IN THE MATTER OF:

Canadian Judicial Council
Inquiry of Justice Paul Cosgrove

RESPONDING MOTION RECORD OF INDEPENDENT COUNSEL (Regarding the Constitutionality of s.63(1) of the *Judges Act*)

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TABLE OF CONTENTS OF

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	TAB NO.
Request for Inquiry from the Honourable Michael Bryant, Attorney General of Ontario, dated April 22, 2004, with Appendix	1
Decision of the Court of Appeal in *Regina v. Elliott*, Docket No. C32813, released December 4, 2003	2

Attorney General
Minister Responsible for Native Affairs
Minister Responsible for Democratic Renewal

The Hon. Michael Bryant

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ministre délégué aux Affaires autochtones
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L'hon. Michael Bryant

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Our Reference #: M04-00798

APR 22 2004

The Right Honourable Beverly McLachlin, P.C., C.J.C.
Chairperson
Canadian Judicial Council
15-150 Metcalfe Street
Ottawa, ON
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Dear Chief Justice McLachlin:

Pursuant to subsection 63(1) of the *Judges Act*, R.S.C. 1985, c. J-1, as the Attorney General for the Province of Ontario, I am requesting that an inquiry be commenced into the conduct of Justice Paul Cosgrove of the Superior Court of Ontario during the trial held at Brockville and Ottawa in *Regina v. Julia Yvonne Elliott*. More particularly, I am requesting that an inquiry be commenced to determine whether Justice Cosgrove should be removed from office for any of the reasons set out in paragraphs 65(2)(b) to (d) of the *Act*.

As you are aware, the test applied by the Canadian Judicial Council as articulated in the Inquiry Committee of the Canadian Judicial Council in the *Marshall* case is as follows:

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

It is my respectful opinion that the conduct of Justice Cosgrove throughout the lengthy proceedings in *Regina v. Elliott* has undermined public confidence in the administration of justice in Ontario and has rendered Justice Cosgrove incapable of executing his judicial office. Accordingly, it is my opinion that Justice Cosgrove has become incapacitated or disabled from the due execution of the office of judge, within the meaning of subsection 65(2) of the *Act*.

.../2

The history of the proceedings giving rise to this request is summarized in the attached Appendix to this letter.

In brief, this trial of a murder charge, the most serious criminal matter society must contend with, was submerged into procedural, pre-trial mendacity that culminated in an unwarranted stay. The proceedings tarnished the administration of justice, and turned into an exercise of vilifying the state built on irrelevant, inappropriate and harmful findings. The proceedings trivialized the *Charter*, and deprived society and the victim's family of any semblance of justice.

Regrettably, the *Elliott* matter is not the first time the Court of Appeal for Ontario has been critical of the manner in which Justice Cosgrove has handled judicial proceedings. In *Perry v. Ontario* (1997), 33 O.R. (3d) 705, the Court of Appeal concluded that Justice Cosgrove had reduced the proceedings to a "procedural nightmare" for the Crown. In *Lovelace v. Ontario* (1997), 33 O.R. (3d) 735, the Court of Appeal concluded that Justice Cosgrove's comments, findings, and rulings had given rise to the appearance that he had not approached the proceedings with an "open mind" and that he had manifested a "suspicious attitude toward the government that caused him to misapprehend some of the evidence before him".

His Honour, in what the Ontario Court of Appeal described as " typical of the trial judge's approach in general," found in excess of 150 *Charter* breaches. Such a finding, an indictment in itself, was based on the following "common elements," according to the Court of Appeal:

1. *There was no factual basis for the findings.*
2. *The trial judge misapprehended the evidence.*
3. *The trial judge made a bare finding of a Charter breach without explaining the legal basis for the finding.*
4. *In any event, there was no legal basis for the finding.*
5. *The trial judge misunderstood the reach of the Charter.*
6. *The trial judge proceeded in a manner that was unfair to the person whose conduct was impugned.*

(*Regina v. Elliott*, Unreported decision of the Court of Appeal for Ontario, September 7, 1999, at paragraph 123 and 124)

In reviewing the trial judge's conduct, which was not supported on appeal, the Court of Appeal concluded, in part:

> *"At times the proceedings completely lost their focus as the trial judge permitted defence counsel to delve into areas that had no possible impact on the Respondent's right to a fair trial. On occasion, the proceedings seemed to resemble nothing so much a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial."*

(*Supra*, at paragraph 164)

.../3

The Court of Appeal concluded that the findings of the Charter breaches were not supported by the evidence; that the judge committed numerous errors; and that findings of misconduct against state actors were unwarranted and unsubstantiated. The formidable contempt power was misused in a coercive manner. Accordingly, integrity of countless persons was unfairly and distressingly sullied. The proceedings were not conducted in a fashion that promoted respect for, or conformity with, the rule of law.

The unsatisfactory way in which these proceedings were conducted and the consequent harm that flowed to the repute of the administration of justice is set out in the attached Appendix and described in detail in the Appellant's Factum filed by the Crown in the Court of Appeal on this matter. In these most unfortunate of circumstances, it is my view that the conduct of Justice Cosgrove during the course of this trial was such that nothing short of an inquiry by the Judicial Council can restore public confidence in the due administration of justice in connection with this matter.

Enclosed please find Justice Cosgrove's Reasons for Judgment in *Regina v. Julia Elliott*, the Notice of Appeal filed by the Crown, and the Court of Appeal's Reasons for Judgment allowing the appeal and ordering a new trial. Under separate cover, I will forward the facta filed with the Court of Appeal in *Regina v. Elliott* by the Crown appellant and by the accused respondent. The Crown's Appellant's Factum describes the lengthy procedural history of this case and provides a comprehensive account of the conduct of the trial judge underlying this request.

Should the Judicial Council need any additional information concerning this matter, please do not hesitate to contact:

Mr. Paul Lindsay
Director
Crown Law Office – Criminal
Ministry of the Attorney General
720 Bay Street
10th Floor
Toronto, Ontario
M5G 2K1

In particular, Mr. Lindsay would be pleased to provide the following:

a) Any additional submissions regarding Justice Cosgrove's conduct of the proceedings or the history of the case;

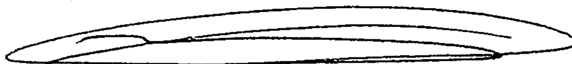
b) A copy of the transcript of proceedings before Justice Cosgrove (approximately 130 volumes, 32,500 pages);

c) A copy of the Appeal Book, which contains all documentary exhibits and other materials filed in the proceedings (32 volumes, approximately 9,500 pages);

d) Contact information for any parties involved in the proceedings, including members of the victim's family and those others whose conduct was unfairly impugned by Justice Cosgrove; and

e) Any additional information that the Council might require.

Yours truly,



Michael Bryant
Attorney General
Minister Responsible for Native Affairs
Minister Responsible for Democratic Renewal

Enclosure

APPENDIX
History of Proceedings

The Trial – 1995-1999

In August, 1995, Julia Yvonne Elliott ("the accused") was charged with second degree murder and interfering with a dead body in connection with the killing and dismemberment of an elderly resident of Kemptville, Ontario. Following a preliminary inquiry and orders to stand trial on both counts, pre-trial applications commenced before Justice Cosgrove in the Superior Court of Ontario in Brockville, Ontario, in September, 1997. Over the next two years, Justice Cosgrove permitted defence counsel, in the context of various applications brought pursuant to the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), to advance all manner of serious allegations of deliberate wrongdoing against the many Crown counsel and police officers who took part in the investigation and prosecution of the case. At the conclusion of one interim application, Justice Cosgrove ordered that the case be traversed to Ottawa.

The Stay of Proceedings

On September 7, 1999, Justice Cosgrove stayed the proceedings as an abuse of process and ordered the Crown to pay the accused's legal costs from the outset of the proceedings. In addition, Justice Cosgrove concluded that the alleged misconduct of the Crown and the police delayed the accused's trial and thereby violated her s. 11(b) *Charter* right to a trial within a reasonable time.

In his Reasons for Judgment, Justice Cosgrove found that eleven Crown Counsel and senior members of the Ministry of the Attorney General and at least fifteen named police officers from three different police forces, in addition to unnamed OPP and RCMP officers, federal Immigration officers, and officials from the Ministry of the Solicitor General of Ontario and the Centre for Forensic Sciences had committed over 150 violations of the accused's *Charter* rights. Many of the violations involved the alleged fabrication of evidence, perjury, deliberate destruction and non-disclosure of evidence, witness tampering, making false or misleading submissions to the court, and various other forms of wilful and grave misconduct. These findings were, in essence, tantamount to a conclusion that there had been a conspiracy of unprecedented magnitude among many of the investigators and prosecutors to intentionally obstruct the course of justice.

The Crown Appeal

1) The position of the Crown on appeal

By Notice of Appeal dated September 7, 1999, the Crown appealed against the stay of proceedings and the order for costs to the Court of Appeal for Ontario. On the appeal, the Crown advanced the position that Justice Cosgrove's many very serious and troubling findings against the police officers and Crown counsel were totally unsupported by the record and demonstrated a fundamental misunderstanding of the law. Moreover, the Crown submitted the following:

a) that Justice Cosgrove conducted himself in a manner that patently demonstrated an actual bias against the Crown or, at the very least, gave rise to a reasonable apprehension of bias;

b) that Justice Cosgrove repeatedly denied the Crown fundamental procedural fairness and grossly breached the rules of natural justice;

c) that the public interest in having these very serious charges tried on the merits was entirely abandoned as Justice Cosgrove conducted a wholly inappropriate wide-ranging judicial inquiry, probing into the largely irrelevant and immaterial conduct of Crown counsel, the police, the correctional authorities, immigration officials, independent RCMP investigators and others;

d) that the proceedings became a "procedural nightmare" for the Crown as a result of Justice Cosgrove's entirely unwarranted and unprecedented orders that saw Crown counsel variously disqualified, compelled to testify, and prohibited from communicating with their predecessors and their superiors; and

e) that throughout the proceedings, Justice Cosgrove made various rulings, comments, and findings which manifested an adversarial stance towards the Crown entirely antithetical to the role of an independent judicial arbiter.

2) Defence counsel's concession on appeal

In response to the position advanced by the Crown, counsel for the accused on the appeal (who was not trial counsel) **did not seek to support any of Justice Cosgrove's findings of police and Crown misconduct**. Nor did the accused's appellate counsel seek to uphold the stay of proceedings based on an abuse of process. The accused's appellate counsel made the following concession:

> *...[T]he appellate Crowns have alleged in their Appellant's Factum that virtually all of...[defence counsel's] motions were without arguable merit and that no judge could reasonabl[y] have found that any of the alleged Charter breaches actually occurred. At the request of the court at the most recent case conference,* ***the Respondent's appellate counsel has reconsidered each of the 150 alleged Charter breaches and cannot envision arguments to make in support [of] the judge's findings with respect to these alleged Charter breaches.*** [Emphasis added.]

Instead, the defence on appeal advanced the position, *inter alia*, that Justice Cosgrove was incompetent and that he had utterly failed to properly manage the trial by allowing defence counsel at trial to advance patently unmeritorious allegations against the police and the Crown, thereby unjustifiably prolonging the proceedings and violating the accused's section 11(b) *Charter* right to be tried within a reasonable time. The defence thereby sought to uphold the stay of proceedings on an entirely different basis than that upon which it had been imposed.

The Decision of the Court of Appeal for Ontario

1) Overview

The appeal was argued during the week of September 15, 2003, before a panel of the Court of Appeal for Ontario composed of Justice Marc Rosenberg, Justice Michael Moldaver, and Justice Janet Simmons. Following the hearing, the Court of Appeal reserved its decision. On December 4, 2003, the Court of Appeal allowed the appeal, set aside the order of Justice Cosgrove staying the proceedings, set aside the costs order, and ordered a new trial.

The sixty-day period within which the respondent could have filed an application for leave to appeal to the Supreme Court of Canada expired on February 2, 2004. The Crown has not been served with any application for leave to appeal, and, accordingly, it would appear that the Court of Appeal's order in this matter is now final.

