stay
17 application. The trial, on
18 which the stay application is
19 a renewed stay from many
20 months ago, is now in its
21 twenty-first month. The
22 accused before the court has
23 been incarcerated for
24 approximately four years.
25 Under those circumstances, it

1 was important that the court
2 proceed as quickly as
3 possible to conclude the
4 evidence on the stay
5 application, so that it
6 could be argued in these
7 proceedings.

8 Can you tell me why Miss
9 Proulx was not in court this
10 morning?

11 THE WITNESS: It would
12 appear, Your Honour, that
13 there was a misapprehension
14 of the purpose of today's
15 court proceeding. Although
16 I have not spoken with Miss
17 Proulx today concerning this,
18 or the request that Your
19 Honour has made, I, and I
20 believe she was under the
21 impression that the date of
22 June 21, 1999, was the
23 delivery date of Inspector
24 Nugent's report. We did not
25 anticipate, having regard to

1 our understanding of the
2 O'Connor process, that
3 submissions would be made
4 today and, as result, I did
5 not object or direct that she
6 be here today.
7 As Your Honour is aware, Mr.
8 Ward of our office has been
9 attending on these proceeding
10 with - not with Miss
11 Proulx, but has alternated
12 appearances because the
13 nature of our office is such
14 that, from time to time, we
15 are unable to put a single
16 counsel on a file and, in
17 order to accommodate the
18 court schedule, we will
19 assign counsel regardless of
20 their availability; that is
21 to say, if a date is set and
22 the counsel is otherwise
23 occupied, we will substitute
24 and put another counsel to
25 deal with the matter, keeping

1 in mind we assign counsel who
2 have the knowledge and the
3 ability to deal with the
4 matters that we expect before
5 the court. And it was
6 perhaps my error in not
7 appreciating what proceedings
8 would occur today that I
9 concurred with the
10 recommendation that Miss
11 Proulx do other work, which
12 she alone is able to do, and
13 assigned, or asked Mr. Ward
14 to attend today, because,
15 while I believe that he could
16 deal with the matters that I
17 anticipated would be dealt
18 with today, I knew that he
19 could not deal with the
20 matters that Miss Proulx is
21 dealing with in northern
22 Ontario.

23 THE COURT: I have ordered
24 Miss Proulx to attend this
25 court on Thursday morning at

1 ten o'clock; do you expect
2 that she will be here?

3 THE WITNESS: I have every
4 expectation that she will be.

5 I have tried to contact her
6 directly and have left
7 messages on her voice mail.
8 It appears that she's in a
9 part of Ontario which is not
10 - well, at the time of my
11 call I could not reach her on
12 her cell phone. I left a
13 detailed message, I expect
14 that I will be speaking with
15 her again between now and
16 Thursday, and I anticipate
17 that we will make the
18 necessary arrangements to
19 have her here.

20 THE COURT: I find your
21 explanation unsatisfactory,
22 counsel. I am contemplating
23 citing you for contempt of
24 court. I have considered
25 whether it is contempt in the

1 face of court, or whether it
2 would be contempt out of the
3 face of the court.
4 Probably, if contempt is
5 found, an argument can be
6 made that it is contempt in
7 the face of the court,
8 because it deals with the
9 procedure of the court, even
10 though this is the first time
11 you have been in the court.
12 I am going to reserve on my
13 decision whether or not I
14 will cite you for contempt
15 until the conclusion of the
16 stay application. I want to
17 advise you that your
18 explanation, in the context
19 of the significance of the
20 proceedings before the court
21 and the information that was
22 available to Miss Proulx and
23 Mr. Ward to bring to your
24 attention, is not acceptable
25 to the court. You are free

1 to go. You will be advised.

2 Mr. Ward?

3 MR. WARD: May I just read
4 into the record, Your Honour,
5 what your remarks were on the
6 29th of April at page 41 of
7 the transcript when Mr.
8 Humphrey is --

9 THE COURT: No, you may not,
10 sir. Please be seated.
11 That will be a matter for
12 argument."

13 I believe June 21 was a Monday, so
14 the Thursday was two days later in that week.

15 I would like to deal now with
16 Particular 2, which deals with the allegation that
17 Justice Cosgrove exhibited a suspicious attitude
18 towards a variety of Crown and government
19 officials.

20 I would take you to (q), which is
21 in the middle of Volume 3:

22 "After staying the
23 proceedings and without any
24 evidence or submissions or
25 ground, Justice Cosgrove

1 denied the ability to make
2 submissions. Justice
3 Cosgrove quashed a federal
4 immigration warrant for the
5 accused, and threatened the
6 immigration officer with
7 contempt if she tried to
8 execute it."

9 We now go September 7, 1999, where
10 there is an immigration officer, Ms Iadinardi,
11 called and Mr. Murphy says:

12 "I'm just wondering, perhaps
13 I'm speaking at great length,
14 if this representative has
15 any intention of enforcing
16 that order now or whether it
17 will be rescinded
18 voluntarily. If not, I would
19 ask the court to quash it so
20 that Julia Elliott can return
21 - can be free and not be
22 detained any further.

23 THE COURT: What is your
24 name, please?

25 THE REGISTRAR: Come

1 forward.

2 MS. IADINARDI: My name is -
3 my name is Maria Iadinardi, I
4 am an immigration officer. I
5 am here to, you know, to
6 ensure that, I suppose, that
7 we execute the warrant for
8 arrest for inquiry. Now, the
9 inquiry is not based on the
10 case that is happening here
11 today, Your Honour. I
12 apologize, I'm not used to
13 this, so I don't - you know,
14 I hope I'm addressing you the
15 correct way. It's for the
16 charges that are outstanding
17 over in Barbados. In other
18 words, under our Immigration
19 Act, which we call 27 --

20 THE COURT: Excuse me, I
21 want to interrupt.

22 MS. IADINARDI: Sorry.

23 THE COURT: I have heard
24 this story before. I have
25 already ruled today that it's

1 a sham and there is no
2 validity to the process, and
3 I grant counsel's request
4 that your order be struck
5 under the provisions of the
6 Act, and not enforced. Thank
7 you.

8 MR. HUMPHREY: Just so my
9 position is clear, Your
10 Honour, if I've been called
11 upon and given an opportunity
12 to make submissions --

13 THE COURT: But you hadn't,
14 because you asked to be
15 released and I did release
16 you, Mr. Humphrey, so I don't
17 want - I'm not inviting your
18 submissions, Mr. Humphrey.
19 Thank you very much.
20 Anything further, Mr. Murphy?

21 MR. MURPHY: No, I just - I'm
22 putting it on the record.
23 Our intention now is to - is
24 to leave the court building
25 and I just want to note on

1 the record that in light of
2 what has happened in this
3 case, that's the clear
4 intention of Miss Elliott.
5 Your Honour's made a ruling,
6 she's free to leave and
7 that's what we intend to...

8 THE COURT: And what is
9 your name, please, again?

10 MS. IADINARDI: Maria
11 Iadinardi.

12 THE COURT: Yes. I want to
13 advise you that if you take
14 steps to take the accused in
15 custody after the order which
16 I have made, I will bring you
17 before this court on a
18 contempt proceeding; you are
19 advised of that, and you
20 should consult a lawyer about
21 that."

22 We now move to particular 3:

23 "Justice Cosgrove failed or
24 refused to control the trial
25 process and, in particular,

1 Findlay would be saying
2 'let's move along', because
3 this Officer's evidence is
4 patently ridiculous. He is
5 denying the most logical
6 implication -- the only
7 logical implication of what
8 this statement says from the
9 accused, which is quite
10 clearly that she is referring
11 to two distinct periods of
12 time, and it's a key point --
13 it's the most key point for
14 this witness, perhaps.
15 My friend can urge the Court
16 that we should move along:
17 the fact that I'm not getting
18 an answer doesn't mean I
19 shouldn't be entitled to
20 pursue the matter. In my
21 submission, this Officer is
22 standing logic on its head,
23 and for us to proceed past
24 this point without me being
25 allowed to explore the

1 nonsense that's inherent in
2 his explanation is, in a
3 sense, to allow the Crown to
4 attempt to pull the wool over
5 the Court's eyes. This is
6 patently ridiculous
7 nonsense --"

8 Mr. Findlay makes his submission
9 and says at page 2913:

10 "And as well, Your Honour,
11 the personal comments about
12 the Crown: my honesty ,my
13 integrity, that I'm trying to
14 pull the wool over the
15 Court's eyes; in my
16 respectful submission, that
17 has no place. My friend -- I
18 made an objection and in my
19 respectful submission my
20 friend can answer my
21 objection based on argument,
22 logic, law, etc., and Your
23 Honour can rule on it, and I
24 don't think it's appropriate
25 for him to continue to

1 question my character and my
2 honesty."

3 Justice Cosgrove refers to the
4 repetitious nature of Mr. Murphy's questioning, and
5 at the top of page 2014 Justice Cosgrove says this:

6 "Quite frankly, as a person
7 sitting and listening to the
8 question and the answer, my
9 feeling is that we're talking
10 about ships passing at night.
11 There is no logic that says
12 that because a person is seen
13 carrying parcels from a car
14 or to a car, that there's any
15 connection that those parcels
16 belong to that person. They
17 could belong, for example, to
18 the deceased. They could
19 belong to his son. They
20 could belong to his aunt.
21 That whole area has not been
22 explored, and for Defence
23 Counsel to put on blinkers
24 and therefore argue that the
25 Officer is being illogical,

1 and proceed with wild
2 exaggerations of the
3 intemperate language and
4 description of Counsel, on
5 this point is not warranted
6 whatsoever."

7 Justice Cosgrove goes on in this
8 vein, and then at page 2915 he says at Line 10:
9 "Finally, I agree with the
10 Crown. The hyperbolic and
11 exaggeration of Counsel's
12 language and description, in
13 all interjection and exchange
14 of argument with the Crown
15 talking about motives, are
16 totally unwarranted,
17 unproductive, and not useful
18 to the Court whatsoever. I
19 would ask Counsel to consider
20 that: that neither justice,
21 his client, the Court, or
22 anybody is served by this
23 exaggeration."

24 We then go to February 11, 1998,
25 page 6057; we are still in the trial proper.

1 Mr. Flanagan makes a submission in
2 the middle of the page and says this at Line 23:
3 "Throughout the motions at
4 this trial, Counsel has on a
5 number of occasions accused
6 the Crown of intentionally
7 attempting to deceive the
8 Court. Now, I recall that
9 when I was present during the
10 motions, Your Honour
11 indicated to Counsel -- I
12 think the expression Your
13 Honour used was, 'That's not
14 helpful'.
15 The day before yesterday, Mr.
16 Murphy again rose and said
17 that the Crown was attempting
18 to "deliberately deceive" the
19 Court. That is a strong
20 accusation for Counsel to
21 make because what the
22 accusation is, is that
23 Counsel is saying, in
24 essence, that the Crown
25 Attorney or Crown Counsel is

1 intentionally trying to
2 deceive the Court. Mr.
3 Murphy then continued
4 yesterday and said that the
5 Crown Counsel, by putting in
6 one case -- and I'm not going
7 to get into that, but -- was
8 "pulling a fast one" on the
9 Court."

10 Mr. Flanagan says at Line 16:

11 "Those are strong
12 allegations. With all due
13 respect, there is absolutely
14 no foundation whatsoever --
15 and I invite the Court to
16 make a finding on it -- that
17 either Crown Counsel is
18 intentionally deceiving Your
19 Honour or this Court, or this
20 Jury.

21 I make the comments now
22 because the -- not just for
23 Your Honour, but for any
24 comments made in the presence
25 of the Jury. I take strong

1 exception to Defence Counsel
2 coming into this trial and
3 saying that the Crown Counsel
4 is intentionally deceiving
5 the Court, without any
6 merit."

7 Mr. Murphy responds, and he is
8 completely unapologetic, and says he stands by the
9 comment, and at Line 26 he says he won't go back on
10 any of his comments, but stands by them.

11 He says:

12 "That's the second time, in
13 my submission, that the Crown
14 has attempted to mislead the
15 Court as to the state of the
16 law, and, indeed, there is a
17 professional duty upon the
18 Crown. The duty is quite
19 distinct, as stated in
20 Boucher v. The Queen in the
21 Supreme Court of Canada, I
22 believe by Justice Rand (ph):
23 the Crown Attorney has a
24 duty to see that justice is
25 done. I do not in any way

1 resile from my comments about
2 the Crown's conduct both on
3 this motion and in the past."