In light of the accused's concession (which the Court of Appeal accepted) that Justice Cosgrove's various findings against the police and the Crown could not be sustained, the Court of Appeal was not, strictly speaking, required to address those findings in its Judgment. Similarly, the Court of Appeal was not required to address the Crown's position that Justice Cosgrove had demonstrated an actual bias against the Crown, had breached the rules of natural justice, and had allowed the proceedings to devolve into a "procedural nightmare". Nevertheless, the Court of Appeal addressed, in pointed language, some of the rulings and findings made by Justice Cosgrove, in part because the Court of Appeal, "[thought] it necessary to record [its] concern with some of the facts found by the trial judge". [¶¶111-112]

2) The Court of Appeal's conclusions respecting alleged Charter Violations

The Court of Appeal variously described Justice Cosgrove's many rulings against the Crown and his findings of *Charter* breaches as: "unwarranted" [¶113]; "unfounded" [¶113]; "ill advised" [¶122]; "unfair to the person whose conduct was impugned" [¶123]; "completely without foundation" [¶125]; "peculiar" [¶133]; "erroneous" [¶136]; "troubling" [¶138]; "factually incorrect" [¶150]; and, "not borne out by the evidence" [¶160]. In addition, the Court of Appeal reached the following findings relating to Justice Cosgrove's conduct throughout the proceedings:

a) There was no basis for permitting defence counsel to call various Crown counsel as witnesses on the *Charter* applications, as the evidence sought from counsel was immaterial and "totally irrelevant". Referring to one incident, the Court of Appeal concluded, "there was no version of this issue that on any realistic view could ever support an abuse of process or a stay of proceedings". [¶¶113-118]

b) Justice Cosgrove hampered Crown counsel in their conduct of the case by making "ill advised" and "unwarranted" non-communication orders that effectively prevented successor counsel from preparing for the prosecution of the motions and the trial proper. The Court of Appeal noted that these orders seemed to have been made because of Justice Cosgrove's "unfounded" suspicion that "the former

Crown counsel would somehow taint the new counsel or would fabricate evidence". [¶¶113, 122]

c) Justice Cosgrove's many findings of *Charter* breaches typically shared the following common elements:

> 1. *There was no factual basis for the findings.*
> 2. *The trial judge misapprehended the evidence.*
> 3. *The trial judge made a bare finding of a Charter breach without explaining the legal basis for the finding.*
> 4. *In any event, there was no legal basis for the finding.*
> 5. *The trial judge misunderstood the reach of the Charter.*
> 6. *The trial judge proceeded in a manner that was unfair to the person whose conduct was impugned.*
>
> [¶¶123-124]

d) Justice Cosgrove's finding that the Assistant Deputy Attorney General for Ontario had instructed Crown counsel to make various submissions to the court that were inconsistent, deliberately false, untrue, and calculated to mislead the court was "without foundation". In particular, the Court of Appeal concluded:

> *It is a serious matter to find that a counsel has given instructions to mislead the court. The trial judge made this finding against the Assistant Deputy Attorney General in the absence of hearing from him and in the absence of any evidence that he had anything to do with the instructions to Crown counsel. This finding was completely without foundation and gives the appearance of a failure by the trial judge to conduct the proceedings impartiality [sic] and fairly.*
>
> *The finding by the trial judge that Crown counsel made false or misleading submissions or representations calculated to mislead the court is not supported by the record.* [¶¶125-126] [Emphasis added.]

e) The administration of justice was brought into disrepute by virtue of the fact that Justice Cosgrove used the *Charter* to remedy "baseless and frivolous claims". [¶129]

f) Justice Cosgrove displayed a "misunderstanding of the role of the Attorney General" by reaching the "peculiar" finding that the Crown's decision to retain counsel from the private bar breached the *Charter* .[¶¶132-136]

g) Justice Cosgrove's "troubling" finding that senior police officers, Crown counsel, and the Assistant Deputy Attorney General had deliberately misled the court

about an "immaterial matter" was not supported by the record. In particular, the Court of Appeal concluded:

> *One of the many troubling findings by the trial judge was that senior police officers, Crown counsel, and the Assistant Deputy Attorney General deliberately misled the court about events surrounding the August 20, 1998 meeting and decision to refer the Detective Inspector MacCharles investigation to the R.C.M.P. He further found that this deliberate deception violated the respondent's Charter rights.* ***Like the other findings made against Crown counsel and the police these were not supported by the record. However, we deal with this issue in particular because it demonstrates a fundamental misapplication of the Charter.***
>
> . . .
>
> ***For the trial judge to build this immaterial matter into Charter violations and find without any reasonable basis that the court had been deliberately misled is troubling.*** *There is no version of the events surrounding the August 20 meeting that could lead to a violation of the respondent's Charter rights sufficient to merit any remedial action.* [¶¶138-141] [Emphasis added.]

h) The evidence supported none of Justice Cosgrove's numerous findings that police officers had committed perjury or given false or misleading evidence. [¶145]

i) The proceedings "completely lost their focus" as Justice Cosgrove permitted defence counsel to delve into areas that had "no possible impact on the respondent's right to a fair trial." In particular, the Court of Appeal concluded:

> *The trial judge made several findings of Charter violations based on conduct by immigration authorities or contact between the Crown and immigration authorities. The evidence did not support the various findings and so the impugned conduct could not have been the basis for a stay of proceedings. However,* ***we mention this matter because it was symptomatic of a more serious problem with this trial. On occasion, the proceeding seemed to resemble nothing so much as a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial."*** [¶164] [Emphasis added]

j) Justice Cosgrove failed in his duty to put a halt to defence counsel's "deplorable" litigation strategy. The Court of Appeal concluded:

> "*Whether his failure stemmed from a misunderstanding of the basic principles that govern the Charter and its application or from his bias toward the Crown or both, we need not finally decide.*" [¶180]

3) **The Court of Appeal's conclusions regarding Justice Cosgrove's Use of the Contempt Power**

Over the course of the proceedings, Justice Cosgrove threatened the use of the contempt power against 13 witnesses, cited at least two witnesses for contempt, and threatened to order the arrest of two civilian witnesses. On appeal, the Crown advanced the position that Justice Cosgrove's misuse of the contempt power had brought the administration of justice into disrepute and was abusive, careless and over-zealous. The Court of Appeal expressed its "concern" about the way Justice Cosgrove misused his contempt jurisdiction and stated, "there are several occasions where it appears that the trial judge may have misunderstood the purpose of the contempt power". Citing one example, in which Mr. Eugene Williams, Q.C., senior counsel with the Department of Justice of Canada, was threatened to be cited for contempt, the Court of Appeal concluded that Justice Cosgrove made a "disparaging and unfair comment" about another Crown counsel involved in the episode. The Court of Appeal then concluded:

> *The power of a superior court to cite a person for contempt of court is a very important power but it is to be used with restraint.* ***It is a serious matter to threaten anyone, let alone an officer of the court, with contempt of court. We can see no basis upon which it would have been open to the trial judge to find Mr. Williams in contempt of court.*** *Contempt of court implies conduct that is calculated to obstruct or interfere with the due course of justice or the lawful process of the courts. It is conduct that seriously interferes with, or obstructs, the administration of justice. See for example R. v. Glasner (1994), 19 O.R. (3d) 739 (Ont. C.A.). At worst, in this case there may have been a misunderstanding as to what was to occur when the R.C.M.P. reports were filed with the court. That does not approach the kind of conduct that can properly be stigmatized as contempt of court.* ***A reasonable observer might be concerned that the trial judge appeared to be biased against the police and their counsel because of this unfortunate incident.*** [¶¶142-144, 166] [Emphasis added.]

Under the heading "Abuse of the Contempt Power", the Court of Appeal expressed its concern about the manner in which Justice Cosgrove used his contempt jurisdiction. In this connection, the Court of Appeal stated:

> *Although abuse of the contempt power was not a matter that gave rise to any erroneous findings of Charter violations, we are concerned about the manner in which the trial judge used his contempt jurisdiction.* [¶142]

Conclusion of the Court of Appeal in *R. v. Yvonne Elliott*

The Court of Appeal made the following observations by way of conclusion:

> *We conclude this part of our reasons as we began. The evidence does not support most of the findings of Charter breaches by the trial judge. The few Charter breaches that were made out, such as non-disclosure of certain items, were remedied before the trial proper would have commenced had the trial judge not entered the stay of proceedings. The trial judge made numerous legal errors as to the application of the Charter. He made findings of misconduct against Crown counsel and police officers that were unwarranted and unsubstantiated. He misused his powers of contempt and allowed investigations into areas that were extraneous to the real issues in the case.* [¶166]

DATE: 20031204
DOCKET: C32813

COURT OF APPEAL FOR ONTARIO

ROSENBERG, MOLDAVER and SIMMONS JJ.A.

BETWEEN:	
HER MAJESTY THE QUEEN Appellant	David Scott, Q.C., David M. Humphrey, Kenneth L. Campbell and Paul Lindsay for the appellant
- and -	
JULIA ELLIOTT Respondent	Brennan Smart, Harald A. Mattson and Craig Parry for the respondent
	Heard: September 15, 16 and 17, 2003

On appeal by the Crown against the order of Justice Paul J. Cosgrove of the Superior Court of Justice dated September 7, 1999.

BY THE COURT:

I. Overview

[1] On September 7, 1999, Cosgrove J. stayed Julia Elliott's trial on charges of second-degree murder and interfering with a dead body as an abuse of process and ordered that the Crown pay her legal costs from the outset of the proceedings. In

13

particular, the trial judge found that police officers, Crown counsel and senior officials of the Ministry of the Attorney General had committed over 150 violations of the respondent's rights under the *Canadian Charter of Rights and Freedoms*[1], thereby compromising her right to a fair trial. In addition, the trial judge concluded that the misconduct of the Crown and the police delayed the respondent's trial and therefore violated her s. 11(b) *Charter* right to a trial within a reasonable time.

[2] In response to the Crown's appeal against the stay of proceedings, the respondent concedes that the *Charter* breaches found by the trial judge including the trial judge's finding of a s. 11(b) breach, are not sustainable and that the finding of an abuse of process and the costs award were unwarranted. However, she asks that this court uphold the stay of proceedings on the sole alternative basis that her lead counsel at trial (not the same as appellate counsel) was incompetent and that *his* actions led to a violation to her s. 11(b) *Charter* right to a trial within a reasonable time.

[3] The respondent claims that her lead counsel derailed her trial for almost two years by bringing countless meritless motions. In addition, she submits that the trial judge was incompetent, and that he contributed to the delay by mismanaging the trial and by accepting defence counsel's arguments.

[4] The respondent asserts that the trial record makes it clear that she was not receiving competent legal advice and therefore that the resulting delay cannot be

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

attributed to her. She claims that the Crown is responsible for the delay because, knowing what was taking place, the Crown failed, either through incompetence or as part of it its trial strategy, to take appropriate action to prevent the violation of her rights.

[5] After reviewing the record, we agree that the trial judge's findings of multiple *Charter* breaches amounting to an abuse of process and his findings concerning a s. 11(b) *Charter* breach cannot stand. However, we reject the respondent's submission that the trial record, standing alone, demonstrates that she was not receiving competent advice. As the respondent failed to adduce any evidence on appeal concerning the advice that she received, we find no merit in her submission that we should uphold the stay of proceedings on the alternative basis that she suggests. For the reasons that follow, we would allow the Crown's appeal, set aside the order staying the charges and the order for costs, and order a new trial.

II. Background

(a) The Crown's case against the respondent

[6] A basic overview of the Crown's case against the respondent will be helpful to appreciating the issues on appeal.

[7] On August 19, 1995, two fishermen discovered the severed thighs of 64-year-old Larry Foster floating in the Rideau River near Kemptville, Ontario. Over the course of the next few days, police recovered Mr. Foster's head, arms and hands, and lower legs

15

and feet from various river locations in the vicinity of the original discovery. Mr. Foster's torso has never been recovered.

[8] Police arrested the respondent in connection with Mr. Foster's death on August 25, 1995. She was subsequently charged with second-degree murder and interfering with a dead body.

[9] The Crown's case against the respondent consisted of three main components: circumstantial evidence of opportunity, D.N.A. evidence linking her to the victim and the disposal of his body, and evidence of post offence conduct.