4 He goes on to give some examples
5 of what he thinks backs up what he says, and refers
6 to the Crown's higher duty.

7 At the bottom of page 6061, he
8 says, "I don't know of any other word, a polite
9 word --," and Justice Cosgrove then says:

10 "I will interject at this
11 time. I am going to reserve
12 my comments on the request by
13 Mr. Flanagan, but I want to
14 alert you, Mr. Murphy, that
15 your language now -- and your
16 conclusions have no basis
17 whatsoever in fact, or have
18 any foundation in fact, on
19 the last item, and that your
20 language that the items
21 disappeared and that they
22 disappeared deliberately are
23 overblown; they are
24 incorrect, they are false.
25 They are the type of language

1 and the kind of approach that
2 you have taken that is not
3 acceptable to this Court.
4 There is no basis for that
5 statement. There is no basis
6 for, in fact, the conclusion
7 that you have reached and
8 you've placed before the
9 Court, and as a Solicitor you
10 should, with your experience,
11 be more mindful of the
12 language that you use before
13 the Court on that particular
14 item. I do that to illustrate
15 to you that you are flying
16 and are taking flights that
17 are un-becoming of an
18 experienced Solicitor in this
19 Court, on that point. Please
20 proceed."

21 Mr. Murphy responds to what the
22 Court is saying, and on page 6064 the Court says:
23 "It is a deliberate denial,
24 and the Crown -- to then say
25 that the Crown maliciously

1 made that statement is,
2 without a trial, again a
3 fanciful conclusion arrived
4 at by Counsel which is
5 unbecoming of a Solicitor of
6 your experience in this
7 Court! This trial should
8 illustrate that conclusions
9 without fact and placed
10 before the Court by fancy are
11 totally unacceptable in our
12 practice and in our Courts!
13 The Court could not possibly
14 comment or agree with the
15 conclusion of Counsel without
16 some more evidence before the
17 Court than what is here. And
18 besides that, it has no, in
19 my view, relevance to the
20 issues before this trial."

21 So that was the way the land lay
22 up at February 11, 1998.

23 I then go to April 15, 1998, and
24 Violet Pender, the sister of the victim, is in the
25 witness box on the stay motion; this is after the

1 March 16 decision, and Mr. Cavanagh says:

2 "Again, Your Honour, in my
3 respectful submission, it is
4 improper to allow Ms. Violet
5 Pender, sitting in the
6 witness box, being laughed at
7 by counsel to the left of me,
8 defence counsel to the left
9 of me at some of her answers.
10 She's being ridiculed by my
11 friend and then asked
12 questions --"

13 Mr. McGarry, at the bottom of the
14 page, says that he has heard snickering several
15 times, and that is similarly inappropriate.

16 The cross-examination proceeds on
17 page 242 -- we are in Ottawa now -- and Mr. Murphy
18 asks the question at Line 8:

19 "Q. I'm suggesting to you,
20 Mrs. Pender, again, that
21 your singular minded
22 determination to have this
23 trial proceed, underscores
24 and increases the likelihood,
25 especially in the face of the

1 frustration you've described
2 with seeing the case go
3 against the Crown on the very
4 issue that this statement of
5 yours of April 6th pertains
6 to, that you will basically
7 come forward now and do
8 whatever you can to ensure
9 that Miss Elliott goes to
10 trial, because that is your
11 mission and you, I suggest,
12 are the representative of the
13 family and the most outspoken
14 one in that regard.
15 A. Well, I might be
16 outspoken, but all I want is
17 a fair trial for my brother
18 Lawrence."

19 And then at page 253, Justice
20 Cosgrove asks the witness to leave, and he says at
21 Line 20:

22 "I want to draw to all
23 counsels' attention,
24 including Mr. Cavanagh, but
25 in particular Mr. McGarry and

1 Mr. Murphy - I include as
2 well Mr. Cadieux - that the
3 rules of professional conduct
4 hold that opposing counsel,
5 barristers, should always, at
6 all times, display
7 courteousness to opposite
8 counsel. That was sadly
9 lacking in the exchange
10 between Mr. Murphy and Mr.
11 McGarry which I observed
12 earlier.

13 It is a serious departure
14 from the code of the
15 profession that has been
16 longstanding in the
17 profession, and I would ask
18 all counsel to bear in mind
19 that the rules of the
20 profession are designed to
21 set the profession aside and
22 to assist the profession.

23 As I say, the exchange that I
24 observed was seriously short
25 of what is expected of

1 counsel before the court. I
2 would ask counsel not again
3 to get into personalities and
4 the kind of exchange that I
5 witnessed.
6 The second reason for it is
7 that we've heard, in the
8 examination of this witness,
9 a concern about justice. We
10 all are, by our professional
11 oaths, and I by my oath as a
12 judge, concerned about
13 justice. My view, since
14 becoming a lawyer, remains
15 intact that I don't believe
16 justice is served in this
17 forum or in any other forum,
18 in which counsel are
19 professionally engaged, if
20 their conduct is less than
21 what is required by the code
22 of professional conduct that
23 I have referred to.
24 This trial is not assisted
25 and not advanced, and the

1 cause of justice is not
2 advanced by conduct less than
3 what is called for in the
4 code of conduct of
5 barristers."

6 We then go to August 18, 1998,
7 where we have Officer Bowmaster being cross-
8 examined, but there are submissions by Mr. Murphy
9 where he says:

10 "I don't want to descend into
11 some of the rancor which we
12 found ourselves subject to,
13 for reasons probably of the
14 longevity of the proceedings
15 before the summer break, but
16 I think Ms. Bair's comments
17 are completely unprofessional
18 and unfortunately they simply
19 add to the unprofessionalism
20 that has characterized the
21 Crown prosecution and the
22 investigation of this case.
23 It is a matter that I believe
24 is serious enough that it may
25 warrant intervention or

1 complaint to the law society
2 and to the Attorney General
3 of Ontario."

4 Mr. McGarry responds to that on
5 the next page at Line 9:

6 "Your Honour, first of all,
7 if I may, with regard to the
8 question of the exclusion of
9 counsel from the other case
10 from the courtroom, in my
11 submission, there is no basis
12 for that. All sorts of
13 counsel can come to the
14 court. But, in any event,
15 Miss Bair has interest in, as
16 you know now, in the other
17 case and is, therefore, for
18 example, entitled to know
19 what Inspector Bowmaster is
20 saying or being asked for
21 that matter."

22 And then at Line 25:

23 "With regard to her comment,
24 which my friend has referred
25 you to on the break: Your

1 Honour, I've been hanging
2 around courtrooms for a long
3 time and what people say on
4 recesses here and down in the
5 coffee shop, often times is
6 not what they would say in
7 open court, and I've never
8 once complained about a
9 defence lawyer who said bad
10 things about me on the recess
11 or outside or downstairs or
12 even in a bar after court,
13 and some things have been
14 said over the years. It
15 seems to me that's between
16 counsel. I think my friend
17 should raise it with Miss
18 Bair. It seems to me that if
19 her comment was in any way
20 justified, it was a reaction
21 to not so much - my friend
22 complains that she was
23 showing lack of decorum by
24 saying it when the court is
25 in recess, but I suspect Miss

1 the Crown, I don't know what
2 jurisdiction I would have to
3 exclude Crown from this case.
4 Witnesses have been
5 excluded, the officer himself
6 is excluded now, but to
7 exclude other Crown, I have
8 not heard a jural reason why
9 the court could or would make
10 that order.
11 On the issue of
12 unprofessional comment: that
13 is a matter that counsel will
14 have to sort out themselves.
15 I think it probably goes
16 towards the - I hearken back
17 to my comments to counsel
18 earlier; that is, counsel who
19 are before me, earlier this
20 year, that decorum and some
21 judgment, in my view, is a
22 time worn successful
23 characteristic of counsel
24 before the court and, when
25 you depart from it, we get

1 meeting with the Crown in
2 connection with that would be
3 a pretty significant,
4 important event to make a
5 note about?

6 A. I'm not an investigating
7 officer on the matter."

8 Officer Kemp repeats that on
9 several occasions, and he says:

10 "There was nothing of
11 significance to make notes
12 about."

13 The cross-examination continues,
14 and at page 3221, Line 7:

15 "Q.Okay. So you're basically
16 saying you don't remember
17 what was discussed at that
18 meeting?

19 A. No.

20 Q. Were you all together in
21 the room?

22 A. I don't believe so, no.
23 I believe we were spoken to
24 individually.

25 Q. By whom?

1 A. Curt Flanagan.

2 Q. Okay. Did he call you up

3 to talk about this-that-and

4 the-other-thing or was it a

5 particular thing he wanted to

6 talk to you about on this?

7 The fact that you had been,

8 for example, subpoenaed as a

9 defence witness on a non-

10 disclosure motion; did he

11 mention that that was why he

12 wanted to talk to you?

13 A. I know we were there about

14 the Elliott matter. I don't

15 recall what we spoke about.

16 Q. Are you going to give

17 evidence in front of a jury

18 on this case, sir?

19 A. I don't know.

20 Q. Do you agree it might

21 pose certain problems if you

22 were to give these kinds of

23 answers in front of the jury?

24 A. It's possible, yes.

25 Q. 'I don't recall. I don't

1 recall. I'm not sure. I
2 don't recall. I think it was
3 about the Elliott matter.'
4 Answers of that vague nature,
5 would you agree, that's
6 almost to the point of being
7 meaningless answers; wouldn't
8 you agree with me?
9 A. Not the best answers, no,
10 sir."

11 At the top of page 3222:

12 Q. Well, what kind of powers
13 of recall are you expected to
14 have as an OPP officer? Are
15 you supposed to be able to
16 remember important incidents
17 or important events that
18 occur?

19 A. There's nothing that
20 happened in the meeting that
21 I felt I should make note of.
22 It was a meeting with the
23 Crown. I seldom make notes
24 of what exactly what I said
25 to the Crown or the Crown

1 said to me."

2 He says again at Line 22:

3 "I have no memory of what was
4 actually said."

5 There is then a discussion about
6 the subpoena:

7 "Q. Did you discuss this
8 omission in the disclosure of
9 this November 13th note until
10 today's date - did you
11 discuss that with anybody
12 outside of court?

13 A. No. I pointed it out
14 when - as soon as I realized
15 it.

16 Q. You pointed it out to
17 whom?

18 A. Pointed it out to
19 Constable Walker and asked
20 her to make a copy of it.

21 Q. That's the extent of it.
22 You didn't talk to anybody
23 else about it?

24 A. No.

25 Q. Sir, you're under oath

1 and I'm suggesting you may
2 have just perjured yourself.

3 A. Sir, I didn't speak to
4 anybody else about it.

5 Q. Well, how come Glenn Cook
6 was in here not an hour ago
7 saying that you made a
8 comment to him where you said
9 "I forgot to give them my
10 notes for November the 13th"?

11 You just committed perjury,
12 I'm suggesting to you, sir.

13 A. After I had Constable
14 Walker copy them, then I
15 realized - I was upset,
16 because I had made a mistake,
17 I had forgotten to give you
18 something.

19 Q. Well, I'm getting upset
20 here, sir, because what
21 you've just done is lie to
22 the court.

23 A. I didn't.

24 Q. And I'm suggesting that
25 you're lying about

1 everything. You're lying
2 about not recalling, you're
3 lying about not knowing why
4 you went to the meeting with
5 Flanagan, you're lying about
6 not knowing what was
7 discussed. You're just a
8 thorough-going lying witness,
9 sir; that's what I'm
10 suggesting to you.

11 A. No, sir, I'm not.

12 Q. And you've just committed
13 perjury, I suggest to you.

14 A. No, sir, I'm not. I
15 didn't. I made the comment
16 after I had given it to
17 Constable Walker.

18 Q. We're way past your
19 explanation, because what you
20 just said ten seconds ago, 20
21 seconds ago was: "I didn't
22 discuss it with anybody."
23 You said Walker and that was
24 it. And I said, "Glenn
25 Cook?" and now you're saying,

1 'Well, I did discuss it with
2 Glenn Cook.' That makes your
3 answer before a false
4 statement, sir. Under oath.
5 Perjury. You don't agree
6 with that? You have to
7 answer yes or no.

8 A. No, I don't, sir."

9 Mr. McGarry then interjects:

10 "Well, with respect, Your
11 Honour, no witness has to
12 answer yes or no.

13 Mr. Murphy continues:

14 "Q.You just committed
15 perjury, sir.

16 A. No, sir, I don't agree.

17 Q. How about you start
18 telling us the truth about
19 what you remember
20 specifically about the
21 meeting that you had on
22 November 13th that was called
23 by Crown Flanagan in
24 Brockville the day before you
25 were to appear on a subpoena,

1 a defence subpoena, that
2 George Ball tipped you off
3 about on the 12th?

4 A. I spoke to George on the
5 13th, sir.

6 Q. You know all about this
7 case, Constable Kemp, it's
8 patently obvious. We've
9 heard from Constable Cook,
10 who isn't even one of the
11 main players, that everybody
12 in Kemptville talks about
13 this case, it's common
14 knowledge. The investigation
15 went on for an intensive
16 period of time in August of
17 '95, there's been little else
18 for anybody in Kemptville to
19 discuss presumably, of a
20 serious case, other than this
21 one, and your answers today,
22 sir, as they were in November
23 of last year, are completely
24 absurd, if not patently
25 untruthful, if not calculated

1 perjury.

2 MR. MCGARRY: If I may rise
3 at this point, Your Honour?
4 That's not a question. It's
5 an argument, in my
6 submission.

7 MR. MURPHY: It's a
8 suggestion.

9 MR. MCGARRY: Well, with
10 respect, Your Honour, first
11 of all, he misquoted the
12 previous witness, because the
13 previous witness didn't say
14 all of that --"

15 Justice Cosgrove then says:

16 "Mr. McGarry, please sit
17 down. You are not doing the
18 cross-examining, counsel is,
19 and that cross-examination is
20 legitimate in the court's
21 view.

22 MR. MCGARRY: Well, with
23 respect, it's not, Your
24 Honour."

25 The cross-examination goes on in

1 the same vein, with accusations of lying in court.

2 At the bottom of page 3235, the
3 question is asked:

4 "Q. Julia Elliott has been
5 sitting around waiting for
6 three years, sir. Who has
7 more right to be upset when
8 faced with this kind of a
9 behaviour from a provincial
10 police constable? Can you
11 answer that question?

12 MR. MCGARRY: Well, again,
13 I rise, Your Honour. That
14 question wasn't a question
15 intended to be answered and,
16 if I may say so, that's
17 improper also.

18 THE COURT: In my view, the
19 question is in accord with
20 the situation before the
21 court and the dynamics of the
22 responses of the witness thus
23 far.

24 MR. MURPHY: You have no
25 response?

1 A. No, sir, I don't."

2 We then move to the evidence of
3 January 11, 1999. This is a discussion after the
4 new Crowns are there.

5 It is a discussion about the
6 possibility for a bail hearing --

7 THE CHAIR: I don't see the name
8 of a speaker for many pages.

9 MR. CHERNIAK: I believe it is
10 Mr. Murphy who is making these submissions.

11 "Everything comes down to the
12 forensic evidence and yet it
13 is now tainted by the
14 machinations, Machiavellian
15 machinations, I suggest of
16 the Crown's office in
17 contacting her so late in the
18 game --"

19 And at the bottom of that page, he
20 continues:

21 " -- if it wasn't for the
22 fact that the accused was in
23 jail for nearly four years to
24 this point, the almost
25 comical conduct, the

1 circumstances of Mr.
2 Strosberg and Mr. Humphrey,
3 the uncertainty surrounding
4 which version of their
5 retainer we're supposed to
6 accept and the court is
7 supposed to accept as
8 truthful."

9 Mr. Murphy goes on in that vein
10 again, and he then says at page 7537:

11 "In my submission, if the
12 Crown is going to continue to
13 run in circles, trying to
14 figure out where it's going
15 to go and to find someone who
16 will take responsibility for
17 prosecuting this case, it
18 shouldn't be the accused who
19 has to wait in jail while
20 they decide that and
21 especially when the Crown's
22 case has literally collapsed
23 under the weight of its own
24 deceptions and deceits and
25 fabrications and corruption

1 and criminality."

2 Mr. Hoffman is responding to the
3 bail application, and after a recess the matter
4 resumes, and he gives a variety of reasons why a
5 bail application would not be appropriate at this
6 time.

7 Mr. Murphy, at page 7544, responds
8 to Mr. Hoffman's submissions:

9 "- for him to give you the
10 one side of that and say that
11 as a practical reality
12 there's no place for us to
13 put Miss Elliott, as a
14 condition of supervised bail,
15 that's quite true but
16 unfortunately in my
17 submission it's the position
18 of the defence, unfortunately
19 what that doesn't do is do
20 justice to the truth and the
21 whole picture is that unlike
22 any other situation that I
23 can imagine, and have any
24 knowledge of in the annals of
25 Canadian justice, the Crown

1 has literally pulled the rug
2 out from underneath the
3 defence by using its
4 influence, its fiscal
5 authority to in effect shut
6 down Ferguson House and then
7 has the audacity to go back
8 after the fact and try to
9 renegotiate some future and
10 indeed speculative
11 reconciliation."

12 He says at Line 22:

13 "In fact, the inference is
14 there for the court perhaps
15 to fall short of a contempt
16 finding against Mr. Hutton to
17 nevertheless see what's going
18 on."

19 You will be hearing more about Mr.
20 Hutton in due course.

21 And then Mr. Murphy goes on at
22 page 7546, Line 17:

23 "I'm just surprised that the
24 Crown has the audacity to say
25 that it somehow has nothing

1 to do with the fact that
2 Ferguson House is closed.
3 It stinks to high heaven!
4 It's unprecedented and it is
5 - I think out of respect for
6 the truth, the Crown might
7 have been better simply to
8 jump over that particular
9 point because it's an insult
10 to anybody's intelligence,
11 objective to this case,
12 objectively observing this
13 case for the Crown to suggest
14 that Ferguson House somehow
15 shut down without any - with
16 absolutely no contribution to
17 that demise by the Crown."

18 And he says at Line 29:

19 "I think on the whole, when
20 one looks back at this case,
21 when it becomes known to the
22 public what has transpired
23 with respect to this one
24 aspect of the case of R. v.
25 Julia Yvonne Elliott,

1 everything we know about this
2 case that's before the court,
3 and more particularly, the
4 irresponsible, reprehensible,
5 illegal and criminal conduct
6 of the police and Crown in
7 this case that the only
8 course that justice should
9 follow in this case is to
10 release her so that she does
11 not have to suffer further
12 prejudice as a result of an
13 ongoing conspiracy to see her
14 convicted at any cost."

15 Following that argument, the
16 Court, at page 7552, says that he will adjourn the
17 bail hearing until tomorrow for a decision, and
18 then goes -- well, in any event, bail was not
19 granted.

20 Some of the next pages on January
21 15, 1999, I believe, dealt with communications
22 between Strosberg and McGarry and Cavanagh; this is
23 at the bottom of page 7617.

24 The discussion goes on and Mr.
25 Murphy is making submissions on this issue, and at

1 the bottom of page 7620 he refers to Detective
2 Walker and Inspector Bowmaster, and he says:

3 "Further, Your Honour, from
4 Detective Constable Walker's
5 preceding notes for December
6 23rd, she indicates at page
7 41 on December 23rd, at 12
8 o'clock, approximately, noon:
9 "I spoke to Detective
10 Inspector Bowmaster and told
11 him about the three items
12 mentioned above --" which
13 were the bail hearing that
14 had been scheduled for
15 January 5th, that the jury
16 and the lawyers were to
17 return January 18th, and that
18 the start of the motion's,
19 defence's legal arguments on
20 the stay motion for February
21 1st, and she's noted them.
22 Then, she says: "I also
23 mentioned that the new
24 lawyers may want me to go to
25 Toronto to assist in the new

1 year and that I will still be
2 required, and I showed him a
3 copy of the letter of 17
4 December from Mitch Hoffman
5 to David Humphrey." And then
6 it's a week later that Mr.
7 Cavanagh - that a copy of a
8 summary of the case which he
9 prepared, according to her
10 note, for the, quote, "new
11 lawyers", unquote, was
12 provided to her. She sought
13 it from him and he provided
14 it on the 30th of December.

15 That is the same issue we talked
16 about earlier today, with respect to those notes.

17 Mr. Murphy at this point says:

18 "In my submission, that is a
19 flagrant, wilful breach by
20 Mr. Strosberg, in the same
21 vein, I suggest or submit
22 with respect as Mr. Ramsay in
23 February of this year - both
24 of whom sought a specific
25 direction from the court on a

1 specific issue: could they
2 communicate with the former
3 Crowns or the Crowns that had
4 become witnesses? In the
5 case of Ramsay, it was Mr.
6 Findlay and Mr. Flanagan. In
7 this case, Mr. Strosberg
8 wanted an exemption to be
9 able to communicate with
10 McGarry and Cavanagh, and
11 Your Honour specifically
12 forbade him to do so."

13 Mr. Murphy goes on in that vein
14 with respect to these notes on the next page, and
15 at Line 20 he states:

16 "And my point is this, Your
17 Honour: that apparently one -
18 or one may infer that Mr.
19 Strosberg knew there was such
20 a summary, that he
21 specifically requested it,
22 knowing that it had been
23 prepared for him by Mr.
24 Cavanagh and then sought the
25 direction of the court by way

1 of an exemption so that he
2 could obtain it. The court
3 gave its order, saying he
4 should not communicate with
5 Mr. McGarry or Mr. Cavanagh,
6 and he went ahead and
7 obtained it anyway."

8 At page 7627, Mr. Murphy argues
9 that:

10 "Your Honour: Mr. Strosberg,
11 in my submission, the Crown
12 has flagrantly breached an
13 order that they sought on
14 their own, perhaps conscious
15 of what they were intending
16 to do, and went ahead and did
17 it, in my submission,
18 anyway."

19 The important part of these
20 submissions, as you will see in a moment, is that
21 Mr. Strosberg wasn't there. He was not given any
22 notice that these kinds of submissions would be
23 made.

24 Mr. Murphy is making these
25 allegations against Mr. Strosberg for breaching an

1 proceeding in the future. So
2 whenever it's convenient for
3 Your Honour to hear me on
4 that point --"

5 Later on that day, on page 7662,
6 Mr. Murphy has made a submission which refers to
7 Mr. Strosberg as the treasurer of the Law Society,
8 and at Line 22 he concludes:

9 " -- what we're seeing is a
10 pathetic abdication of
11 responsibilities by the
12 agents of the Attorney
13 General of this province, not
14 by defence.

15 MR. STROSBURG: Your
16 Honour, I'm bound to rise to
17 ask for a direction from Your
18 Honour. Counsel is entitled
19 to put their submission in
20 forceful language. In my
21 respectful submission, there
22 is, what I've just heard, the
23 kind of adjectives that I've
24 heard directed at me and my
25 friend Mr. Humphrey are just

1 simply unreasonable and
2 unacceptable in a courtroom.
3 "Imelda Marcos; Bay Street
4 lawyers; amnesiac wandering
5 the streets; multiple
6 personalities; wrong, boys;"
7 that really is not helpful,
8 in my submission.
9 In my submission, this is a
10 complicated matter. Your
11 Honour has to deal with this
12 matter. I learned on Friday
13 that Mr. murphy had made an
14 allegation against me in this
15 courtroom that, without the
16 courtesy of giving me notice
17 in advance, that he intended
18 to do it without seeking an
19 explanation from me. Now,
20 there is an absolute
21 privilege counsel has when
22 they address the court.
23 Balanced with that privilege
24 is a responsibility. It's a
25 responsibility to act in a

1 way that Mr. Murphy says
2 every one should act, and I
3 believe every one should act,
4 and that's fairly.
5 Now, on Friday, without
6 speaking to me, Mr. Murphy
7 said that "in my submission,
8 that is flagrant, wilful
9 breach by Mr. Strosberg". He
10 sought no explanation from
11 me, he gave no notice to me
12 and this court permitted him
13 to make that statement and,
14 in my submission, that's
15 utterly unfair. It's utterly
16 unfair that --

17 THE COURT: Have you
18 reviewed the transcript of
19 the proceedings of Friday
20 last?

21 MR. STROSBURG: I just got
22 the transcript.

23 THE COURT: My question is,
24 have you read it?

25 MR. STROSBURG: I've just

1 read it.

2 THE COURT: You did read
3 it. And in it you will see
4 that the court, after the
5 submission was made, said
6 that the court would not deal
7 with that issue until such
8 time as you were in the court
9 and in a position to respond
10 to it.

11 MR. STROSBURG: But, Your
12 Honour, Mr. Murphy should
13 have been cut off, it should
14 not have been permitted to go
15 on beyond the first time he
16 made an allegation against.
17 Counsel have a
18 responsibility. Counsel have
19 a responsibility to --

20 THE COURT: I have no
21 responsibility to reject
22 application records alleging
23 abuse of process, including
24 yourself, before this court.

25 I have no respon - I have no

1 authority to say I won't
2 accept those, counsel.
3 MR. STROSBERG: Your Honour
4 did not - Your Honour
5 misapprehends what I say.
6 Mr. Murphy is entitled to
7 file a document saying
8 whatever it is that he wishes
9 to say. He then cannot stand
10 up and make a statement about
11 me or about anyone else -
12 he's entitled to file that
13 document, entitled to do
14 that, but not entitled to
15 make the statement. What I'm
16 suggesting to Your Honour is
17 that the type of language
18 that I've just heard from Mr.
19 Murphy, the adjectives which
20 really don't advance the
21 process, are unnecessary and
22 I'm suggesting to Your Honour
23 that Mr. Murphy is entitled
24 to file a notice of motion,
25 as he did on Friday, but he

1 was not entitled to stand up
2 and then say in open court
3 that I had been guilty of a
4 wilful, flagrant, wilful
5 breach. That was simply
6 wrong. And the fact that
7 Your Honour said at the end
8 that you won't deal with it,
9 doesn't detract from the fact
10 that it was wrong to have
11 been said, absolutely,
12 fundamentally wrong to make -
13 to have the statement made.
14 THE COURT: I don't follow
15 you, Mr. Strosberg. What is
16 the difference between
17 handing a document to the
18 court alleging that you made
19 a wilful flagrant step in
20 contravention of this court's
21 order than with Mr. Murphy
22 standing and repeating that?
23 What is the difference?
24 MR. STROSBURG: There is a
25 fundamental difference,

1 because what he does is he -
2 by filing the notice, he
3 gives Your Honour notice that
4 he intends to argue that,
5 that's what he does."