[10] Mr. Foster first met the respondent in the spring of 1993 during a vacation in the Barbados. At the time, Mr. Foster was recovering from leukemia and was plagued with back problems. He met the respondent in a local massage parlour where she was working as a masseuse. They developed a personal relationship and, in July of 1993, while vacationing in Canada, the respondent stayed with Mr. Foster for about a month. During this visit, she became indebted to Mr. Foster for about $5,000. Mr. Foster was not a wealthy man, and following this visit, he made ongoing efforts to have the respondent repay the money that she owed him.

[11] On a subsequent trip to Canada in 1994, the respondent met another man, Jean Yves Momy, through a dating service. She would later implicate Mr. Momy in Mr. Foster's murder.

[12] In late July 1995, the respondent returned to Canada. She spent the initial part of her visit staying with Mr. Momy in Ottawa and then went to Brooklyn to visit her sister, and from there made trips to Toronto and Montreal. She returned to Mr. Momy's apartment on the morning of Friday, August 18, 1995. Mr. Momy says that he went out for the day and that the respondent was not there when he returned at around 6 p.m.

[13] Mr. Foster was last seen alive outside his apartment in Kemptville between 3:00 and 4:00 p.m. on the afternoon of Friday, August 18, 1995. His body parts were discovered in the Rideau River at approximately 1:00 p.m. the following day. A combination of witnesses and telephone records link the respondent to Mr. Foster's apartment and to the Kemptville area during significant portions of the intervening period.

[14] At approximately 9:00 p.m. on August 18, 1995, two of Mr. Foster's neighbours saw a black woman entering their apartment building. The woman was carrying a box and walked up the stairs in the direction of Mr. Foster's apartment. One of the neighbours gave a description of the woman's clothing. It matched a description of clothing the respondent was seen wearing later that night.

[15] Another neighbour recalled seeing Mr. Foster's car backed-in towards the entrance of the building on August 18, 1995, just after 9:00 p.m. The neighbour saw a person make several trips between the car and the building, and then drive away. During one of the trips, the person put a rolled-up piece of carpeting in the back seat of the car. The

neighbour could not identify the person, but gave a description of the person's clothing that also matched a description of clothing the respondent was seen wearing later that night.

[16] Mr. Foster's telephone records disclose a five-minute telephone call to the respondent's residence in the Barbados on August 18, 1995 at 9:36 p.m. The respondent shares her residence with a female partner, Gillian Lowe. Ms. Lowe told the police that she recalled a telephone conversation with the respondent at around that time.

[17] At approximately 10:00 p.m. on August 18, 1995, Constable Laderoute of the Kemptville Police stopped the respondent less than one kilometre from Mr. Foster's apartment as part of a R.I.D.E. program. Constable Laderoute would later testify that the respondent was driving Mr. Foster's car, a blue Ford Taurus, licence number 301-HOM. Constable Laderoute noted that the car was packed with a variety of boxes and other items.

[18] At 11:30 p.m. on August 18, 1995, the respondent was involved in a car accident in Ottawa. She was driving Mr. Foster's car and produced Mr. Foster's ownership and insurance. Those documents were later found in Mr. Foster's apartment. Constable Denis of the Ottawa Police attended the accident. He too noticed that there were many items in Mr. Foster's vehicle.

[19] Mr. Momy's sister lives in the same building in Ottawa where Mr. Momy lives. On August 19, 1995 at approximately 1:30 a.m. she was dealing with a family emergency. While doing so, she noticed the respondent making several trips to Mr. Momy's apartment, bringing various belongings inside. She provided a description of the respondent's clothing matching those of Mr. Foster's neighbours and Constable Denis.

[20] Mr. Momy states that he arrived home on August 19, 1995 at approximately 4 a.m. to find Ms. Elliott waiting inside his apartment. He told police that the respondent had with her two knives, a duffle bag, various plastic shopping bags, and two barbeque grills. He said that, shortly after he arrived, she left his apartment wearing a brown dress with a whitish design.

[21] After executing a search warrant at Mr. Momy's residence, police discovered two knives, one of which was stained with traces of Mr. Foster's blood; a suitcase tag bearing Mr. Foster's name; and two barbeque grills belonging to Mr. Foster.

[22] Mr. Foster's telephone records disclose a further telephone call from his apartment to the respondent's residence in the Barbados at 7:32 a.m. on August 19, 1995.

[23] At approximately 8:45 a.m. on August 19, 1995, a witness noticed a person wearing a brown dress leaning into a car stopped on the Lewes bridge, near where the

victim's severed head was found. Bloodstains consistent with Mr. Foster's blood were subsequently found on the side of the bridge.

[24] At approximately 9 a.m. on August 19, 1995, three of Mr. Foster's neighbours saw a black woman at their building. Two of the witnesses observed the woman carrying boxes. One of the witnesses said it was the same woman she had seen the night before. That witness said the woman carried some boxes downstairs, put them in Mr. Foster's car, and drove away at around 9:30 a.m. In addition, the witness said that she saw the woman return and enter their building about a half hour later. A third witness saw the woman get into Mr. Foster's car and arrange some parcels at around 9:00 or 9:30 a.m. The first two witnesses gave a description of the woman's clothing that was consistent the descriptions given by Mr. Momy and the witness at the Lewes bridge.

[25] Police subsequently found a bundle of items wrapped in a shower curtain alongside a local road. The shower curtain contained a piece of the victim's flesh, along with a variety of bloodstained items originating from Mr. Foster's apartment, including the pieces of carpet referred to above. Also included was an unrolled blue condom with traces D.N.A. consistent with that of Mr. Foster and a pair of women's panties with traces of menstrual blood consistent with that of the respondent.

[26] Mr. Momy said that the respondent called him from Kemptville at around 11:00 or 11:30 a.m. on August 19, 1995 and asked to be picked up.

[27] On the afternoon of August 25, 1995, two police officers saw the respondent in Kemptville and took her to the police station where she was eventually arrested. She made three different statements to the police over the course of the evening of August 25, 1995 and the early morning hours of August 26, 1995.

[28] In her only statement to the police that the trial judge ruled admissible, the respondent said that she met Mr. Foster on the evening of Friday, August 18,1995 and decided to stay the night at his apartment. She borrowed Mr. Foster's car to drive to Mr. Momy's residence to retrieve her belongings. However, Mr. Momy trailed her secretly when she returned and followed her inside Mr. Foster's apartment. Once inside the apartment, Mr. Momy and Mr. Foster began to fight. The respondent claimed that she watched as Mr. Momy strangled Mr. Foster. She told him to stop but he would not listen. She fled the apartment but returned shortly after daybreak on Saturday morning. Mr. Foster was lying on the floor. She checked for a pulse but did not feel anything. She called the Barbados and then called Mr. Momy but he did not answer. She attempted to drive to Ottawa but could not, as she was trembling too much so she returned Mr. Foster's vehicle and then called Mr. Momy and asked him to pick her up.

[29] On the strength of this account, the respondent was charged with being an accessory to murder and Mr. Momy was arrested and charged with murder. However, the police released Mr. Momy after questioning him.

[30] Significantly, post mortem examination of Mr. Foster's head and neck revealed no evidence of strangulation.

[31] Mr. Momy told the police that sometime after August 19, 1995, the respondent took a room at the Ottawa YWCA. The police executed a search warrant at this room and seized a sports bag and brown floral print dress. Forensic testing revealed that both items were stained with Mr. Foster's blood.

[32] In addition, police determined that, following the murder, the respondent used Mr. Foster's VISA card to obtain cash advances totalling $1,000, that she had arranged to ship several items from his apartment to her home in the Barbados (including his stereo, microwave oven, camera and hair dryer), and that she had attempted to obtain an earlier flight home, by claiming falsely that her daughter was ill.

(b) The history of the proceedings against the respondent

(i) ***Overview***

[33] As already noted, police arrested the respondent in connection with Mr. Foster's death on August 25, 1995. Following a bail hearing on September 15, 1995, the respondent was detained in custody. She remained in custody until a stay of proceedings was entered four years and two weeks after her arrest.

[34] Prior to the commencement of pre-trial motions on September 29, 1997, the case proceeded relatively uneventfully. However, shortly before the commencement of pre-

trial motions, the respondent discharged lead defence counsel and Mr. Kevin Murphy assumed carriage of the defence.

[35] Based on the original time estimates, it was anticipated that pre-trial motions would last about two weeks and that, by the end of 1997, the trial would be completed. However, Mr. Murphy brought further pre-trial motions in addition to those that were originally planned with the result that pre-trial motions were not completed until December 17, 1997.

[36] The trial proper commenced in Brockville on January 27, 1998. However, on February 13, 1998, after less than nine full days of evidence in front of the jury, defence counsel embarked on a *voir dire* relating to an unproduced original will-say statement from Constable Laderoute. The trial proper never resumed.

[37] Between February 13, 1998 and September 7, 1998 defence counsel brought three mid-trial applications for a stay of proceedings and numerous sub-applications in pursuit of an evolving theory that, at the behest of O.P.P. case-manager Detective Inspector Lyle MacCharles and with the tacit approval of Crown counsel, police investigators engaged in a conspiracy to concoct evidence and develop a case that could result only in the respondent being convicted. The respondent now concedes that the evidence adduced during the course of the proceedings not only failed to establish defence counsel's theory, but it also did not justify embarking on many of the applications that ensued. However,

on September 7, 1999, after nineteen months of *voir dires*, the trial judge accepted defence counsel's theory and entered a stay of the proceedings.

[38] It is the almost two-year period commencing on September 29, 1997, on which the respondent relies as amounting to unreasonable delay.

(ii) Preliminary proceedings prior to the commencement of the trial

[39] Following her arrest, the respondent retained Michael Neville as lead counsel with Mr. Murphy assisting as junior counsel. Within approximately one year of the respondent's arrest, the defence team had obtained pre-trial disclosure and completed the preliminary inquiry, which proceeded over the course of 16 days.

[40] On September 18, 1996, the respondent was ordered to stand trial. The trial was scheduled to commence on September 29, 1997 and was estimated to last five to six weeks.

(iii) *Pre-trial motions*

[41] On September 23, 1997, the Crown was advised that Mr. Neville had been discharged and that Mr. Murphy had taken over as lead counsel for the defence. Mr. Ian Cadieux joined the defence team as junior counsel.

[42] Pre-trial motions commenced on September 29, 1997. There were four defence motions before the court on that day, including a motion to adjourn the trial for two

weeks because of the change in counsel and because all of the transcripts from the preliminary inquiry were not yet available.

[43] However, between September 29, 1997 and December 17, 1997, defence counsel brought thirteen additional motions. In addition to the motion for an adjournment, the defence motions included: two requests to the trial judge to recuse himself because he had conducted the respondent's bail hearing; a request for a mistrial because of comments made by the trial judge, three challenges to the array; a request to challenge individual jurors for cause; a request for a change of venue, two requests relating to the respondent's place of incarceration; three applications for a stay of proceedings; two *Charter* motions for the exclusion of evidence (a statement motion and a search warrant motion); an application to relieve the police case manager of his courtroom security duties; and a request for an order for the release of exhibits for scientific testing.

[44] Several of the defence motions had to be adjourned on their original return date because defence counsel had not given proper notice. The Crown consented to the challenge for cause motion and to the adjournment request. Of the contested motions, the defence succeeded in excluding some of the respondent's statements to the police, in ensuring that the respondent remained in custody in Ottawa and in obtaining the release of an exhibit for scientific testing. One of the applications for a stay of proceedings was adjourned. The remainder of the defence motions were dismissed.

[45] Two of the pre-trial applications for a stay of proceedings are noteworthy because of the significance they acquired later in the proceedings. The first of these applications related to the potential unavailability of Detective Inspector MacCharles to give evidence.

[46] On October 2, 1997, Detective Inspector MacCharles suffered a heart attack. His doctor recommended that he remain off-duty during his recovery, which was estimated at three to six months. Defence counsel maintained that a stay was necessary because of the importance of Detective Inspector MacCharles's evidence to two issues: first, the defence pre-trial application to exclude the respondent's statements to the police; and second, to the trial issue relating to Constable Laderoute's contact with the respondent concerning the August 18, 1995 R.I.D.E. stop. Defence counsel was successful in excluding the relevant portions of Ms. Elliott's statements without Detective Inspector MacCharles giving evidence. However, that portion of the stay application relating to Detective Inspector MacCharles's availability to give trial evidence was adjourned and would later be revisited during the third mid-trial application for a stay of proceedings.