6 There was a question about whether
7 the material was or was not filed, and Justice
8 Cosgrove says at the bottom of the page:

9 "You see, there's the
10 difficulty, counsel, with
11 respect, there's the
12 difficulty with counsel not
13 being here. My distinct
14 recollection is that I was
15 not handed that document
16 until Mr. Murphy had made his
17 submissions.

18 MR. STROSBURG: But, Your
19 Honour, with respect, with
20 respect, I don't mean to be
21 quibbling with Your Honour,
22 but my - the thrust of the
23 position that I put to Your
24 Honour is simply this: that
25 Mr. Murphy is entitled and

1 has to vigorously put forward
2 every defence that he
3 possibly can on behalf of Ms.
4 Elliott. I recognize that,
5 and I accept his obligation
6 to do that. I respect that
7 obligation, I would expect
8 nothing else from him. But
9 there is a degree of fairness
10 that's required that he's
11 entitled to file his notice
12 of motion but what - when he
13 stands up and he makes a
14 statement in open court
15 without giving me an -
16 without making an inquiry
17 from me, without asking for
18 an explanation, makes it in
19 open court without notice to
20 me, that's a matter of
21 unfairness. And I'm saying
22 to Your Honour that that's
23 not the way that this trial
24 or any other trial should be
25 dealt with."

1 At page 7667, Line 7:

2 "In my submission, Your
3 Honour, what we're dealing
4 with, we have to set a time
5 line and we have to set a
6 reasonable time line. And
7 who is responsible for any
8 further delay will be a
9 matter that Your Honour will
10 sort out at the time you hear
11 the application --"

12 Mr. Humphrey, on the same day, at
13 page 7672, makes submissions:

14 "Your Honour, but there's a
15 tradition at the bar, and
16 it's an honourable tradition,
17 that counsel refer to counsel
18 opposite as "my friend", and
19 that reflects the dignity
20 that counsel are to bring to
21 the proceedings that, no
22 matter how heated the battle,
23 the adversaries are to treat
24 each other with dignity and
25 respect, and I must say very

1 sadly, Your Honour, I can't
2 think of any criminal case
3 that I've been involved in,
4 directly or indirectly, any
5 case, really, that I've even
6 heard of, where the tone has
7 degenerated to the point that
8 the tone in these proceedings
9 has reached.
10 In my respectful submission,
11 it's totally inappropriate
12 for my friend to refer to the
13 Crown as having "multiple
14 personality disorder". It's
15 totally inappropriate to
16 start injecting comments
17 about this being the "height
18 of Torontocentric lawyers",
19 "a la Bay Street lawyers",
20 and the other types of
21 comments that Mr. Strosberg
22 has adverted to. And what
23 I'm asking is that Your
24 Honour, as best as you can,
25 exercise your jurisdiction to

1 control the court's process
2 and to endeavour to require
3 of all counsel that they
4 maintain some level of mutual
5 respect and dignity and, when
6 I say that, if Your Honour
7 were to find that Mr.
8 Strosberg or I were crossing
9 the line and getting into
10 rhetorical excess that is
11 insulting and demeaning to
12 counsel opposite, I would
13 expect to be admonished and
14 reined in. That is what I'm
15 asking Your Honour to do for
16 the balance of these
17 proceedings, is simply to
18 ensure that counsel conduct
19 themselves professionally and
20 responsibly and respect the
21 level of decorum that this
22 court is entitled to demand
23 of counsel.

24 The Court then calls on Mr.
25 Murphy, who says:

1 "Well, on that note, Your
2 Honour, the theme of the day
3 being elementary fairness,
4 one has to - from my
5 perspective, at least, as the
6 object of these comments from
7 Mr. Humphrey, and before Mr.
8 Strosberg - query the
9 fairness of them being
10 directed by - directed at
11 defence counsel in a case of
12 this nature, by the treasurer
13 of the Law Society of Upper
14 Canada, formerly the head of
15 the discipline committee of
16 the Law Society of Upper
17 Canada. I referred, I
18 believe, on the 16th of
19 December, if not the 23rd, to
20 the spectre of intimidation.
21 Indeed, it's been argued in
22 the pleadings before the
23 court that were provided last
24 week, the additional grounds,
25 further and additional

1 grounds, that there is an
2 attempt, in my submission, to
3 usurp the function of the
4 court by this aforementioned
5 flourish of private counsel
6 being retained and everything
7 that's surrounded it. I
8 have a great deal of
9 difficulty, from the
10 perspective of fairness, and
11 a court looking at this
12 record as to the propriety of
13 Mr. Strosberg, the treasurer
14 of the Law Society, making
15 the submissions that he's
16 making before the trial judge
17 from the office that he
18 holds, and Mr. Humphrey
19 simply reaffirming that, and
20 I have difficulty with my
21 comments being characterized
22 as insulting and demeaning."

23 Mr. Murphy moves on to the fact
24 that there have been a lot of different Crowns on
25 the case, and he says on page 7675:

1 "I described the Crown has
2 having multiple personality
3 disorder and I stand by that,
4 I don't resile from that in
5 any way.
6 As far as being
7 Torontocentric, I don't
8 resile from that in any way.
9 I don't resile from my
10 earlier comments that I think
11 it's inappropriate that the
12 treasurer of the Law Society
13 should involve himself in the
14 manner that he has before the
15 court, which is itself the
16 subject of a further
17 complaint. And I don't think
18 that speaking of rhetorical
19 submissions that is of any
20 assistance to the court to
21 have Mr. Humphrey make what
22 are essentially self-serving
23 and rhetorical comments about
24 the "demeaning", in
25 quotations, and "insulting",

1 in quotations, comments that
2 he's imputing to me. This is
3 from the team that is led by
4 a barrister whose moniker is,
5 "Litigation is war, the weak
6 go to the wall". That is
7 Mr. Strosberg's best known
8 aphorism, if I can call it
9 that."

10 Mr. Murphy goes on with his
11 argument, and says at page 7677:

12 "I take issue with my friend,
13 Mr. Humphrey's (sic), the
14 legality of his submission,
15 at the very least, that he's
16 somehow entitled to have
17 advance notice and give him
18 an opportunity to explain
19 allegations concerning his
20 involvement and, again, I'm
21 not sure how one
22 distinguishes him standing in
23 this court today and waxing
24 indignant about it, to his
25 complaint about me having

1 apparently inappropriately,
2 according to him, even
3 referred to it beyond the
4 printed page that was
5 submitted last week, I don't
6 see how it is that he's
7 allowed to wax indignant and
8 I'm not allowed to simply
9 paraphrase before the court
10 the allegation.
11 In any event, the matter of
12 delay continues. It's very
13 effective for the Crown to
14 throw this back on the
15 defence, as I have said, and
16 I don't back down from my
17 comments. I am simply
18 putting it on the record. I
19 would be dishonest to this
20 court and I would be
21 misleading this court if I
22 didn't say I find it very
23 intimidating and questionable
24 that the Law Society
25 treasurer would make these

1 comments.

2 THE COURT: Well, that's
3 the third time, or maybe
4 fourth - I have made note of
5 it.

6 MR. MURPHY: To me, it's an
7 attempt to basically implore
8 the court to view my
9 behaviour as substandard, as
10 unprofessional, and one is
11 supposed to, as one cannot
12 avoid in the case of an
13 experienced barrister like
14 Mr. Strosberg, one can't
15 avoid the inference that
16 somehow his opinion should
17 carry greater weight, and
18 it's for that reason that I
19 objected on one - inter alia,
20 one reason why I felt that it
21 wasn't appropriate for him to
22 be presenting himself to the
23 court as he did on the 23rd
24 of December, as some sort of
25 an independent, impartial

1 observer. Thank you.

2 THE COURT: I will deal

3 with the issue of the

4 demeanour and presentation by

5 counsel to the court, to get

6 - and then return to the

7 schedule, which is where I

8 thought we would focus this

9 morning.

10 I have had this discussion

11 two or three times in these

12 proceedings, and I have

13 indicated to counsel that,

14 for the court, ad hominem

15 arguments go over my head;

16 they waste the court's time

17 and they are a little bit

18 boring.

19 Counsel's presentation style,

20 demeanour, etcetera, in front

21 of the jury is something

22 else, but the ad hominem

23 argument before me, with my

24 experience as a lawyer and my

25 life experience at this

1 point, just add something
2 that are a waste of time.
3 With my 15 years on the
4 bench, I think I have
5 developed the ability to
6 recognize that those are ad
7 hominem arguments. They may
8 be strategically motivated by
9 counsel, but they don't have
10 much to do with the decisions
11 that I am called upon to make
12 in these proceedings, nor
13 have they.

14 I have, as well, in previous
15 discussions, encouraged
16 counsel to go back and look
17 at the canons and the
18 principles of the profession,
19 because I do agree with Mr.
20 Strosberg that - and this is
21 a point echoed by Mr.
22 Humphrey - that the
23 professionalism of our
24 profession, the legal
25 profession is underpinned

1 with the ability of counsel
2 to deal civilly, rationally,
3 we hope, civilly with one
4 another, in the interest of
5 the respective clients. Mr.
6 Strosberg and Mr. Humphrey
7 may, in their discovery now
8 of some of the transcripts
9 which they have found, see
10 that I am repeating myself."

11 Justice Cosgrove goes on, on the

12 next page:

13 "He makes the observation
14 that, quite frankly, that
15 without civility and without
16 the professionalism which is
17 the hallmark of the legal
18 profession, the system is not
19 manageable. And when I read
20 that, it sort of struck a
21 cord close to my challenges
22 in presiding as the judge in
23 this trial. My wish would be
24 that counsel would go back
25 and look at those

1 introductory comments by late
2 Justice Martin, because, as I
3 have said before, counsel's
4 responsibilities to their
5 respective clients can only
6 be enhanced by an adherence
7 to the codes of conduct of
8 the profession and finally,
9 from my point of view,
10 echoing what late Justice
11 Martin said, the system
12 itself, the whole process
13 flounders and suffers, which
14 is my concern as a presiding
15 judge. All of that being
16 said, I want to get back to
17 the issue of scheduling."

18 I think there is a point in the
19 evidence where Mr. Murphy did apologize for some of
20 the things he said, and if this is a good time for
21 a break, I may be able to find that.

22 THE CHAIR: All right.

23 --- Recess at 2:47 p.m.

24 --- Upon resuming at 3:04 p.m.

25 THE CHAIR: Mr. Cherniak?

1 MR. CHERNIAK: Yes, thank you. I
2 was able to find the statement by Mr. Murphy that I
3 referred to before the break.

4 This is at page 7688 of the
5 transcript, just after a recess, and Mr. Murphy
6 says:

7 "Your Honour, I just was
8 going to make one quick
9 comment, and I asked Mr.
10 Cavanagh if he wouldn't mind
11 waiting just for a second.
12 One of the great things about
13 breaks, Your Honour, is it
14 gives an opportunity to
15 review and reconsider.
16 I don't, I have already said
17 that I don't resile from the
18 comments and the content of
19 what I said in response, and
20 in my submissions concerning
21 this morning, but I have to
22 make a career in these courts
23 and I don't want it left on
24 the record that I would say
25 things which were intemperate

1 and ill-advised in the heat
2 of battle. I don't want that
3 left on the record, I think
4 it's professional. I accept
5 everything Your Honour has
6 said, not just on this
7 occasion but on previous
8 occasions, so I withdraw, to
9 the extent that anyone can
10 put the toothpaste back in
11 the tube, comments of the
12 nature of, for example,
13 "wrong, ol' boys" and other
14 flights of over-enthusiasm
15 that I indulged in.
16 I'm frustrated by the delay,
17 but I don't think it does my
18 client any service - who is
19 equally frustrated, whose
20 frustration I empathize with
21 - to indulge myself to that
22 extent, and I offer an
23 apology to the court and to
24 Mr. Humphrey - and
25 unfortunately Mr. Strosberg

1 has already left.

2 THE COURT: Thank you. Mr.
3 Humphrey.

4 MR. HUMPHREY: My friend
5 probably appreciates it's not
6 necessary, but the apology is
7 very much accepted and
8 appreciated and hopefully we
9 can all proceed in the spirit
10 which Your Honour discussed
11 in your comments earlier."

12 I would now like to turn to
13 particular 3(A). This particular, as you will see,
14 deals not so much with what Justice Cosgrove said,
15 but what he did not say.

16 This is Wednesday, February 25,
17 1998, in the early stages of the stay motion.

18 The court refers, at the bottom of
19 page 6705, to the verbal notice that was received
20 and there were some issues about procedure.

21 And then, on page 6706, Mr. Murphy
22 says:

23 "Your Honour, I have a
24 preliminary concern which I
25 am only raising now because I

1 wasn't able to -- at least
2 take some steps prior to
3 coming in this morning to
4 address -- hopefully, I
5 thought -- I thought it might
6 be possible to avoid having
7 to raise them here.
8 The first issue, Your Honour,
9 is one that was raised last
10 week on the occasion of Mr.
11 Stewart showing up and
12 presenting himself as
13 independent counsel. The
14 issue is this, Your Honour:
15 Counsel attempted to speak to
16 Mr. Ramsay this morning,
17 expressly requesting to do so
18 in the absence of Mr.
19 Findlay, and we were rather
20 curtly told that we could
21 address our comments to Your
22 Honour and that if we felt it
23 appropriate, we could write
24 Mr. Ramsay a letter. So,
25 things aren't off to a great

1 start, in my respectful
2 submission.
3 The purpose of our
4 communicating out of court
5 with Mr. Ramsay and wishing
6 to do so alone was to canvass
7 his potential involvement or
8 potential conflict with
9 respect to this case. Your
10 Honour will be aware that
11 last week we raised a concern
12 that the Attorney General's
13 Ministry as a whole is in a
14 conflict where issues of
15 criminality by the police are
16 raised, even if only at the
17 level of an allegation, as
18 Mr. Stewart was so fond of
19 emphasizing."

20 Mr. Murphy makes the submission
21 that the question is:
22 " -- whether Mr. Ramsay is
23 one of the Crowns who was
24 involved in providing search
25 warrant advice to the

1 investigators whether Mr.
2 Ramsay is one of the Crowns
3 in the Law Office in Toronto
4 who was involved, for
5 example, in providing search
6 warrant advice to the
7 investigators or, indeed, was
8 responsible or involved in
9 any consultation with respect
10 to the D.N.A. warrants."

11 At Line 17:

12 " -- as I said last week,
13 Your Honour, it's of great
14 concern, given that there's
15 an apparent continuing
16 criminal conspiracy
17 potentially going on, that
18 the representative of Her
19 Majesty this morning may well
20 be in a conflict, and that
21 leaves aside the entire issue
22 of Mr. Findlay."

23 Mr. Murphy goes on to read some
24 prior changes in the evidence, and he continues on
25 page 6709, at Line 19:

1 "The implication of the
2 evidence to this point and
3 the evidence that we will be
4 calling further, before we
5 get to the issue of in what
6 form, -- the whole issue of a
7 continuing criminal involve-
8 ment by senior O.P.P.
9 investigators in an attempt
10 to suborn perjury, in an
11 attempt to mislead the Court,
12 and the issue that's raised
13 on the motion as to Mr.
14 Flanagan's possible
15 involvement in that as a
16 Crown, in my submission,
17 makes the issue of conflict,
18 as far as the Ministry of the
19 Attorney General is
20 concerned, alive and well in
21 this courtroom. Not least
22 where Mr. Ramsay rather
23 impolitely refuses to talk to
24 Counsel in the absence of Mr.
25 Findlay.

1 In my submission, Mr.
2 Findlay's continuing presence
3 is of great concern. He is
4 the eyes and ears of Mr.
5 Flanagan, every bit as much
6 as, if not more than Mr.
7 Stewart was. The Court has
8 already wasted a week as a
9 result of Mr. Stewart
10 attending here, with full
11 knowledge of his prior
12 involvement, and attempting
13 to pass himself off as
14 independent.
15 And now my concern is, even -
16 - even if Your Honour finds
17 that Mr. Ramsay, subject to
18 what-ever representations
19 he's going to make on his
20 knowledge of this case or
21 involvement with other
22 members of the Crown's
23 office; -- even if Your
24 Honour finds there is no
25 conflict, it's of great

1 concern with respect to the
2 appearance of these
3 proceedings and the
4 appearance of objectivity
5 that Mr. Findlay, who even
6 now is handing notes over to
7 Mr. Ramsay, should be allowed
8 to continue. That, in my
9 submission, totally goes
10 against the issue of
11 independent counsel."

12 Mr. Murphy goes on in that vein,
13 and at the bottom of page 6711 he says:

14 "And Mr. Ramsay is a Crown
15 Attorney; he's in a conflict,
16 in my submission. He's
17 trying to justify or is here
18 specifically and expressly
19 for the purposes of doing
20 damage control. He has no
21 independence, given that even
22 as I'm making my submissions,
23 Mr. Findlay continues to
24 provide him with advice. He
25 won't meet with Counsel for

1 the defence independently,
2 with a -- in the face
3 of a reasonable request. We
4 were simply brushed off, Your
5 Honour, and it increases my
6 concern that this is, in
7 effect, damage control at a
8 higher level. I have
9 concerns as to why an
10 Attorney General's Counsel
11 could blithely appear without
12 even the courtesy of a
13 discussion with Defence
14 Counsel on this application;
15 not least where the
16 continuing conduct of police
17 investigators and the issue
18 concerning Mr. Flanagan are
19 very alive and before the
20 Court.
21 In my submission, there may
22 be well -- in addition to the
23 criminal involvement we've
24 already heard on the
25 evidence, there may also be a

1 continuing attempt by the
2 Attorney General's Department
3 to play damage control at a
4 higher level, and in my
5 submission, there is no
6 independence where Mr.
7 Findlay is, in effect, the
8 eyes and ears of Mr.
9 Flanagan. I'm not talking
10 about a briefing, I'm talking
11 about the fact that as we
12 speak he's sitting at counsel
13 table, he is an employee of
14 Mr. Flanagan's, he is junior
15 to Mr. Flanagan; he is
16 inextricably connected to
17 this case. Mr. Ramsay is
18 obviously experienced enough
19 to know that that's an issue,
20 where he's come down from
21 Toronto, and especially, I
22 assume, where he knows that
23 one counsel already has un-
24 successfully tried to appear
25 as "independent counsel".

1 My concern is this. In
2 addition to all the other
3 misconduct that we've heard
4 on the evidence by police
5 and, by implication, leaving
6 the inference of the Crown's
7 knowledge and involvement
8 (Mr. Flanagan's), we now have
9 apparently more accessories
10 after the fact here.
11 Including Crown Counsel from
12 Toronto. And they are
13 accessory after the fact
14 because they are enabling
15 another suspect in this
16 matter, -- potentially, and
17 in our submission, the theory
18 of the defence is that it is
19 the person who committed this
20 homicide, -- by this conduct
21 and this continuing pattern
22 of cover-up, which Your
23 Honour will know has gone on
24 from the earliest dates in
25 the investigation in August

1 of '95 -- by this continuing
2 pattern, the Attorney General
3 is in up to its neck with
4 respect to trying to cover
5 the impropriety up, and
6 further, may indeed be
7 accessories after the fact to
8 enabling the person who did
9 this crime to escape. And
10 that applies as well to the
11 police investigators. In my
12 submission, that's a very
13 live issue. I think there is
14 case law quite clearly that
15 says that members of the same
16 law firm -- and I have an
17 authority and I can obtain it
18 for Your Honour; I obtained
19 it from quick law last night
20 and I didn't have the
21 opportunity to print it.
22 There is a case which clearly
23 states that members of the
24 same law firm cannot appear
25 as counsel on a criminal

1 trial. And that, in my
2 submission, -- this is the
3 biggest law firm going."

4 I take it he is referring to the
5 Department of Justice there.

6 "It may be the only one in
7 the province that doesn't
8 have -- that hasn't filed for
9 bankruptcy in the face of the
10 economic cutbacks that have
11 occurred in the criminal
12 justice system. And for Mr.
13 Ramsay to seek to avoid, and
14 to do it, in my submission,
15 in a discourteous fashion,
16 confirms our concerns, at the
17 very least, as to his role
18 and as to whether he's
19 entering into this as
20 independent counsel in truly
21 good faith or whether he's
22 simply here to play clean-up,
23 to do damage control, -- in
24 effect, to continue on the
25 pattern of misconduct and --

1 and impropriety that's been
2 the hallmark of this case, in
3 my submission. So, the first
4 issue is whether he is
5 independent, and the second
6 issue is the presence,
7 continuing presence of Mr.
8 Findlay.

9 THE COURT: Mr. Ramsay?

10 MR. RAMSAY: Thank you, Your
11 Honour.

12 THE COURT: Mr. Ramsay, you
13 would not, in the transcript
14 of the last day's
15 proceedings, be aware that
16 the Court, -- on the occasion
17 of previous counsel, Mr.
18 Stewart, before the Court --
19 I thought clearly, directed
20 that any person now coming to
21 the Court to represent Mr.
22 Flanagan should have had no
23 previous dealings with this
24 case.

25 MR. RAMSAY: I would fit

1 that.

2 THE COURT: That was the
3 stipulation.

4 MR. RAMSAY: I would meet
5 that criteria.

6 THE COURT: Now, I must
7 admit, having gone through
8 the process once, that I
9 assumed that your presence
10 today would fit that
11 category.

12 I understand that you're
13 saying as an officer of the
14 court that you've had no
15 previous dealings with this
16 matter --

17 MR. RAMSAY: I am.

18 THE COURT: -- with this
19 trial. Yes. There's the
20 second issue of the point
21 raised, which is the role of
22 Mr. Findlay."

23 And at the bottom of the page:

24 "MR. RAMSAY: Your Honour,
25 the role which I am proposing

1 at this point, which is
2 actually going on at this
3 point subject to any other
4 ruling, is, as far as this
5 motion is concerned, I am
6 lead counsel for the Crown
7 and he is junior counsel for
8 the Crown, and I propose to
9 use him to assist him and, of
10 course, the very significant
11 fact is that he's been at
12 this trial and I have not,
13 and any of the items to be
14 dealt with on the motion have
15 a factual context which
16 relates to matters which were
17 heard before the jury, on
18 pre-trial motions and so on,
19 and that's the role that I
20 propose. In my submission,
21 there is no reason why he
22 shouldn't take that role. He
23 wasn't at this meeting at
24 which someone apparently
25 said, "Well, let's re-

1 interview Mr. McGovern".
2 Now, of course, that's --
3 THE COURT: And other things.
4 MR. RAMSAY: Other things,
5 none of which amount -- well,
6 I'm not going to argue the
7 merits of the motion, but
8 yeah, there were other
9 things; the essential one
10 being someone said, "Let's
11 re-interview McGovern".
12 Anyway, Mr. Findlay wasn't
13 there, there is no question
14 of him being called as a
15 witness, and in my
16 submission, it's really
17 inconceivable that he
18 wouldn't be allowed to
19 continue on as Crown counsel
20 in this case for the purpose
21 of this motion.
22 Now, the -- And he's not an
23 employee of Mr. Flanagan.
24 He's an employee of the
25 Crown, as is Mr. Flanagan and

1 as am I. And, of course,
2 that's all that's available
3 to appear for the Crown. I
4 haven't had previous
5 involvement in this case. I
6 understand from reading the
7 record that one Counsel, one
8 of my colleagues in the
9 office, was involved in
10 giving advice on a search
11 warrant; I was not involved
12 in that and I have not
13 conferred with her about
14 that. So, in my submission
15 on the -- Well, on the two
16 questions, I -- I do have
17 something else I'd like to
18 say to Your Honour, but on
19 the two questions you've
20 asked me, those are the
21 answers.

22 First is, I have not had
23 previous involvement in the
24 case; and second, in my
25 submission there is no reason

1 why Mr. Findlay shouldn't act
2 as Crown Counsel on this
3 motion to assist me. And in
4 fact, I would say that -- if
5 you will forgive me some
6 rhetoric or -- I mean, really
7 -- I mean, I might as well be
8 trying to do it with one hand
9 tied behind my back. I mean,
10 I really shouldn't be in that
11 position, particularly when
12 there is no reason. There is
13 no reason. There is no
14 reason why the presence of
15 Mr. Findlay should be called
16 into question.