[47] The second noteworthy pre-trial stay application related to disclosure. In particular, the defence alleged that the Crown had not disclosed the following items:

- copies of O.P.P. or Kemptville police occurrence reports pertaining to Mr. Foster; and
- copies of telephone records of ingoing and outgoing calls made at Mr. Foster's residence, prior to and following August 18, 1995.

[48] In order to put subsequent events in context, we will briefly describe the substance of this pre-trial application.

[49] The undisclosed occurrence reports related to two incidents: first, a complaint Mr. Foster made to the police on June 21, 1995 concerning silent telephone calls that he was receiving; and, second, a December 1991 incident in which Mr. Foster was alleged to have threatened one of his neighbours. The request for telephone records related, at least in part, to the silent telephone calls.

[50] General information about the silent telephone calls had been disclosed to the defence prior to the preliminary inquiry, and defence counsel cross-examined some of the witnesses about the silent telephone calls. However, for reasons that are unclear, Detective Constable Ball (the officer co-ordinating disclosure) did not receive the actual occurrence report relating to the police attendance at Mr. Foster's home and therefore did not provide it to the defence. Moreover, in late October 1997, in response to a follow-up request by defence counsel for occurrence reports, Detective Constable Ball advised Mr. Flanagan, one of the trial Crowns, that there were no undisclosed occurrence reports. Relying on Detective Constable Ball's advice, Mr. Flanagan wrote a letter to defence counsel confirming that information. Following Mr. Flanagan's letter, the occurrence report relating to the June 21, 1995 attendance was discovered and disclosed to the defence.

[51] Although defence counsel did not pursue this matter further on the pre-trial stay application, he raised it again on the mid-trial stay applications, claiming, in particular, that the failure of police to investigate Mr. Foster's use of an automatic call tracing feature (the "*57 feature") prejudiced the defence. In the result, on September 7, 1999, the trial judge concluded that the failure of police to adequately investigate the silent calls and Mr. Flanagan's letter to defence counsel were breaches of the respondent's *Charter* rights.

[52] As for the incident involving Mr. Foster and his neighbour, defence counsel's primary concern appeared to be that he had not received complete information about Mr. Foster's criminal record. However, the evidence adduced on the pre-trial stay application established that although Mr. Foster was charged with uttering a threat in early January 1992, the charge was withdrawn after Mr. Foster entered a peace bond.

[53] In addition, other evidence indicated that the police did not have a computer system for occurrence reports in December 1991; that the paper record of such a charge would be destroyed within two years after the year in which it was laid; and that charges (as opposed to convictions) are not always recorded on the CPIC system. Accordingly, prior to completing the pre-trial application, defence counsel advised the court that any remedy for non-disclosure had been "rendered academic" by the information that he had obtained on the pre-trial application.

[54] Despite these developments, the trial judge permitted defence counsel to re-open this issue and eventually found, in his September 7, 1999 ruling, that "the apparent deliberate destruction by *unknown* O.P.P. officers ... of computerized records pertaining to criminal charges" against Mr. Foster amounted to a breach of Ms. Elliott's *Charter* rights [emphasis added].

(iv) *The first mid-trial stay application*

[55] Presentation of evidence to the jury commenced on January 27, 1998 and continued until February 12, 1998. Although the pre-trial motions took longer than anticipated, the real turning point in the trial was on February 13, 1998 when, after cross-examining Constable Laderoute about the August 18, 1995 R.I.D.E. stop, defence counsel embarked on a *voir dire* relating to the non-disclosure of a handwritten will-say statement. Although defence counsel obtained the information he said that he required about the handwritten will-say, the disclosure motion quickly evolved into a mid-trial stay application that lasted until March 13, 1998.

[56] The thrust of the mid-trial stay application became an assertion that police investigators had engaged in "unprofessional, incompetent, negligent, improper and unlawful conduct", and that both trial Crowns "were involved in the police misconduct, were aware of police misconduct and failed to stop it; or, were wilfully blind to the police misconduct". During the course of the stay application, defence counsel expanded it to include approximately three dozen alleged *Charter* violations encompassing six basic

areas: breach of disclosure obligations (including the matters raised on the pre-trial stay application relating to non-disclosure); failure to investigate alternate theories of responsibility for the murder ("tunnel vision"); alleged loss or destruction of exhibits and other documents; alleged fabrication by Constable Laderoute of his August 18, 1995 R.I.D.E. stop notebook entry; alleged false statements made by Detective Constable Ball concerning information he had received from other officers; and alleged witness tampering.

[57] Although police investigators denied the allegations of witness tampering and no civilian or police witnesses substantiated counsel's complaint, defence counsel sought, and was granted the right, to compel both trial Crowns to testify based solely on that allegation. In addition, the trial judge ordered that Crown counsel brought in to assume carriage of the stay application have no contact with the trial Crowns who were compelled to testify.

[58] A basic understanding of how the original *voir dire* commenced will assist in understanding the unusual nature of what subsequently occurred.

[59] On February 11, 1998, the Crown called Constable Laderoute as a witness on the trial proper. Constable Laderoute testified that, on August 18, 1995, he stopped the respondent while conducting a R.I.D.E. program in Kemptville close to Mr. Foster's home. He said the respondent was not wearing a seatbelt and that the only identification she could produce was her passport. However, he permitted the respondent to leave on

the understanding that she would produce her driver's licence and the ownership and insurance documents for the vehicle she was driving the following day. He recorded the respondent's name, date of birth, her address and the licence number of the vehicle at the back of his notebook, out of chronological sequence: *Aug. 18/95 10:05 p.m.* ***Barbasos*** *D.O.B. – 60/06/17 Julia Elliott New Orleans Apt. 430 Donald Street Lic. Plate – 301-HOM* [emphasis added].

[60] In cross-examination, defence counsel suggested to Constable Laderoute that he did not make the R.I.D.E. stop notebook entry on August 18, 1995, but rather that he did so a week later, on the evening of August 24, 1995, at the suggestion of Detective Inspector MacCharles, after Mr. Foster's body was identified and after Constable Laderoute saw a photograph of Mr. Foster's girlfriend while taking a missing person report at Mr. Foster's residence.

[61] At one point in his cross-examination, Constable Laderoute was asked the following question and gave the following answer:

> Q. And I suggest to you that you were playing catch-up, sir, and you were playing damage control, and you were instructed by MacCharles or another senior investigator to make a note of your encounter on August 18th, because you didn't at the time.
>
> A. Yes, sir. That would be correct.

[62] That question and answer became a focal point of defence counsel's submissions that Constable Laderoute fabricated his notebook entry relating to the August 18, 1995 R.I.D.E. stop and that the police were engaged in a conspiracy to convict the respondent.

[63] During the course of the stay application, Constable Laderoute testified that Detective Inspector MacCharles did in fact tell him to "make notes" but explained that in saying, "[y]es sir...[t]hat would be correct", he was simply responding to one of the suggestions in defence counsel's question. Constable Laderoute said:

> At that time, I had already made my note on the first encounter with Ms. Elliott. ...I was making my notes for the missing person report, which I had already started. He just made that brief statement, "[m]ake notes".

Moreover, the presence of the word "Barbasos" and the respondent's date of birth on page three of her passport demonstrate the likelihood that Constable Laderoute copied part of his notes from her passport. Significantly, police did not obtain the respondent's passport until searching her room at the Ottawa YWCA on August 27, 1995.

[64] Despite these factors, in his March 16, 1998 ruling, the trial judge concluded that Constable Laderoute did not record the licence plate number on the evening of August 18, 1995, but rather "somehow" subsequently obtained that information and inserted it into his notebook on August 24, 1995, thereby breaching the respondent's *Charter* rights [emphasis in the original]. In his September 7, 1999 ruling, the trial judge expanded his original finding by holding that Constable Laderoute misled R.C.M.P.

investigators when he told them that he copied information from the respondent's passport on August 18, 1995 and not on August 24, 1995.

[65] Defence counsel also led evidence from Constable Laderoute during the trial proper that one of Constable Laderoute's two will-say statements was produced to the defence in typed form only. Defence counsel maintained that the handwritten draft was important because the typed copy did not indicate the date on which the second will-say was prepared and because that date could assist in determining when Constable Laderoute made his notes. He accordingly embarked on a *voir dire* aimed at obtaining disclosure in relation to the unproduced draft will-say.

[66] At the outset of the *voir dire*, defence counsel acknowledged that there was no issue that Constable Laderoute did in fact stop the respondent on August 18, 1995. However, he submitted that the police "used Constable Laderoute ... in effect to forge a link between Ms Elliott and the vehicle they wanted to search".

[67] The second witness called on the *voir dire* was a police case management officer who may have submitted the original will-says for typing. The case management officer produced a previously undisclosed police statement register, which set out particulars of witness statements and which included the date of Constable Laderoute's draft will-say. However, rather than abandoning the *voir dire* upon discovering that information, defence counsel stated that he was expanding its scope to an application "pursuant to

sections 7, 11(d) and 24 of the *Charter*", and began questioning the case management officer about a to-do list.

[68] The case management officer confirmed that the to-do list was generated following a September 10, 1995 meeting at the home of Mr. Flanagan and that it identified a need to re-interview certain witnesses. As part of his motion, defence counsel submitted that police investigators pressured those witnesses to modify their statements. In addition, defence counsel asserted that, given the temporal connection between the meeting and generation of the to-do list, Mr. Flanagan was a necessary witness on his motion. Although there was no evidentiary basis for the allegation that Mr. Flanagan was a necessary witness, the trial judge embarked on a hearing to determine whether he was compellable.

[69] Three aspects of the compellability hearing are noteworthy. First, the trial judge refused to permit a senior Ottawa Crown to address the compellability issue, therefore requiring the attendance of Mr. Ramsay, counsel from the Crown law office, to assume carriage of the stay application. Second, when Mr. Ramsay appeared, defence counsel moved to disqualify him, asserting that the entire Ministry of the Attorney General was in a conflict of interest because of Mr. Flanagan's actions. Defence counsel also made the absurd submission that Mr. Ramsay was an accessory after the fact to murder, because he was enabling the real murderer to escape. Although the trial judge called on Mr. Ramsay to respond, he declined to disqualify him. Third, during the course of the application, the

trial judge prohibited Mr. Ramsay from communicating with the trial Crowns (the compellability of both original trial Crowns was eventually put in issue).

[70] On March 16, 1998, the trial judge ruled that a stay of proceedings was not warranted. However, he found seventeen breaches of the respondent's *Charter* rights and granted a variety of remedies arising from those breaches. In addition, he declared a mistrial, released the jury, and on his own motion directed that the trial be moved to Ottawa.

[71] Some examples of the *Charter* breaches found by the trial judge include the following:

- premature tunnel vision on the part of the lead investigator in conducting the investigation;
- inaccurate and misleading testimony by a police officer at the respondent's bail hearing (referring to the fact that Detective Constable Ball gave evidence in-chief of certain inferences he drew from information he received from other officers rather than stating what the officers told him);
- deliberate non-disclosure of Mr. Foster's criminal record;
- denial of the existence of any police reports pertaining to the threatening telephone calls received by Mr. Foster;
- failure of police investigators and the Crown to submit or resubmit various items of evidence for testing, including a used condom found on the opposite side of the road to the shower curtain that was submitted to the Centre of Forensic Sciences for testing but returned untested and a broken silver necklace found on the floor of Mr. Foster's bedroom;

- deliberate destruction of an original handwritten draft case *synopsis*; and
- failure of Crown counsel to re-interview Constable Denis with a view to reconciling an inconsistency in his trial preparation interview with his earlier statements.

(v) ***The second mid-trial stay application***

[72] Following the March 16, 1998 ruling, proceedings continued in Brockville so that the remedies ordered by the trial judge could be implemented. Several witnesses testified as part of that process.

[73] The trial was then scheduled to resume in Ottawa with jury selection to take place on April 14, 1998. However, on that day, defence counsel served a renewed notice of application to stay the proceedings alleging over forty additional *Charter* violations. Although the Crown submitted that the application should not be heard until after evidence at trial had been taken, the trial judge declined to hear submissions on that point and proceeded with the application.