17 If you will permit me, Your
18 Honour, I should say that I
19 mean no personal affront to
20 my learned friend or hurt to
21 his feelings, but this is not
22 a case in which I would be
23 well advised, and, indeed, it
24 is not a case in which I am
25 prepared to have private,

1 unwitnessed, off the record
2 discussions. I mean, you've
3 already heard that this
4 potential conflict I am
5 supposed to have has been put
6 in terms of me being an
7 accessory after the fact to
8 an indictable offence, which
9 is a unique experience for me
10 in 17 years, and this is
11 obviously not the sort of
12 case, given what has gone on,
13 in which I can be put in that
14 position. I will certainly
15 make every attempt, in proper
16 circumstances and with proper
17 safeguards, to communicate
18 with my friend, as lawyers
19 have to do throughout the
20 trial, and I will certainly -
21 - I will certainly do that
22 in a helpful and cordial
23 manner, but I can't be put in
24 the position of being in
25 private meetings that are not

1 recorded and in which I'm
2 there by myself.
3 Now, I will also say this. I
4 want to assist the Court to
5 carry on with the business
6 before it, so I will just say
7 this once. My learned
8 friend's submissions with
9 respect to my conflict, with
10 respect to accessory after
11 the fact, all that stuff, are
12 an outrage, they are a
13 personal affront, they are --
14 more importantly, they are an
15 affront to my office, they
16 are an affront to this Court.
17 Now, having said that, I
18 know they are going to come
19 up again; I'm just going to
20 ignore them, but I just want
21 to be on the record that my
22 silence should be taken
23 really just as a question of
24 getting on with the job and
25 not as a -- and not getting

1 sidetracked, and not as any
2 kind of acquiescence or lack
3 of objection."

4 Mr. Ramsay then goes on to other
5 things, and at page 6720, Mr. Murphy is invited to
6 make submissions, and he says at Line 20:

7 "Thank you, Your Honour.
8 Justice Twaddle in
9 Deslauriers, the now referred
10 to quotation Your Honour
11 referred to with respect to
12 his commentary in Deslauriers
13 that counsel should obtain
14 outside counsel to avoid
15 being put in the position of
16 justifying or judging the
17 actions of, in effect,
18 himself and counsel on whose
19 behalf he appears. I can't
20 think of a clearer example
21 going on of that than what
22 Mr. Ramsay has just engaged
23 in. He purports to be
24 independent counsel and he
25 rises to say, quite

1 expectedly, given the
2 circumstances and the nature
3 of the submissions I had made
4 and the motion itself which
5 he now seeks to quash or at
6 least to -- to truncate down
7 to insignificance; -- he's
8 described them as an outrage
9 and a personal affront.
10 A "personal affront"! So,
11 Your Honour, if that doesn't
12 meet the description of
13 someone who is in a conflict
14 of interest, seeking not
15 only, as Justice Twaddle
16 says, to justify the Crown's
17 conduct and actions and
18 judgment that's being
19 impugned, but also to make
20 accusations against Defence
21 Counsel for raising it.
22 That's exactly what Mr.
23 Ramsay has just finished
24 doing. And if that isn't
25 enough, if that isn't clear

1 enough, Your Honour, as I
2 said before, this is clearly
3 a high level attempt by the
4 Ministry of the Attorney
5 General at damage control.
6 He's asking you, in effect,
7 to ignore every other
8 paragraph of the proceedings,
9 of the -- excuse me, of the
10 motion, the notice of
11 application, except --
12 THE COURT: Well, he hasn't
13 made argument; he's certainly
14 -- simply just notified the
15 Court that he intends to move
16 that motion, and I don't want
17 to go into that at this
18 time."

19 At the bottom of the page, Mr.

20 Murphy goes on:

21 " -- in my submission, that
22 is damage control in the most
23 extreme and blatant form, and
24 for him to overlook the
25 evidence -- he refers to

1 Constable Laderoute's missing
2 notes as a trifling matter by
3 implication, by inference.
4 He has overlooked completely
5 the fact that Constable
6 Laderoute has admitted under
7 oath that he was instructed
8 by a senior O.P.P. officer to
9 make up a note! And that
10 that same investigator who is
11 in charge of the
12 investigation was in charge
13 when Constable Laderoute
14 appeared on June 27th of '96
15 and gave perjured evidence
16 about that.

17 THE COURT: Well, that's part
18 -- Presumably, that will be
19 part of the motion, and I've
20 got other things to deal with
21 from a procedural point of
22 view first.

23 MR. MURPHY: Yes. On the
24 issue of conflict, Your
25 Honour, there couldn't be a

1 better example of somebody
2 who is in a complete
3 conflict, because the stakes
4 are now higher. The
5 Provincial Ministry of the
6 Attorney General should go
7 out and find somebody who
8 isn't playing damage control
9 for the Ministry and for the
10 O.P.P., and who isn't crying
11 outrage and personal affront
12 and attempting to imply to
13 the Court that a person of
14 his considerable experience,
15 and Your Honour will know
16 he's appeared in the Court of
17 Appeal on numerous occasions,
18 -- he is attempting, in my
19 submission, to do the very
20 thing that Justice Twaddle
21 warns against and that
22 Justice Twaddle says in
23 Deslauriers is the premise,
24 the rationale for having
25 truly independent counsel.

1 And in my submission, it's
2 transparent on its face, and
3 the idea that we're now going
4 to proceed to discuss a
5 truncated -- he's in effect
6 now saying "this is what the
7 Defence's Charter application
8 should be -- should be
9 restricted to", and he also
10 calls this an affront to the
11 Court.
12 I think it's an affront, in
13 my respectful submission, --
14 the defence considers this
15 whole case and the whole
16 investigation and the conduct
17 of all concerned in the
18 prosecution of this matter to
19 be an affront to the citizens
20 of Canada and to the citizens
21 of Ontario, and for an Agent,
22 a counsel of the Ministry --
23 who is rolling his eyes now
24 as I speak, Your Honour; he
25 obviously considers this to

1 be some sort of a grand-
2 standing submission. This is
3 the first time, I would
4 submit, that we have got a
5 Morin type of investigation
6 which has been uncovered
7 while it's in progress!!
8 This is a miscarriage of
9 justice, which has been
10 exposed in progress!!
11 And for this Attorney
12 General's counsel to come
13 down here and say he's
14 personally affronted by it:
15 for one thing, Your Honour,
16 with respect, that is totally
17 beside the point, --
18 MR. RAMSAY: No, I'm sorry,
19 Your Honour, -- I'm
20 personally affronted by being
21 accused of being a criminal!
22 MR. MURPHY: If I could just
23 continue, please. I think
24 what I suggested was that
25 people who are involved in

1 assisting a person who
2 murdered somebody to escape,
3 and that's the charge --
4 Maybe Mr. Ramsay is not
5 familiar with the history of
6 the case. That's what Ms.
7 Elliott was originally
8 charged with. The person
9 that the police named as the
10 principal, as the person who
11 murdered Lawrence Robert
12 Foster, was Jean Yves Momy!
13 And they charged her with
14 enabling him to escape.
15 My comment is this, and I
16 stand by it! If police
17 officers, by inaction, by
18 negligence, by misconduct,
19 and if it's found to be that
20 on the evidence, with the
21 knowledge or wilful
22 blindness, or participation
23 of the Crown Attorney
24 responsible for their
25 conduct, is allowed to

1 escape, allows Mr. Momy to
2 escape justice, -- that fits
3 the definition of being an
4 accessory after the fact!
5 And I agree, this is perhaps
6 a unique experience for Mr.
7 Ramsay -- I have to admit, in
8 my lesser experience, it's a
9 unique experience for me."

10 On the next page, Mr. Murphy

11 continues:

12 "We have uncovered, in my
13 submission, the evidence at
14 least points seriously in the
15 direction of what Your Honour
16 referred to well back in the
17 pre-trial proceedings as a
18 Son of Morin or a Morin Two
19 scenario.

20 We have police investigators,
21 by their own admission, going
22 back and re-interviewing
23 witnesses in order to get
24 "better times". We've got
25 evidence disappearing, being

1 lost. We've got police
2 officers lying --
3 THE COURT: Well, I will hear
4 that. I will hear that,
5 presumably, if I get to the
6 motion. I think you should--
7 MR. MURPHY: I think my point
8 is, Your Honour, --
9 THE COURT: Yes, what is your
10 point?
11 MR. MURPHY: The point is
12 this. Mr. Ramsay can wax
13 indignant if he wishes.
14 That's not the issue! I'd
15 like to deal with this
16 matter, because it's
17 sufficiently serious that in
18 my submission it should be
19 outside and beyond the scope
20 of somebody coming down and
21 -- and essentially whining on
22 the record that what -- "Oh,
23 is this ever an outrageous
24 and -- and terrible affront
25 both to me personally and to

1 administration of justice"! I consider this whole case
2 and the whole investigation to be an affront to the
3 rights of the accused and to the administration of
4 justice!
5 THE COURT: You are repeating
6 yourself now. I understand your point.
7
8 MR. MURPHY: Thank you.
9
10 THE COURT: In dealing with this matter, the Court, in
11 response to the initial preliminary comments of
12 Defence Counsel, has earlier stated that the Court, under
13 the circumstances, wished that the representative for
14 Mr. Flanagan be counsel from the Ministry who had no
15 previous involvement with this case. I am satisfied by
16 Mr. Ramsay's information to the Court this morning that

1 he hasn't.
2 The comments with respect to
3 the role of the Ministry and
4 the appearance of conflict in
5 the connection of the
6 observations of Justice
7 Twaddle continue to give me
8 some pause for thought, but I
9 have already made my
10 decision. On the facts in
11 this case and under these
12 circumstances in this case,
13 I've said that Counsel, with
14 the qualifications that Mr.
15 Ramsay has, is entitled to
16 continue to respond to the
17 motion.
18 In terms of Mr. Findlay's
19 continued involvement, the
20 objection to his involvement
21 was first raised today. I
22 would think that in view of
23 his involvement to this point
24 and in view of the fact, for
25 example, that he appeared on

1 the last occasion before this
2 Court, that it would be
3 anticipated that he would
4 continue as an assisting
5 counsel. No allegations have
6 been made with respect to Mr.
7 Findlay's connection to the
8 complaints with respect to
9 Mr. Flanagan, and for those
10 reasons, the Court has no
11 objection to Mr. Findlay
12 continuing as an assisting
13 counsel on this motion."

14 That brings us to particular 3(D),
15 again this particular is a matter not of what
16 Justice Cosgrove did, but what he did not do.

17 We now go to April 14, 1998. Both
18 Mr. Cavanagh and Mr. Findlay are gone, and Mr.
19 McGarry is now on the matter.

20 On page 71, Mr. McGarry says:
21 "Your Honour, my position is
22 that if we can deal with some
23 of these procedural matters,
24 we may never get to the point
25 where that has to be argued

1 and, therefore, we avoid the
2 necessity of delay occasioned
3 by retaining independent
4 counsel. If Your Honour
5 rules in a certain manner as
6 to how the procedure should
7 be in this case, then I will
8 have to - my next step will
9 be to seek independent
10 counsel; I'm obliged to do
11 that. But I'm trying to
12 avoid that in the interest of
13 saving time, by demonstrating
14 to the court why this motion
15 should not proceed in a
16 manner that requires
17 independent counsel to argue
18 the motion of whether we
19 should testify or not."

20 Mr. McGarry had recently been
21 notified that Mr. Murphy wants him to testify.

22 Mr. Murphy then says at Line 20:

23 "Well, Your Honour, first of
24 all, I don't know if the
25 Crown is making an admission

1 that there was in fact a
2 meeting on the 31st of March,
3 involving Mr. Flanagan,
4 himself, Ms. McNally, Mr.
5 Cavanagh, Detective Constable
6 Ball, Constable Mahoney, and
7 that that took place here in
8 the courthouse on the 31st
9 of March, if not the 30th."

10 Mr. Murphy goes on in that vein on
11 the next page, and at Line 10 he says:

12 "If that's an admission of
13 fact, in my submission, we're
14 dealing with a situation,
15 once again, where the Crown
16 is engaged in what are, in my
17 submission, improper
18 involvement with witnesses,
19 of which Mr. Flanagan,
20 himself, was a witness on the
21 voir dire, and will, in all
22 likelihood, be a witness on
23 the trial, as will Mr.
24 Findlay, and in the face of
25 orders which my friend is

1 obviously not cognizant of,
2 that Your Honour made with
3 respect to Mr. Ramsay. And
4 we all know already of the
5 problem Mr. Ramsay had in
6 complying with Your Honour's
7 order not to communicate with
8 Mr. Flanagan, or Mr. Findlay,
9 in an identical situation.
10 So, in my submission, if
11 that's an admission of fact,
12 that that meeting occurred,
13 then, in my submission, Mr.
14 McGarry, Ms. McNally and Mr.
15 Cavanagh, and the other
16 officers present, including
17 Mr. Flanagan, are all
18 compellable on that point.
19 And it seems to me, Your
20 Honour, that this is somewhat
21 of deja vu for the court.
22 Mr. McGarry is now in the
23 identical situation as Mr.
24 Stewart was, when he
25 purported to appear to speak

1 as independent counsel and
2 attempted, as it were, to cut
3 to the chase, by arguing -
4 making argument in advance of
5 the issue that Your Honour
6 has properly identified, and
7 that is, whether, in fact, he
8 was independent."

9 He continues on the next page:

10 "In my submission, we have an
11 identical situation and my
12 friend is trying to do what
13 Mr. Stewart tried
14 unsuccessfully to do, and
15 that is to argue law, or
16 argue, in this case,
17 procedural law to avoid the
18 issue which is indeed his
19 meeting with the other two
20 so-called members of the so-
21 called new team, with Mr.
22 Flanagan, which in my
23 submission, puts us right
24 back in the same abuse of
25 process situation that Mr.

1 Flanagan properly removed
2 himself as counsel for, and
3 subsequently Mr. Findlay."

4 Mr. Murphy goes on to talk about
5 the March 31 meeting, and Justice Cosgrove says on
6 page 77:

7 "Well, there are - there
8 certainly are parallels and
9 the court does - it's fresh -
10 the proceedings involving the
11 role of independent counsel
12 are not that long ago,
13 they're fresh in my mind, but
14 the parallels break down in
15 some areas."

16 And Justice Cosgrove goes on about
17 that, and says on page 75:

18 "The role of Mr. McGarry and
19 Mr. Cavanagh and Miss
20 McNally, as I'm advised by
21 their notice of application,
22 which I dealt with last week,
23 is that they are now defence
24 (sic) counsel. They are not
25 here as independent counsel,

1 prosecution team, assigned on
2 March 27th, is Mr. McGarry,
3 Mr. Cavanagh and Miss
4 McNally. So that, until you
5 served notice of your
6 application this morning, the
7 court, in effect, was
8 continuing with the trial.
9 Now, admittedly, that has
10 changed, because the court is
11 now dealing with a renewed
12 notice of application. But
13 anything that has transpired
14 up until the time that that
15 is served, presumably, is in
16 the context of trial
17 preparation - my question:
18 Is it not?
19 MR. MURPHY: It's not proper
20 - it may be, Your Honour,
21 that may be the recurrent
22 characterization or gloss
23 that the Crown puts on all of
24 its attempts to fit the
25 evidence of witnesses to meet

1 its theory --"

2 And he continues at the bottom of
3 that page:

4 "It is inappropriate, in my
5 submission, given the fact
6 that Mr. Flanagan withdrew
7 himself, to avoid the
8 pitfalls that were identified
9 by Justice Twaddle in
10 Deslauriers --"

11 At the top of page 77, Mr. Murphy
12 at Line 3 says:

13 "And, in my submission, this
14 meeting is further evidence
15 of the incestuous
16 relationship that has
17 developed in this case, to
18 the point where, Your Honour
19 will remember, where Mr.
20 Ramsay, who invited
21 instructions from Your
22 Honour, requested it with
23 respect to whether he should
24 even communicate with Mr.
25 Findlay and Mr. Flanagan for

1 the purposes of preparation
2 on the voir dire, on the
3 abuse of process voir dire,
4 was instructed by Your Honour
5 not to, and he went ahead and
6 did it anyway."

7 He refers to some more comments of
8 Mr. Ramsay, and says at the bottom of the page:

9 "It's completely and
10 disgustingly incestuous. And
11 the notion of independent
12 counsel is not, in my
13 submission, extinguished
14 merely because that voir dire
15 may or may not be over."

16 The Court says in the middle of
17 page 78:

18 "We will get to procedure
19 later."

20 And Mr. Murphy says:

21 "But, Your Honour, I think
22 it's highly suspicious,
23 highly inappropriate, first
24 of all, that Mr. Flanagan is
25 involved to the extent that

1 he is still, having been
2 implicated, having been
3 called as a witness --"

4 And the Court says, at the top of
5 page 79:

6 "Well, let's get back to the
7 intention signalled in the
8 notice of motion to call the
9 three new Crown counsel."

10 He talks about the fact that they
11 don't have to be subpoenaed, and he says to Mr.

12 Murphy at Line 14:

13 "I would be interested in
14 preliminary comments or any
15 observations you have to make
16 on those issues, as regards
17 to the new counsel, Crown
18 counsel team, in the context
19 of relevance or necessary
20 evidence, in the context of
21 your renewed application."

22 Mr. Murphy then asks for some
23 witnesses to be excused, and Mr. McGarry says:

24 "I take no exception to that
25 particularly, Your Honour,

1 but I might note that my
2 friend has got one of these -
3 it's an amazing, expanding
4 application. In his notice -
5 -
6 THE COURT: I will overlook
7 that comment, because of your
8 newness to the case, Mr.
9 McGarry. It has no weight
10 and will, in retrospect, you
11 will discover, if you
12 continue with this case, have
13 no merit, your last argument.
14 MR. MCGARRY: Very well,
15 Your Honour, but she's not
16 mentioned in here at all.
17 THE COURT: Yes. Please sit
18 down. Go ahead, Mr. Murphy."
19 Mr. Murphy continues, and on page
20 81:
21 "Your Honour, it's difficult
22 - first of all, I'm wondering
23 if the Crown is making an
24 admission with respect to the
25 fact that that meeting

1 occurred?

2 MR. MCGARRY: I'm making no
3 admissions, Your Honour, at
4 this point.

5 MR. MURPHY: I can advise
6 Your Honour that Mr. Flanagan
7 was in the courthouse, met
8 with - at least visibly, with
9 Mr. Cavanagh, with Mr.
10 McGarry - and it's really
11 shameful, in my submission,
12 they won't even make this
13 admission - he met with him
14 at lunch time."

15 Mr. Murphy launches into a lengthy
16 matter about the new statement from Violet Pender,
17 and he reads from the statement -- which I will not
18 take the panel through.

19 He then makes a submission on page
20 86 about abuse of process, and comments on the
21 relevance of that fact.

22 At page 87, Mr. Murphy says:

23 "Now, April 6th, seven days
24 after the March 31st meeting
25 at which Mr. Flanagan

1 appears, we have two
2 statements produced which
3 magically account for, not
4 one of the three theories
5 that were floated by the
6 Crown, because, as Your
7 Honour quite correctly notes
8 in the ruling of March 16th,
9 Mr. Flanagan contradicted the
10 statements of Constables Ball
11 and Churchill with respect to
12 the accused having worn the
13 shirt. He said that wasn't
14 part of the Crown theory.
15 Indeed, that's why Your
16 Honour presumably ordered
17 them to clarify that as part
18 of the remedy to the
19 applicant for the various 17
20 breaches of her Charter
21 rights. Now, the Crown
22 produces, through the mouth
23 of Violet Pender and her son,
24 the magical panacea to
25 correct this major

1 deficiency, and it happens
2 seven days after Mr. Flanagan
3 is having lunch, if not
4 meeting prior to that, or
5 following that, with the
6 three new Crowns.
7 It stinks, Your Honour, to
8 high heaven. This will
9 probably be the fourth time
10 I've said that on the record.
11 There's no other way to
12 describe it. There's no more
13 dignified way to put it. It
14 smells and, for that reason,
15 the March 31st meeting is
16 relevant, in and of itself.
17 Mr. Flanagan's presence there
18 is of serious concern to the
19 accused on this motion, on
20 the continuation of this
21 motion for renewal of this
22 application for a stay, and
23 Mr. McGarry's discussions,
24 and indeed those of his co-
25 counsel, Ms. McNally and Mr.

1 Cavanagh, are equally
2 relevant --"

3 And Mr. Murphy goes on about the
4 shirt is Mr. Momy's, and he says at the bottom of
5 the page:

6 " -- the accused wore the
7 shirt, three times, now Mr.
8 Flanagan is borne out by
9 these new statements. The
10 case is changing and it's
11 grossly unfair, and it smells
12 to high heaven, and it's an
13 abuse of process in and of
14 itself. What else will the
15 Crown stoop to, to make this
16 case work? My friend stands
17 there with a straight face
18 and says he's acting in the
19 interest of the accused, and
20 he said, on three separate
21 occasions, Your Honour,
22 today, that my motivation for
23 bringing - renewing this
24 application is to avoid a
25 trial. We had a trial. We

1 shot holes a mile wide in the
2 Crown's case, through its
3 first six witnesses. We
4 never got our turn. The
5 Crown is taking this
6 purported remedy and using it
7 as an opportunity to reinvent
8 its case --"

9 The Court then asks:

10 "Well, you're getting into
11 the substance of the issue
12 now. I want to get back to
13 the issue of relevance and
14 necessity; anything more on
15 that?"

16 Mr. Murphy goes on about contact
17 with Mr. Flanagan with respect to certain
18 witnesses, and on page 90 at Line 22 he says:

19 "Mr. Ramsay has beat a hasty
20 retreat back to Toronto and
21 we're left with this highly
22 incestuous prosecution. The
23 relationship with the police
24 investigators, the meeting
25 with Mr. Flanagan, it's all

1 part and parcel of the
2 continuing abuse of process,
3 the continuing violation of
4 Miss Elliott's constitutional
5 rights, and points, Your
6 Honour, to the inadequacy of
7 the remedies, because the
8 remedies, Your Honour, in my
9 respectful submission, have
10 been frustrated by this type
11 of conduct, and the Crown, if
12 not the police, are laughing
13 at this remedy, because it
14 does do nothing to prevent to
15 remove the abuse. It
16 simply gives them a chance to
17 go back and reinvent the
18 wheel, and that's exactly
19 what they're doing, and
20 that's the stench of these
21 statements, the circumstances
22 about which we know nothing,
23 other than what Mr. McGarry
24 has told us this morning.
25 Detective Inspector

1 MacCharles is the person that
2 Ms. Pender is referred to
3 speak to the --
4 MR. MCGARRY: With respect,
5 I never said that, Your
6 Honour.
7 MR. MURPHY: Mr. McGarry
8 said that --
9 MR. MCGARRY: I did not.
10 MR. MURPHY: -- Mr. Ramsay
11 did not speak to Ms. Pender,
12 that he referred her to
13 Detective Inspector
14 MacCharles.
15 MR. MCGARRY: I did not say
16 that, Your Honour. I said
17 that Mr. - that Mr. Ramsay
18 did not speak to Mrs. Pender,
19 that he communicated with
20 Detective Inspector
21 MacCharles and asked him to
22 assign an independent
23 investigator who had nothing
24 to do with the case - in this
25 case Detective Constable

1 Alarie - who spoke with Mrs.
2 Pender. And I would thank
3 my friend not to misquote me.
4 He's already insulted my
5 ethics twice, with no
6 foundation. I would thank
7 him if - if I can't stop him
8 from doing that, at least I
9 can stop him from misquoting
10 me.

11 MR. MURPHY: Perhaps, Your
12 Honour, there is no better
13 argument for why Mr. McGarry
14 should be giving evidence
15 under oath in the witness
16 stand than what we've just
17 seen from him standing and
18 giving evidence now. If
19 that doesn't show his
20 relevance and the necessity
21 of his evidence on this abuse
22 of process motion, nothing
23 does.

24 MR. MCGARRY: I was just
25 qualifying what I said this

1 morning, so that there is no
2 misunderstanding. I offered
3 that this morning to assist
4 the court, and I think, as an
5 officer of the court, I'm
6 entitled to do that. My
7 friend misquoted me this
8 afternoon. I never suggested
9 that Detective Inspector
10 MacCharles talk to Mrs.
11 Pender.

12 THE COURT: Reply?

13 MR. MCGARRY: Your Honour,
14 with regard to this whole
15 matter, as the question of
16 compellability, if Your
17 Honour finds that there is an
18 issue as to our
19 compellability, then we will
20 have to seek time, obviously,
21 to obtain counsel. I think
22 we're required morally and
23 ethically to do that. With
24 regard to your preliminary
25 issue, Your Honour, first of

1 all, my friend has raised the
2 issue of the propriety of the
3 meeting without any evidence
4 that there was any
5 impropriety in the meeting.
6 The fact is, Your Honour,
7 that as Crown counsel, I am
8 quite entitled to meet with
9 witnesses prior to a trial,
10 in fact, I would be negligent
11 not meeting with witnesses
12 prior to a trial.

13 THE COURT: Are you saying you
14 did meet?

15 MR. MCGARRY: I'm not
16 denying that I met with Mr.
17 Flanagan. I refused to admit
18 it earlier, because I don't
19 see why I should make my
20 friend's job easier for him
21 when he's smearing me in this
22 court. But I certainly do
23 not deny that Mr. Flanagan
24 attended my office on the
25 31st of March, 1998. As to

1 the contents of that meeting
2 --
3 THE COURT: And was that in
4 the presence of your co-
5 counsel?
6 MR. MCGARRY: It certainly
7 was in the presence of Miss
8 McNally - were you present?
9 And Mr. Cavanagh was present
10 for part of it. However,
11 Your Honour, the point is
12 that I'm quite entitled - are
13 we to suggest - I mean, my
14 friend would seem to take the
15 position that the Crown is
16 not entitled to meet with
17 anyone prior to the
18 commencement of a case.
19 Well, how can that be?
20 Now, if there were some
21 evidence that something
22 arising out of that meeting
23 was improper, then perhaps
24 there would be a basis, but
25 there is no evidence. There

1 is simply the fact of a
2 meeting that took place
3 between Mr. Flanagan and I.