[74] In advising the court that he proposed to bring a further application for a stay, defence counsel indicated that he relied, in part, on the delivery, days earlier, of two additional witness statements from the Crown, both taken on April 6, 1998. The statements were from Mr. Foster's sister and her son. Defence counsel characterized the statements as "highly suspicious" because they related to one of the issues raised on the

first application for a stay. Without hearing from the Crown, the trial judge characterized the statements as "spectacular".

[75] The second mid-trial application for a stay was heard between April 14, 1998 and May 21, 1998. The issues canvassed included: whether the recently delivered witness statements had been concocted; failure of the police investigators to follow up on the June 1995 silent telephone calls to Mr. Foster; whether Bell Canada employees were being forthright in their evidence on the application concerning how long records of Mr. Foster's use of the *57 feature would have been retained; various issues relating to the police investigation of Mr. Momy, and whether Mr. Ramsay had contravened a direction not to speak to Mr. Findlay, one of the original trial Crowns, during the first mid-trial application for a stay.

[76] On May 27, 1998 the trial judge found eleven further breaches of the respondent's *Charter* rights but reserved his decision on the appropriate remedy until at least the conclusion of the Crown's case.

[77] In particular, the trial judge found that Mr. Ramsay's contact with Mr. Findlay during the first mid-trial stay application was "a deliberate contravention of the trial process" and a breach of the respondent's *Charter* rights. The trial judge made this finding even though he had earlier declined to disqualify Mr. Ramsay on that basis, saying "the Court recognized that counsel may have legitimately interpreted the order in another way".

[78] Other examples of *Charter* breaches found by the trial judge include the following:

- failure of the police to ensure that they had gathered all of Mr. Momy's handwritten journal entries when they executed a search warrant at his residence on August 27, 1995;
- failure of O.P.P. investigators to disclose the "witness statement register" until February 1998; and
- failure of the police to follow up on Mr. Foster's use of the *57 feature on his telephone in relation to the June 1995 telephone calls.

[79] Following the trial judge's ruling, the case was adjourned to August 17, 1998 for jury selection. That date was selected despite Crown counsel's statement that he was prepared to proceed with the trial during the summer months. After consulting with the respondent, defence counsel supported the trial judge's suggestion to adjourn until August 17, 1998.

(vi) ***The third mid-trial stay application***

[80] For some time prior to August 17, 1998, the O.P.P. had been conducting an internal investigation into allegations that an officer had disposed of a handgun that he received from a Crown witness in an unrelated homicide case ("the Cumberland case").[2] Detective Inspector MacCharles was the O.P.P. case manager for both the Elliott case and the Cumberland case. On August 11, 1998, Detective Inspector MacCharles admitted

[2] The handgun was not the alleged murder weapon in the Cumberland case and the witness was not a witness in the Elliott case.

instructing another officer to "get rid of" a gun the officer had received in relation to the Cumberland case and thereafter to deny the incident.

[81] When proceedings resumed on August 17, 1998, defence counsel indicated that he intended to renew his application for a stay of proceedings based on this recently disclosed information. The Crown led evidence indicating that the O.P.P. investigation into the matter would soon be complete and might result in the matter being referred to an independent police agency for further investigation. As a result of these developments, the case was adjourned until September 8, 1998.

[82] On September 3, 1998, Crown counsel Mr. McGarry, who now had carriage of the prosecution, wrote to defence counsel and informed him that the MacCharles investigation (including MacCharles' conduct in the Elliott case) had been referred to the R.C.M.P. for further investigation.

[83] On September 8, 1998, Mr. McGarry informed the court of the developments and indicated that, although he thought it would be difficult to proceed with the stay application without knowing the results of the R.C.M.P. investigation, he was prepared to proceed if that was defence counsel's wish. The new O.P.P. case manager, Detective Inspector Bowmaster, was then called to give evidence concerning the likely completion date of the R.C.M.P. investigation.

[84] Detective Inspector Bowmaster advised the court that he did not think the R.C.M.P. investigation would begin for another three weeks and estimated that it would likely take between three and six months. During the course of his evidence, he referred to a meeting he attended on August 20, 1998 with Ottawa-Carleton Crown Attorney Mr. Berzins, Acting Regional Crown Mr. Pelletier and O.P.P. officials. He said that at the conclusion of that meeting everyone present agreed that the MacCharles investigation should be referred to the R.C.M.P.

[85] At the request of defence counsel, the trial judge decided to proceed immediately with the renewed stay application. However, as a result of Detective Inspector Bowmaster's evidence concerning the August 20, 1998 meeting, rather than focussing on Detective Inspector MacCharles's involvement in the Elliott investigation, much time was spent dealing with evidence about when the trial Crowns were aware that Detective Inspector MacCharles was "dirty", what decisions were reached at the August 20, 1998 meeting, who was advised of the results of the meeting, and when they were advised.

[86] In pursuit of these inquiries, defence counsel was permitted to lead evidence from Mr. Berzins, Mr. Pelletier, and the two lead trial Crowns in the Cumberland case. In addition, as a result of evidence that O.P.P. officials told the Elliott trial Crowns of the outcome of August 20, 1998 meeting after it concluded, defence counsel was permitted to call Elliott trial Crowns Mr. McGarry and Mr. Cavanagh and to advance an allegation

that they misled the court concerning when they learned of the decision to refer the MacCharles investigation to the RCMP.

[87] Following the trial judge's decision to permit the defence to call the Elliott trial Crowns as witnesses, Mr. Hoffman, an assistant Crown attorney from Windsor, appeared for the Crown on an interim basis while the Crown attempted to retain independent counsel. The trial judge instructed Mr. Hoffman not to have any contact with Messrs. McGarry and Cavanagh.

[88] The Ministry of the Attorney General was eventually successful in retaining two members of the private bar to represent it on the stay application. The two new counsel, Mr. Strosberg and Mr. Humphrey, appeared before the trial judge on December 23, 1998. Despite defence counsel's original submission that someone from outside the Ministry of the Attorney General should be retained as independent counsel, he questioned the authority of the two new counsel acting for the Crown. On January 18, 1999, the trial judge accepted that the two new counsel had authority to appear for the balance of the stay application. Despite this ruling, in his September 7, 1999 stay ruling, he concluded that their retainer had been without legal authority and amounted to a breach of the respondent's *Charter* rights.

[89] The renewed mid-trial stay application was expanded over time by at least five additional notices of application. The proceedings were also marked by several citations for contempt and threatened citations for contempt.

[90] Final submissions on the stay application were adjourned to March 1999, to allow the new Crown counsel to obtain transcripts and to accommodate written submissions. However, proceedings were ultimately adjourned pending completion of the R.C.M.P. investigation.

[91] In late March 1999, the lead R.C.M.P. investigator was required to attend and provide a status report. During his attendance, the trial judge directed that he turn over his investigative file to the court. The file was sealed, copied and returned to the R.C.M.P. Defence counsel then brought an *O'Connor*[3] application for disclosure of the file. That application was eventually adjourned pending completion of the R.C.M.P. investigation.

[92] On June 21, 1999, the lead R.C.M.P. investigator provided the trial judge with two reports, one relating to the Elliott investigation and one relating to the Cumberland investigation. Copies of both reports were turned over to the defence. The R.C.M.P. concluded that there was no evidence that Detective Inspector MacCharles had in any way tainted the Elliott investigation. Final argument on the stay application commenced on July 28, 1999 and was completed on August 5, 1999.

[93] Examples of other issues explored during the course of the third mid-trial stay application include the following: whether and when Detective Inspector MacCharles would be available to testify and at what points he had previously been available throughout the course of the proceedings; Detective Inspector MacCharles's role in the

[3] *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)

Elliott investigation, in particular, his instructions to Constable Laderoute on August 24, 1995 and his involvement in selecting a police officer to conduct the April 6, 1998 interview of Mr. Foster's sister and her son; the propriety of the Crown conducting further witness interviews of Barbadian witnesses; alleged perjury by police officers relating to travel plans for the additional witness interviews; allegations that the police and correctional officials were harassing the respondent; whether various police officers had complied with a defence request that they produce updated notes from September 28, 1997; whether comments made by an Elliott trial Crown at the time of withdrawing an impaired driving charge in an unrelated matter impacted on the ability of that Crown to continue the Elliott prosecution; and whether an ongoing summary prepared by one of the Elliott trial Crowns of alleged incidents of judicial bias should be produced.

[94] As previously noted the trial judge delivered his decision on September 7, 1999. In doing so, in addition to finding a breach of the respondent's right to a trial within a reasonable time, he found two additional *Charter* breaches stemming from Constable Laderoute's actions and testimony, fifteen *Charter* breaches arising from alleged perjured, false or misleading evidence of other police officers; forty-eight *Charter* breaches arising from issues connected with Detective Inspector MacCharles; five *Charter* breaches arising from the inclusion of "faulty" information in search warrants; over forty *Charter* breaches arising from alleged deficiencies in the conduct of the police investigation; seven *Charter* breaches arising from alleged deficiencies in disclosure; nine *Charter* breaches relating to immigration issues; two *Charter* breaches arising from

alleged interferences with defence counsel; two *Charter* breaches arising from alleged "tunnel vision" on the part of the Crown; four *Charter* breaches relating to subpoenaing Crown counsel; one *Charter* breach based on an alleged violation of a non-communication order by Crown counsel; and one *Charter* breach arising from the retainer of members of the private bar.

[95] Some examples of the specific findings are noteworthy:

- a finding that Crown counsel breached the respondent's *Charter* rights by failing to disclose the decision to refer the MacCharles investigation to the R.C.M.P. at the earliest opportunity;

- a finding that Crown counsel and the Ministry of the Attorney General breached the respondent's *Charter* rights by failing to disclose the fact or extent of their involvement in the August 20, 1998 decision to refer the MacCharles investigation to the R.C.M.P.;

- a finding that senior Crown counsel and senior O.P.P. officers breached the respondent's *Charter* rights and deceived the court by purporting to isolate the trial Crowns from involvement in or knowledge of the August 20, 1998 meeting while informally apprising them of it the same day;

- a finding that R.C.M.P. investigators breached the respondent's *Charter* rights by advising Crown witnesses that their investigation was brought about as a result of "allegation raised by defence counsel"; and

- findings that the Assistant Deputy Attorney General, Murray Segal, breached the respondent's *Charter* rights by instructing various Crown counsel "to oppose" subpoenas served on other Crown counsel on the basis that the subpoenaed counsel had no material or relevant evidence to give knowing that representation was false.

(c) Other Relevant Events

(i) *The Crown's recusal applications*

[96] During and soon after the first mid-trial stay application, the Crown requested that the trial judge recuse himself. The trial judge dismissed the first application and declined to hear the second.

[97] On March 6, 1998, Mr. Ramsay submitted that the trial judge should recuse himself on two bases: first, because he had descended into the arena by his examination of police witnesses, and second, because he had expressed the view, during an exchange with counsel, that Constable Laderoute acknowledged making his August 18, 1995 notebook entry at a later time. The trial judge dismissed the application.

[98] Subsequently, on April 8, 1998, after the matter had reconvened in Ottawa, Mr. Ramsay indicated that Mr. McGarry, Mr. Cavanagh and Ms. McNally would continue with the trial but that he proposed to deal with any further applications arising out of proceedings in Brockville and to bring an application to have the trial judge recuse himself.

[99] The trial judge declined to hear from Mr. Ramsay, saying "if there's any business to be placed before this court, it should be the new prosecution team that the court has been advised is now in place". When Mr. McGarry subsequently appeared he indicated that he would not be pursuing the application for recusal.

(ii) *The Cadieux letter*

[100] On September 21, 1998, Mr. Murphy advised the court that Mr. Cadieux would no longer be acting as junior counsel. Subsequently, on September 23, 1998, Mr. Murphy introduced Mr. Jeffrey Meleras as Mr. Cadieux's replacement. Following Mr. Meleras' introduction, both the trial judge and Crown counsel indicated that they had received a sealed envelope from Mr. Cadieux.

[101] After a meeting with Mr. Murphy, the respondent confirmed that she had read a letter from Mr. Cadieux that was contained in the envelopes and agreed that the trial judge and the Crown could review the letter. Counsel and the trial judge then adjourned to chambers.

[102] Once in chambers, Crown counsel submitted that Mr. Cadieux's letter raised concerns about Mr. Murphy's fitness to conduct the defence and that it was incumbent on the court to look into the matter. In particular, Crown counsel referred the court to four paragraphs of Mr. Cadieux's letter expressing the following concerns: (i) that Mr. Murphy had dismissed Mr. Cadieux despite the respondent's recent advice that she wanted Mr. Cadieux to remain on the case; (ii) that Mr. Murphy's emotional state was affecting his judgment; (iii) that Mr. Murphy's decision to dismiss Mr. Cadieux was irrational, leaving Mr. Cadieux with no option but to sue him; and (iv) that Mr. Murphy's

dismissal letter made it apparent that Mr. Murphy intended to lie to the court regarding the reason for Mr. Cadieux's non attendance.[4]

[103] In response to crown counsel's submissions, the trial judge stated that he found no merit in the suggestion that the court "should be alerted to the competency of counsel for the accused". In particular, the trial judge noted that Mr. Cadieux's had raised his concerns only after he was dismissed, and said:

> ...I have already commented on the record that I have disapproved of some of the presentation and posture by counsel for the accused. This is a highly emotional, highly charged case, so I am aware that there have been emotional outbursts. I am aware that there have been strenuous, strenuous arguments made to the court. None of that gives the court pause to even commence a consideration of the competency of counsel to represent his client.

[104] Nothing further was said about the Cadieux letter when proceedings resumed in court.

III. The Positions of the Parties on Appeal

(a) The Crown

[105] The Crown's original position on appeal was that the stay of proceedings that was granted is not sustainable for three reasons. First, the trial judge demonstrated actual bias against the Crown or, in the alternative, a reasonable apprehension of bias, and ought

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[4] Mr. Murphy's letter directed Mr. Cadieux not to attend court and indicated that Mr. Murphy proposed to advise the court that Mr. Cadieux was unable to continue for personal reasons.

47

to have disqualified himself. Second, various orders permitting defence counsel to call the trial Crowns as witnesses and precluding Crown counsel from communicating with one another resulted in a breach of natural justice and a denial of procedural fairness to the Crown. Third, the *Charter* breaches found by the trial judge, including the s. 11(b) breach, are not supportable as a matter of fact and law; moreover, even if some of the *Charter* breaches are supportable they do not justify the extraordinary remedy of a stay of proceedings.

[106] In response to Ms. Elliott's submission on appeal that a stay is warranted under s. 11(b) of the *Charter* on different grounds than those relied upon by the trial judge, the Crown submits that the trial record demonstrates that Mr. Murphy adopted a trial strategy of attempting, at all costs, to obtain a stay of the proceedings, regardless of the delay that that strategy might entail. Further, on the record before this court, there is no basis for concluding that the respondent was not aware of her *Charter* right to a trial within a reasonable time and that she did not fully endorse the trial strategy that Mr. Murphy adopted. In the circumstances, the Crown contends that a traditional s. 11(b) analysis is appropriate and the respondent cannot avoid responsibility for the delay that is attributable to the defence.

(b) The respondent

[107] The respondent submits that a traditional s. 11(b) analysis is not appropriate in this case for three reasons. First, the trial record makes it abundantly clear that her lead trial

counsel was incompetent and therefore incapable of providing her with effective assistance. In light of defence counsel's ineffective assistance, it cannot be said that the respondent knowingly waived her s. 11(b) right to a trial within a reasonable time, nor can she be held responsible for any of defence counsel's actions that may have caused or contributed to delay.

[108] Second, the trial judge demonstrated a clear inability to manage the trial, a blatant misunderstanding of the legal principles applicable to defence counsel's meritless arguments, and frequently misunderstood the evidence that was before him. Accordingly, the trial judge too was incompetent and either caused, or contributed to, much of the delay and failed to take appropriate action to protect her against the ineffective assistance of her counsel.

[109] Third, knowing of these problems and of the risk to the respondent's right to a trial within a reasonable time, the Crown failed, either through incompetence or as a matter of trial strategy, to take steps available to it alone to prevent the violation of her rights.

[110] In these circumstances, the almost two year period from September 29, 1997 until September 7, 1999 amounts to unreasonable delay attributable to the Crown and violates the respondent's right to a trial within a reasonable time.

IV. Analysis of the *Charter* Violations

[111] As we have said, the respondent now concedes that the stay of proceedings cannot be sustained. The respondent concedes that the evidence does not support most of the *Charter* violations found by the trial judge and that, in any event, none of the violations was of a nature to warrant the remedy of a stay of proceedings.

[112] We agree with those concessions and the respondent's position before this court relieves us of the need to review all of the 150 alleged *Charter* breaches. We nevertheless wish to deal with some of the issues that arose at trial, and particularly those that could conceivably arise at the new trial. We also think it may be helpful to comment on some of the orders that were made by the trial judge since it would seem that there is still some confusion about the scope of *Charter* remedies and the procedure to be followed. We also think it necessary to record our concern with some of the facts found by the trial judge.

(a) Calling counsel as witness

[113] Several of the procedural and other errors committed by the trial judge revolve around his allowing the defence to call Crown counsel as witnesses. The trial judge permitted defence counsel to call eight Crown counsel on the various motions; four of the counsel prosecuting the respondent, and four Crown counsel prosecuting or otherwise involved with the Cumberland case. There was no basis for permitting defence counsel to do so. In addition, the trial judge hampered Crown counsel in their conduct of the case

by making unwarranted non-communication orders that effectively prevented successor counsel from preparing these Crown counsel as witnesses and preparing for the prosecution of the motions and the trial proper. The trial judge also made unfounded findings against the Assistant Deputy Attorney General because he allegedly instructed counsel to oppose applications to have Crown counsel testify. We intend to very briefly deal with each of these areas.

(i) *The test for calling counsel as witnesses*

[114] It is only in exceptional circumstances that Crown or defence counsel will be permitted to call opposing counsel as a witness. It is not sufficient that the counsel may have material evidence to give. The party seeking to call opposing counsel must lay an evidentiary foundation for showing that the counsel's evidence is likely to be relevant and necessary. This stringent test applies whether it is defence counsel seeking to call Crown counsel or Crown counsel seeking to call defence counsel. This rule has been laid down in many decisions of the Superior Court. Craig J. expressed the test, in part, as follows in *R. v. Stupp, Winthrope and Manus* (1982), 36 O.R. (2d) 206 at 219 (Ont. H.C.J.):

> In my opinion, when a subpoena or the right to call a witness is challenged as here, it is not sufficient for the party proposing to call the witness to merely allege that the witness can give material evidence; but rather the onus is on the accused in this case to establish that it is likely that Brian Johnston can give material evidence. That is particularly applicable where, as here, the accused takes the extraordinary step of seeking to call Crown counsel as a witness. If Brian

> Johnston is called, he obviously cannot continue as counsel at the preliminary hearing and other counsel will be required to pick up the pieces of a long and complicated preliminary hearing. It is an interference with the judicial process which can only be contemplated in unusual cases. *In my opinion, an accused person should not be permitted to call Crown counsel to conduct a fishing expedition or to examine in the hope that something might turn up that would assist him on the issue; but rather counsel must satisfy the judge that there is a real basis for believing that it is likely the witness can give material evidence. If it is otherwise, preliminary hearings and trials can be interrupted at random; and the administration of criminal justice could be seriously impaired.* That is particularly so where, as in this case, there are extensive police investigations. If the investigating officers seek legal advice during the course of the investigation, then Crown counsel in all such cases may be put under subpoena in an attempt to establish abuse of process [emphasis added].

[115] In *R. v. Sungalia et al.*, [1992] O.J. No. 3718, Campbell J. held as follows:

> Crown counsel and defence counsel are subject to the process of the court. They are not immune from subpoena.
>
> As a practical matter, however, criminal litigation would be impossible if Crown counsel had the unrestricted right to call defence counsel as a witness or if defence counsel had the unrestricted right to call Crown counsel as a witness.
>
> *There is a persuasive burden on the lawyer who seeks to force opposing counsel to go into the witness box and relinquish his role as counsel. The persuasive burden is to show relevance and necessity.*
>
> *As a general rule neither relevance nor necessity is shown simply because opposing counsel, accompanied by an assistant interviews a witness whose statement becomes the subject of cross-examination.* If Crown counsel or defence counsel could be routinely called as a witness simply because she had previously interviewed one of her own witnesses then

> no lawyer, Crown or defence, could ever prepare properly for trial [emphasis added].

[116] We agree with these statements. In particular, we stress the necessity part of the test. In this case, the trial judge permitted defence counsel to call several of the Crown counsel because they had attended meetings at which many others, including police officers, were present. There was no basis shown that the evidence of the Crown counsel was necessary in such circumstances. There was nothing to show that the police officers who attended the meetings could not adequately convey what occurred. The defence counsel's vague suspicions that Crown counsel might say something different from the police officers was not enough to overcome the threshold for calling counsel as witnesses.

[117] Moreover, the evidence sought from counsel was immaterial. It related to matters that on any view of the facts could not substantiate an abuse of process. For example, considerable time was spent pursuing the issue of when exactly various Crown counsel knew of the decision to call in the R.C.M.P. to investigate Detective Inspector MacCharles's misconduct relating to the Cumberland case. This was not simply a fishing expedition. It was an attempt to pursue an issue that was of no consequence to the litigation. On any reasonable basis of the facts the exact date when the decision was made, whether on August 20, 1998 or within a week or two thereafter, was completely irrelevant. Moreover, the fact that a police officer may have conveyed the information to Crown counsel in the Elliott matter was also totally irrelevant. There was no version of

this issue that on any realistic view could ever support an abuse of process or a stay of proceedings.

[118] Moreover, once Crown counsel, Mr. McGarry and Mr. Cavanagh in particular, were called the trial judge permitted a wide ranging cross-examination that established beyond doubt that defence counsel was engaged in little more than a fishing expedition.

(ii) ***The test for calling witnesses in general***

[119] Strictly speaking the necessity test did not apply to the Crown counsel from the Cumberland case. However, it was incumbent on defence counsel to show that these counsel had material evidence to give. Ordinarily, a subpoena will go as a matter of course upon the statement by counsel that a witness has material evidence to give. However, where the subpoena or the right to call a witness is challenged, a mere allegation that the proposed witness has material evidence to give is not sufficient. The party must establish that the witness can give material evidence. Defence counsel made no such showing with respect to the Cumberland Crown counsel.

[120] We also note that Crown counsel offered to prepare an agreed statement of facts as to the proposed testimony of the two Cumberland Crown counsel, Ms. Bair and Mr. Cooper, to avoid their having to testify. This offer should have been pursued in the absence of some real indication that no agreement could be reached.

[121] When the Cumberland Crown counsel did testify, it became clear that they had no material evidence to give. They were not involved in the respondent's trial and only provided information about when they became concerned about Detective Inspector MacCharles's conduct related to the Cumberland case. There was no reasonable basis for thinking that their conduct could have led to a breach of the respondent's rights.

(iii) *Non-communication orders*

[122] The trial judge made various orders prohibiting Crown counsel from discussing the case with their predecessors who had been removed from the case because of the rulings of the trial judge that they testify at the proceedings. These orders frustrated attempts by the new counsel to prepare for the continuing motions and for the trial proper. They seemed to have been made because of the trial judge's suspicion that the former Crown counsel would somehow taint the new counsel or would fabricate evidence. These suspicions were unfounded. Crown counsel are officers of the court. They are expected to conduct themselves honourably and in accordance with the *Rules of Professional Conduct*. The trial judge had no basis for assuming that Crown counsel would act otherwise and his non-communication orders were ill advised.