4 I think that everybody in
5 this court, and I think that
6 the public at large would be
7 very surprised, not to say
8 shocked, if on one counsel
9 being removed from a case, to
10 hand it over to another
11 counsel, there wasn't a
12 meeting.

13 I think everybody would - how
14 can anybody expect that that
15 not take place. And to
16 suggest, simply because there
17 was a meeting, with no
18 evidentiary basis, that
19 somehow that is improper, in
20 my submission, is simply
21 inappropriate."

22 Mr. McGarry then states:

23 "Secondly, with regard to the
24 question of necessity, my
25 friend can call Mr. Flanagan.

1 It's premature to say it's
2 necessary to call me. He can
3 call Mr. Flanagan on his
4 motion. It may be that,
5 arising out of Mr. Flanagan's
6 evidence with regard to that
7 meeting, it may become
8 necessary to call me at that
9 point, or it may become
10 necessary for the Crown to
11 call me at that point, and
12 then we can deal with the
13 issue. But the reality is,
14 it's not necessary now,
15 because he can call Mr.
16 Flanagan.

17 All my friend is doing, Your
18 Honour, and I can assure you,
19 as sure, you know, it's
20 springtime outside, that if
21 this happens, then the next
22 counsel, the same thing will
23 happen, because he will have
24 to meet with me, or with Mr.
25 Flanagan, for that matter,

1 prior to preparing the trial,
2 and we will end up -
3 eventually, Your Honour, we
4 will arrive to the point -
5 there's 652, I think it is
6 now, assistant Crown
7 attorneys in the province of
8 Ontario, and if we keep going
9 this way, we will end up at a
10 point where none of them can
11 prosecute the case."

12 Mr. McGarry submits on page 95
13 with respect to necessity that there are other
14 witnesses who can be called.

15 Justice Cosgrove makes his ruling,
16 and states on page 95:

17 "On the issue of whether Mr.
18 McGarry and Mr. Cavanagh, and
19 Miss McNally, should be
20 represented by independent
21 counsel, I do not, at this
22 time, on the basis of the
23 information before the court,
24 believe that a groundwork has
25 been laid that they should

1 not continue as counsel in
2 the case. I also feel that
3 there is not, at this time,
4 evidence that would warrant
5 the court calling for
6 independent counsel, or
7 requesting counsel to retain
8 independent counsel on the
9 issue of their potential
10 presence as witnesses on this
11 renewed application for a
12 stay.

13 I qualify that by saying that
14 I view their role, at this
15 point, somewhat akin to the
16 role that Mr. Findlay played.

17 And the development with
18 respect to Mr. Findlay was,
19 after hearing evidence on the
20 voir dire, the court came to
21 the conclusion that it
22 required the evidence of Mr.
23 Findlay, in the context of
24 evidence that was before the
25 court, and that remains a

1 potential to the court and a
2 possibility, but no more than
3 a potential and possibility.

4 So I am prepared to continue
5 with the argument on the
6 procedure."

7 Moving now to August 18, 1998,
8 Sergeant Bowmaster was in the box, but he was
9 excused.

10 Mr. Murphy talks about disclosure,
11 and in the middle of page 1581, Mr. Murphy says:

12 "First of all - the question
13 I was going to ask him, which
14 is germane, and which I am
15 getting sidetracked from,
16 because of these startling
17 revelations, would have been:
18 Why doesn't - why was the
19 fact of his taking over the
20 job not disclosed to defence
21 counsel until yesterday in
22 the process of Mr. McGarry's
23 representations?"

24 Mr. Murphy goes on in that vein,
25 and at page 1582, Line 22, he says:

1 "I'd like to reserve the
2 right, as it were, subject to
3 Your Honour's comments, to
4 pursue this with this
5 officer, because, to be fair
6 to the defence, it's just
7 coming out now. And it also
8 underscores, in my
9 submission, the fact that the
10 Crown is engaged in damage
11 control. And the evidence
12 we've just heard from
13 Detective Inspector Bowmaster
14 is that that's precisely
15 what's going on, as we speak,
16 at this very moment."

17 Mr. McGarry responds on page 1583:
18 " I know of no obligation on
19 the Crown to disclose to
20 anyone the appointment of an
21 officer until that officer
22 has evidence to offer or
23 something to provide to the
24 court. With regard to the
25 re-interviewing of witnesses,

1 in my submission, it's
2 perfectly proper for me, in
3 my discretion as Crown
4 counsel, to ask that
5 witnesses be interviewed or
6 re-interviewed. That, as has
7 emerged now, is going on.
8 But, in my submission, it is
9 not a requirement, nor is it
10 appropriate, nor is it proper
11 that I be required to notify
12 anyone in advance that that's
13 what I intend to do. What I
14 am required to disclose is
15 the results of the
16 investigation, and rest
17 assured, when Detective
18 Sergeant Bahm returns from
19 his interview - with his
20 interview and his notes, that
21 will be disclosed, as is
22 appropriate. But I don't
23 think that I am required to
24 say to Mr. Murphy in advance,
25 'I am going to be

1 interviewing the following
2 witnesses.' Of course, I am
3 not."

4 Mr. Murphy is called upon and
5 makes submissions about the letter he got from Mr.
6 McGarry, which reads:

7 "I am not in a position to
8 tell you which witnesses I
9 will call during the first
10 two weeks of the trial. I
11 can tell you that I
12 anticipate calling the
13 following witnesses --"

14 The letter concludes:

15 "We will, however, as soon as
16 we have definitely decided
17 that a witness will in those
18 circumstances be called,
19 advise you of that fact."

20 And he adds: Now, that reads
21 like something Lewis Carroll
22 might have written in an
23 inspired moment."

24 Mr. Murphy says at the top of page
25 1586:

1 "And the difficulty we have
2 with this duplicitous type of
3 non-committal response on who
4 the Crown is going to call is
5 underscored, in my
6 submission, by the fact that
7 the Crown is now engaged,
8 through this officer, in two
9 key functions, which, in my
10 submission, are designed to
11 do nothing other than salvage
12 the case and to ensure
13 conviction at any cost, and
14 that is, to reassign new
15 officers to go out and re-
16 interview old witnesses."

17 And further down:

18 "It will be quite,
19 unsurprisingly, a whole new
20 case. It will be a case in
21 which I strongly suspect that
22 none of the problem areas -
23 of which this current witness
24 is well aware, despite his
25 evasive, inconsistent answers

1 - it will be a case, unlike
2 the previous case, and it
3 will be a case meant to pave
4 over and gloss over and
5 conceal from the jury the
6 known facts of the
7 investigation."

8 Mr. Murphy goes on in that vein,
9 and at Line 10 of the next page he says:

10 "And now, I'm astounded to
11 hear that he is in the
12 process of doing the very
13 thing that I am seeking to
14 cross-examine him on, and
15 that is, the damage control
16 aspect of his
17 responsibilities. So I'm not
18 sure how the defence is
19 supposed to have - how
20 there's going to be a fair
21 trial, when this kind of
22 subterfuge continues and the
23 abuse of process continues
24 unabated, and this kind of
25 nefarious conduct continues.

1 personnel are put into place,
2 that they send out their
3 minions to do further,
4 quote/unquote, "re-
5 interviews", and I think it's
6 disgusting that the Crown
7 would now attempt to play
8 fast and loose and say,
9 "Well, we don't really have
10 to tell defence counsel that
11 we're re-interviewing Sharon
12 Law." Why - the more
13 pertinent question, Your
14 Honour, is: Why isn't Sharon
15 Law under arrest? Why isn't
16 Ron Laderoute under arrest?
17 Why is he walking around
18 Kemptville in an OPP uniform?
19 Why is Detective Inspector
20 MacCharles having
21 interference run for him by
22 this Detective Inspector
23 Boatright - or Bowmaster?
24 Why are we being subjected to
25 this continuing disgusting

1 prosecution, based on
2 illegality and criminal
3 conduct by the police? We
4 don't even know what the case
5 is going to be at this point.
6 Ron Laderoute is going to
7 show up, if he shows up, in
8 an OPP uniform, with no
9 action having been taken
10 against him. And this
11 officer here is suddenly
12 caught up in the fact that he
13 does know something about
14 this case and he's telling
15 Your Honour this morning that
16 he doesn't, and then he's
17 complaining that I've tried
18 to discredit him. The only -
19 one of the only obvious
20 inference, given everything
21 else we've heard in evidence,
22 Your Honour - and you've
23 heard this evidence and it
24 may be the most troublesome
25 case that any of us have ever

1 heard or will be likely to
2 hear - this officer, the
3 strongest and most obvious
4 inference is, beyond a
5 reasonable doubt, is that
6 he's a liar. As MacCharles
7 is a liar, as George Ball is
8 a liar. The lies just keep
9 coming. The Clintonesque
10 dismissal, diminution of this
11 - of MacCharles' statement to
12 say that it discloses a
13 discretion - an indiscretion.
14 Now, he's admitted under
15 cross-examination, Detective
16 Inspector Bowmaster, as
17 MacCharles' successor, that,
18 yes, he agrees that it's
19 criminal and that it's
20 reprehensible and that it is
21 an understatement to say that
22 it's an indiscretion. But
23 that, unfortunately, hasn't
24 impeded the Attorney General
25 of this province from

1 harnessing every available
2 officer, apparently for the
3 purpose of securing a
4 conviction in front of a jury
5 of Julia Elliott."

6 He continues, and at the bottom of
7 page 1889 he says, "We were snowed." And Mr.
8 Murphy goes back to what happened in Brockville,
9 and to James Stewart showing up, and concludes at
10 Line 22:

11 "There's only one reason why,
12 Your Honour, in my
13 submission, why they didn't
14 do that. Because damage
15 control started right then
16 and there on these two cases.
17 THE COURT: I'm going to
18 interject at this time, Mr.
19 Murphy. I am not dealing
20 with issues of damage control
21 in the examination of this
22 witness. I did not deal with
23 that in my questions of him
24 and I am not dealing with the
25 issues of disclosure. I am

1 not dealing with the issue of
2 fair trial."

3 Mr. Macintosh has the pages for
4 you that continue on from here, so they can be
5 inserted in your books.

6 The Court continues on the next
7 page:

8 "I called the officer to
9 assist the court on a very
10 narrow issue of the procedure
11 and status of the ongoing
12 investigation referred to in
13 Mr. McGarry's letter of
14 August 14th. All of these
15 other issues may be germane
16 to an expansion of the stay
17 motion or in some other
18 context, but they're not
19 before me now, and the
20 questions and your cross-
21 examination of the officer
22 were, where I last
23 interjected, were getting
24 into areas of substance,
25 getting into areas of damage

1 control, getting into areas
2 of disclosure. Those aren't
3 the issues that I signalled
4 to counsel that the officer
5 was being called for, and my
6 questions were restricted to
7 those areas and I want
8 counsel to, at this time,
9 restrict cross-examination to
10 the procedure of the ongoing
11 investigation. The other
12 matters are for another
13 time."

14 Mr. Murphy, at the bottom of the
15 page, wants to make a motion for non-disclosure,
16 and he says:

17 " My concern is this: I don't
18 want this witness leaving the
19 courtroom charged, as I'm
20 suggesting he is, with
21 covering the tracks and with
22 obstructing justice further.
23 I am concerned that he's
24 going to go out, and what he
25 is being cross-examined about

1 here, until we have the
2 opportunity to do it, he may
3 find himself in a position of
4 a conflict, where he will be
5 trying, in anticipation of
6 the questions I've already
7 asked him, he may get to, as
8 it were, all of the people
9 who he has named. So I'm
10 wondering either if I could
11 continue just to go through
12 the list and go back to the
13 strict issues, just so we can
14 have some indication of who
15 the officers are, because I'm
16 very concerned, given that
17 he's saying that things are
18 going on outside court as we
19 speak today in Ottawa. I'm
20 very concerned that we know
21 and that he also be
22 admonished not to speak to
23 anybody, because of the
24 ongoing voir dire that will
25 arise with respect to the

1 non-disclosure motion.
2 THE COURT: If you are
3 serving notice on the court
4 that you intend to make a
5 motion for non-disclosure,
6 you will have to do it in
7 accordance with the rules and
8 the court will receive that
9 motion in writing."

10 Finally, at page 1593:

11 "My ruling is that I am
12 asking counsel to restrict
13 his cross-examination to
14 areas dealing with the nature
15 and schedule of the ongoing
16 investigation, which is
17 referred to in Mr. McGarry's
18 letter."

19 I will turn now to particular
20 3(C), which is the --

21 THE CHAIR: Mr. Cherniak, we are
22 now past four o'clock, and I am wondering if you --

23 MR. CHERNIAK: I am sorry, I lost
24 my head. I saw four o'clock, and somehow my mind
25 said four-thirty.

1 THE CHAIR: We will continue
2 tomorrow, thank you.
3 --- Whereupon the hearing was adjourned
4 at 4:07 p.m., to be resumed on Tuesday,
5 September 9, 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