(iv) *Opposing defence applications to call witnesses*

[123] The trial judge found four *Charter* breaches based on the conduct of the Assistant Deputy Attorney General, Murray Segal, for example, in instructing counsel to move to quash defence subpoenas to Crown counsel and instructing counsel to make submissions

opposing the defence applications to call Crown counsel as witnesses. These findings of the trial judge were typical of other *Charter* breaches in that they shared these common elements:

1. There was no factual basis for the findings.

2. The trial judge misapprehended the evidence.

3. The trial judge made a bare finding of a *Charter* breach without explaining the legal basis for the finding.

4. In any event, there was no legal basis for the finding.

5. The trial judge misunderstood the reach of the *Charter*.

6. The trial judge proceeded in a manner that was unfair to the person whose conduct was impugned.

[124] Since these findings were typical of the trial judge's approach in general, we propose to use them as an example of the errors made by the trial judge. The trial judge found that the Assistant Deputy Attorney General instructed counsel to make various submissions and that these submissions or representations to the court were inconsistent, deliberately false, untrue and calculated to mislead the court.

[125] It is a serious matter to find that a counsel has given instructions to mislead the court. The trial judge made this finding against the Assistant Deputy Attorney General in the absence of hearing from him and in the absence of any evidence that he had anything to do with the instructions to Crown counsel. This finding was completely without

foundation and gives the appearance of a failure by the trial judge to conduct the proceedings impartiality and fairly.

[126] The finding by the trial judge that Crown counsel made false or misleading submissions or representations calculated to mislead the court is not supported by the record. It is not necessary to analyze the evidentiary record to demonstrate the errors by the trial judge in his appreciation of the evidence. The positions taken by the various Crown counsel in opposing the orders compelling Crown counsel to testify were reasonable based on the paucity of information provided in the subpoenas and the submissions of Mr. Murphy. The trial judge seems to simply have misunderstood the positions taken by counsel since his findings bear little relationship to the actual submissions and representations made by Crown counsel. One example will suffice. The trial judge found that the Assistant Deputy Attorney General breached the respondent's *Charter* rights because he instructed Crown counsel, Mr. Sotirakos, to appear on October 10, 1998 to oppose subpoenas served on Mr. McGarry and Mr. Cavanagh on the basis that neither had any relevant or material evidence to give concerning the August 20, 1998 meeting, "knowing that representation was deliberately false and misleading".

[127] In fact, Mr Sotirakos did not appear to oppose the subpoenas. He appeared to seek an adjournment so that other counsel, Mr. Thompson, could appear to argue the issue. There was no suggestion in his submissions that he was informed about the case or was

purporting to inform the court about the evidence that Crown counsel could provide. He set out the Crown's general position as follows:

> I can indicate as well that my understanding is that the motion the Crown wishes to proceed on really has two prongs to it: One, would be that the Crown would be requesting of this court that, should the issuance of a subpoena have been in issue, that the court not grant such a subpoena. The second prong is, of course, that, given the position of the Crown regarding the subpoena, that Your Honour excuse Messrs. McGarry and Cavanagh from the requirement of testifying, quite simply because, a) there is, with all due respect, nothing relevant that either Mr. Cavanagh or Mr. McGarry could provide to this court; and b) that there is nothing material or necessary that requires them to testify.
>
> Now, I think that would be the basis with respect to the motion in the broadest sense, without getting into the details as to why that argument is made.

[128] Later on, it became abundantly clear that Mr. Sotirakos had not discussed the details of the case with Mr. Segal, and did not have any knowledge of the evidence that Crown counsel might be able to give. He was completely candid with the trial judge that he had only been contacted by Mr. Segal the previous day to try and find a counsel to respond to the latest application by the defence to call trial counsel. He indicated that he knew very little about the case and was simply laying out what would be the prosecution's argument. He was not making that argument and was not purporting to set out the evidence the trial counsel might or might not be able to provide. The comments by the trial judge at the time make it clear that he understood Mr. Sotirakos's limited role.

[129] The *Charter of Rights and Freedoms* is part of the fundamental law of this country. It contains important protections for accused persons. But, it brings the *Charter* and the administration of justice into disrepute when, as here, it is used to "remedy" baseless and frivolous claims. The trial judge never explained how making submissions to a court could constitute a breach of the *Charter*. He did not explain what provision of the *Charter* was engaged by this conduct or what legal principle was involved.

[130] We can assume that the trial judge had in mind the fundamental justice rights in s. 7 or the fair trial rights in s. 11(d). In *Reference re: Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503, Lamer J. held that the principles of fundamental justice "are to be found in the basic tenets of our legal system". But, as Sopinka J. said in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 591, these principles must not be so broad "as to be no more than vague generalizations about what our society considers to be ethical or moral". Either under s. 7 or s. 11(d) an accused has a right, for example, to disclosure and to make full answer and defence. As an element of the right to make full answer and defence an accused has a right to adduce relevant and admissible evidence. As McLachlin J. said in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 608:

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.

[131] The *Charter* has not, however, changed the way in which courts determine the admissibility of evidence. Courts make those determinations by hearing submissions and sometimes hearing evidence, as on a *voir dire*. The fact that Crown counsel make submissions about the admissibility of evidence, does not infringe an accused's right to call evidence and challenge the evidence called by the prosecution. The submissions made by Mr. Sotirakos and the other Crown counsel did not infringe the respondent's rights nor threaten to impair those rights. They were simply submissions, nothing more. In the case of Mr. Sotirakos, it was a submission for an adjournment of a few days so that properly instructed counsel could attend.

(v) ***Questioning the independence of counsel***

[132] The trial judge came to believe that Crown counsel arguing the various motions had to be "independent". Thus, counsel who might have some knowledge of the case or participated in some of the tactical decisions in the case were not qualified to appear. We are unaware of any such rule. The trial judge was wrong to disqualify Crown counsel for these reasons.

[133] One of the more peculiar findings by the trial judge related to the Crown's decision to retain counsel from the private bar. Earlier in the case, the trial judge had been of the view that "independent" counsel could be counsel "from the Ministry or otherwise". Not surprisingly, in view of the trial judge's view about the need for independent counsel and the difficulties that were being encountered in Crown counsel

being forced to testify, the Ministry of the Attorney General eventually sought counsel from the private bar. However, when these counsel, Mr. Strosberg and Mr. Humphrey, appeared, the trial judge doubted that they had status to act on behalf of the Crown. Eventually, he became persuaded that the counsel from the private bar could be retained and they had carriage of the prosecution until the stay of proceedings.

[134] However, in his ruling on the stay of proceedings, the trial judge made the following findings:

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

[135] The factual premise underlying the trial judge's finding, that the retainer of private counsel caused delay, is not supported by the record. Mr. Humphrey, who eventually took over most of the in-court work, proceeded with dispatch. He was prepared and his submissions were to the point and helpful. His attendance at last seemed to put an end to the trial counsel having to be removed because they were required to testify.

[136] Further, the legal premise underlying the trial judge's finding is erroneous and displays a misunderstanding of the role of the Attorney General. At common law and by statute (*Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5), the Attorney General of Ontario has all the powers that belong to the Attorney General and Solicitor General of England by law or usage. While Ontario now has a professional prosecution

service largely made up of full-time employees of the Ministry, it has always been open to the Attorney General to retain any counsel to conduct litigation on behalf of the Crown. Originally, in both England and Upper Canada, barristers, who were not employees of the Attorney General, were retained to prosecute cases on an *ad hoc* basis on behalf of the Crown. See for example, Philip C. Stenning, *Appearing for the Crown* (Cowansville, Quebec: Brown, 1986) c. 7. While the practice has diminished in the Superior Court of this province, the Attorney General of Ontario and the Attorney General of Canada regularly employ private counsel on an *ad hoc* basis to prosecute cases in both the Ontario Court of Justice and, on occasion, in the Superior Court of Justice. In other provinces, especially British Columbia, it is not uncommon for defence counsel to regularly be retained by the Attorney General of that province to act in major prosecutions. We see no basis in law or in principle for any distinction because in this case the accused was charged with murder.

[137] When Mr. Strosberg and Mr. Humphrey represented to the trial judge as officers of the court that they had authority from the Attorney General to conduct the prosecution, that should have been the end of the matter. There is nothing to indicate that these counsel failed to carry out their instructions or that they were incapable of prosecuting the case in accordance with the ethical and legal obligations of counsel acting as agents of the Attorney General.

(b) Allegations of deliberately misleading the court

[138] One of the many troubling findings by the trial judge was that senior police officers, Crown counsel and the Assistant Deputy Attorney General deliberately misled the court about events surrounding the August 20, 1998 meeting and decision to refer the Detective Inspector MacCharles investigation to the R.C.M.P. He further found that this deliberate deception violated the respondent's *Charter* rights. Like the other findings made against Crown counsel and the police these were not supported by the record. However, we deal with this issue in particular because it demonstrates a fundamental misapplication of the *Charter*. The following is an example of the kind of finding the trial judge made:

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

[139] The defence has a constitutional right to disclosure of all relevant material and the information must be disclosed with reasonable dispatch. That said, the defence does not establish a *Charter* violation simply by showing that there has been delay in disclosing a piece of information. More importantly, there can be no *Charter* violation where the

alleged delay or non-disclosure relates to irrelevant matters. As L'Heureux-Dubé J. said in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 74:

> Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the *Charter*, he or she must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence. It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. *Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect.* I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial [emphasis added].

[140] Information as to the exact date when the R.C.M.P. were called in to investigate Detective Inspector MacCharles's misconduct in the Cumberland investigation and who made the decision and who knew about the decision was immaterial to the respondent's ability to make full answer and defence. Moreover, within days of the decision being made, the respondent's counsel was informed of the decision. No one, least of all the trial judge, was misled about the relevant facts, that a decision had been made and that it would take some time to complete the R.C.M.P. investigation.

[141] For the trial judge to build this immaterial matter into *Charter* violations and find without any reasonable basis that the court had been deliberately misled is troubling.

There is no version of the events surrounding the August 20 meeting that could lead to a violation of the respondent's *Charter* rights sufficient to merit any remedial action.

(c) Abuse of the contempt power

[142] Although abuse of the contempt power was not a matter that gave rise to any erroneous findings of *Charter* violations, we are concerned about the manner in which the trial judge used his contempt jurisdiction. There are several occasions where it appears that the trial judge may have misunderstood the purpose of the contempt power. For example, on one occasion one of the counsel who had appeared for the R.C.M.P. was unavailable as she had commitments in northern Ontario. This counsel, Ms. Proulx, had seen the R.C.M.P. file concerning the investigation of Detective Inspector MacCharles, but the trial judge had ordered her not to discuss its contents with anyone. Another counsel for the R.C.M.P., Mr. Ward, appeared for Ms. Proulx. The understanding by counsel for the R.C.M.P. was that submissions were not going to be made on that occasion on the *O'Connor* application; rather the R.C.M.P. reports would just be filed and a date set for argument. In any event, the trial judge had been advised two months earlier that either Mr. Ward or Ms. Proulx would be attending on this date. The trial judge made a disparaging and unfair comment about Ms. Proulx[5] and then made an order that her superior Eugene Williams, Q.C. attend that afternoon.

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[5] "I will not permit the car travel excursion of the Crown as a priority over these proceedings."

[143] Mr. Williams testified and explained his understanding of the proceedings. The trial judge stated that he found his explanation unsatisfactory and said: "I am contemplating citing you for contempt of Court". He then reserved on whether Mr. William's action was contempt in the face of the court and dismissed Mr. Williams without giving Mr. Ward an opportunity to remind the trial judge of what had been said on the earlier occasion. The trial judge never did cite Mr. Williams for contempt of court.

[144] The power of a superior court to cite a person for contempt of court is a very important power but it is to be used with restraint. It is a serious matter to threaten anyone, let alone an officer of the court, with contempt of court. We can see no basis upon which it would have been open to the trial judge to find Mr. Williams in contempt of court. Contempt of court implies conduct that is calculated to obstruct or interfere with the due course of justice or the lawful process of the courts. It is conduct that seriously interferes with, or obstructs, the administration of justice. See for example *R. v. Glasner* (1994), 19 O.R. (3d) 739 (Ont. C.A.). At worst, in this case there may have been a misunderstanding as to what was to occur when the R.C.M.P. reports were filed with the court. That does not approach the kind of conduct that can properly be stigmatized as contempt of court. A reasonable observer might be concerned that the trial judge appeared to be biased against the police and their counsel because of this unfortunate incident.

(d) **Findings related to testimony concerning the August 18, 1995 R.I.D.E. stop of the respondent**

[145] The trial judge made numerous findings that police officers had committed perjury or given false or misleading evidence in the course of testifying at the trial and on the various *voir dires* and therefore had breached the respondent's *Charter* rights. The evidence supports none of these findings. A fair reading of the record shows that the officers did not give deliberately false evidence. At worst, on some occasions, sometimes due to the complexity of defence counsel's questions, officers may have given mistaken evidence. None of these occasions could have amounted to a breach of the respondent's *Charter* rights.

[146] One example will suffice to show the trial judge's erroneous approach to these issues. The trial judge made findings against Constable Laderoute based on the August 18, 1995 R.I.D.E. stop of the respondent when she was driving the deceased's motor vehicle. The R.C.M.P. as part of the MacCharles investigation looked into the defence allegation that Constable Laderoute had altered his notebook. They concluded that he did not. A fair review of the evidence supports that conclusion. What is of particular concern with the trial judge's approach to this issue is that there was never any dispute that Constable Laderoute did stop the respondent and at a time when she was driving the deceased's vehicle. Any controversy about the notebook could not have impaired the respondent's right to a fair trial.

[147] This was not a case where the police had deliberately destroyed material evidence. Even if the defence allegation was borne out by the evidence, the defence at most might have been able to persuade the trial judge to remove the reference to the licence plate from the information to obtain the search warrant for the YWCA search. This would not, however, have affected the validity of the warrant in view of the abundance of other material in the warrant that confirmed the identity of the vehicle. In any event, complete success on that issue for the defence would at most have led to exclusion of evidence from the YWCA search, not a stay of proceedings for abuse of process. Neither the trial judge nor defence counsel recognized that misconduct or even serious errors in the course of the investigation are not remedied by a stay of proceedings. In particular, mistakes or misconduct in the collection of evidence will almost invariably be dealt with under s. 24(2) of the *Charter*.

(e) Findings relating to Crown counsel statements or tactics

[148] The trial judge made a number of findings that Crown counsel had breached the respondent's *Charter* rights because of certain statements made by counsel in the course of proceedings. Again, we do not find it necessary to deal with all of the errors made by the trial judge. We will, however, consider some of these findings because they indicate some misunderstanding of the role of the *Charter* and especially of remedies for *Charter* violations. We are also concerned about some of these findings because of the misapprehension of the role of Crown counsel.

(f) Expressions of personal opinion by Mr. McGarry

[149] The trial judge made several findings of *Charter* violations based on the conduct of Mr. McGarry. For example, he found as follows:

> I find that repeated expressions of personal opinion as to the guilt of the applicant made to this Court by Crown McGarry during the renewal of the abuse of process *voir dire* and, specifically, his comment on September 10th, 1998 that he would not be prosecuting the applicant if he didn't "believe she was guilty of murder" is a violation of the applicant's right to be presumed innocent until proven guilty under section 11(d) of the *Charter*, and of his duties as a Crown prosecutor.

[150] There are several concerns with this finding. It is factually incorrect. Our review of the record simply does not bear out the finding that Mr. McGarry repeatedly expressed a personal opinion about the guilt of the applicant. The one comment referred to by the trial judge has, unfortunately, been taken out of context. The impugned comments were not made in the presence of the jury and were in response to intemperate remarks by defence counsel culminating in a demand that the Crown stay the proceedings against the respondent. In the course of those remarks, defence counsel improperly expressed the opinion that the trial was a miscarriage, that "we are being asked to embark on the conviction train" by the Crown and that the "carriage master is the Attorney General, and we're being asked: Do we want to get the train rolling again?" He expressed the opinion that the process is "corrupted and … tainted" to "an unprecedented degree".

[151] In response, Mr. McGarry said, "the Crown is not in the habit of staying proceedings against people who are guilty of murder, and I am confident that I can prove this woman guilty of murder and, therefore I would not be staying these proceedings." He also took up defence counsel's analogy to a train and pointed out that there is "on this track, an acquittal train and … if [the] evidence, as he keeps saying, is so weak and so bad, he would be taking his acquittal train out of the station. But the reality is, Your Honour, it has no wheels".

[152] These comments by Mr. McGarry if made in the presence of the jury would have been improper. But they were made in submissions before the trial judge and in response to provocative and intemperate remarks by defence counsel. An expression of opinion by a prosecutor that he or she is able to prove the guilt of the accused in that context is not a violation of the accused's *Charter* rights and not a breach of the prosecutor's duty. The prosecutor is entitled to seek a conviction provided that he or she does not resort to unfair means to do so. As this court said in *R. v. Gayle* (2001), 54 O.R. (3d) 36 at para. 61:

> It is not appropriate for Crown counsel to seek a conviction at all costs. Counsel's duty is to lay credible and relevant evidence before the trier of fact, assisting the trier to ensure that justice will be done. In this sense, it is said that the Crown's responsibilities are "quasi-judicial".

[153] The Honourable Michel Proulx and David Layton expressed the prosecutor's duty as follows in *Ethics and Canadian Law*, (Toronto: Irwin Law, 2001) at 697:

> The prosecutor has a dual role in the justice process. On the one hand, Crown counsel must seek to act fairly to achieve a just result in the furtherance of the public interest. *On the other hand, the prosecutor can legitimately act as an advocate in striving to obtain a just conviction*. Probably the greatest challenge for a prosecutor is reconciling the frequent tension involving these duties [emphasis added].

[154] Finally, even if Mr. McGarry's expression of opinion was improper, that did not translate into a *Charter* violation. As we have pointed out, the statement was not made in the presence of the trier of fact. It could not have affected the respondent's right to a fair trial under s. 11(d). There was no evidence that Mr. McGarry's belief that he was prosecuting the right person for the death of the deceased improperly influenced any decisions he was called upon to make. The trial judge did not identify any decisions or actions taken that could have impacted on the respondent's right to a fair trial. Crown counsel must retain their objectivity: *R. v. Regan*, [2002] 1 S.C.R. 297 at para. 70. However, an honest and reasonably held belief that the accused is guilty of the offence being prosecuted is not inconsistent with this duty. See *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 193.

(g) Disclosure

[155] The trial judge made numerous findings that the respondent's rights were infringed because of a failure by the Crown to make adequate disclosure. We have touched upon some of them above and it is unnecessary to review all of those findings. There were, however, certain common features upon which we intend to comment.

[156] The Crown's obligation to make disclosure in accordance with *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, is to disclose all relevant material in its possession. The Supreme Court expressed the relevancy requirement in *R. v. Eggar*, [1993] 2 S.C.R. 451 at 467 as follows:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed: *Stinchcombe, supra*, at p. 345. *This requires a determination by the reviewing judge* that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence [emphasis added].

[157] Thus, the disclosure obligation is a broad one. But, the obligation is only to disclose relevant information. Crown counsel may as a matter of prudence err on the side of caution and produce everything in its possession. See *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 28. There is no breach of the obligation, however, unless the trial judge determines that what was not disclosed was relevant. The trial judge failed to do that in this case. He accepted at face value the allegations by defence counsel that material or information that was not disclosed was relevant. While there are several examples of this error, two will suffice.

[158] The trial judge held that the respondent's *Charter* rights were violated because Mr. Ramsay did not provide to the defence a copy of a letter he wrote to Detective Inspector MacCharles asking that he appoint an officer to obtain witness statements from

certain witnesses. The witness statements obtained as a result of this part of the investigation would be relevant and would have been disclosed. However, Crown counsel's letter was not relevant to any legitimate issue in the defence. Its disclosure would not have assisted the defence in meeting the Crown's case or in advancing the defence case or making any relevant decision.

[159] The trial judge also found that the Crown had breached its disclosure obligations because Mr. Findlay failed to disclose that he intended to reinterview a Crown witness, Constable Denis. The trial judge did not explain how the failure to disclose an intention to conduct an interview could be a breach of the *Charter of Rights and Freedoms* and we can see no basis for such a finding.

[160] The trial judge also found *Charter* violations because of delay in making disclosure. Those findings are not borne out by the evidence. But, even if there was some delay, that did not translate into a *Charter* violation or entitle the respondent to a remedy. For example, the trial judge found that the failure of the Crown to make prompt disclosure of the deceased's medical records was a violation of the respondent's rights. However, if the defence wanted those third-party records, they had to follow the procedure in *R. v. O'Connor, supra*. There was no obligation on the Crown to attempt to obtain the records. When the Crown was able to obtain the records, with the consent of the deceased's son, the records were turned over to the defence. In any event, the trial

had not commenced when the records were turned over to the defence. The respondent was not hampered in her ability to make full answer and defence.

[161] Another common mistake by the trial judge was in failing to critically analyze the defence claims that they were prejudiced by the non-disclosure or delayed disclosure. It is not necessary for the defence to prove prejudice in order to establish a breach of the *Charter* because of non-disclosure. See *R. v. Carosella*, [1997] 1 S.C.R. 80 at para. 37. However, before an accused is entitled to a remedy such as a stay of proceedings under s. 24(1) of the *Charter*, the accused "must establish on a balance of probabilities that the failure to produce or disclose what he seeks has impaired his right to make full answer and defence or was so oppressive as to amount to an abuse of process": *R. v. Stinchcombe (No. 2)* (1994), 149 A.R. 167 at 174 aff'd [1995] 1 S.C.R. 754.

[162] Thus, even if the trial judge was entitled to find violations of the disclosure obligations, since those violations had no impact on the respondent's right to a fair trial, they could not have been the basis for any remedy of the kind granted by the trial judge. For example, the trial judge found a *Charter* violation because of the "failure or refusal" of Crown counsel to disclose that Detective Inspector MacCharles had returned to work and would therefore be available to testify. However, it became clear that defence counsel's position on having MacCharles testify shifted depending on his availability. When it seemed the officer would not be available to testify, his presence was crucial to

the defence and would prevent the respondent from having a fair trial. When the officer was available, the defence showed no interest in having him testify.

[163] The same thing happened with respect to items that the defence sought for independent testing. When the items, such as a blue condom found on the road near some items associated with the killing, seemed to have been lost or unavailable, the inability of the defence to have them tested "irrevocably prejudiced" the right to make full answer and defence. When the items were eventually located, the defence lost interest and did not seek release of the items for independent testing or respond to a Crown request for consent to have items resubmitted for testing. In those circumstances, the evidence did not support a finding that the defence had been prejudiced at any time.

(h) *Charter* breaches relating to immigration matters

[164] The trial judge made several findings of *Charter* violations based on conduct by immigration authorities or contact between the Crown and immigration authorities. The evidence did not support the various findings and so the impugned conduct could not have been the basis for a stay of proceedings. However, we mention this matter because it was symptomatic of a more serious problem with this trial. At times, the proceedings completely lost their focus as the trial judge permitted defence counsel to delve into areas that had no possible impact on the respondent's right to a fair trial. On occasion, the proceeding seemed to resemble nothing so much as a wide-ranging commission of inquiry into matters that were wholly irrelevant to the criminal trial.

[165] The *Charter of Rights and Freedoms* has introduced additional complexity into our system. Trials can take longer and put greater demands upon the administration of justice. That is the price we must pay for ensuring that accused are dealt with fairly and in accordance with the principles of fundamental justice. However, the *Charter* has not so transformed our system of justice that a criminal trial becomes an excuse for inquiring into all the ills of society. The trial judge should not, for example, have permitted forays into the immigration system, funding for halfway houses, funding for the Centre of Forensic Sciences and the relationship between the Crown and Bell Canada. And, needless to say, the trial judge was in error in finding that the respondent's *Charter* rights were violated because of perceived misconduct in relation to these extraneous matters.

(i) Conclusion on the *Charter* breaches

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

V. The Respondent's Revised s. 11(b) Argument

[167] The trial judge ordered that the proceedings against the respondent be stayed for two reasons.

[168] First, he concluded that the prosecution amounted to an abuse of process, in violation of the respondent's rights under s. 7 of the *Charter*. In that regard, he found that in the course of the proceedings, various police officers and Crown attorneys were responsible for breaching the respondent's *Charter* rights on no less than 150 occasions. In the opinion of the trial judge, these breaches were serious. All in all, they lent credence to the defence position that the respondent had been the victim of a one-sided police investigation skewed by tunnel vision and a prosecution tainted by a lack of objectivity. That being so, the trial judge was of the view that the respondent could not possibly receive a fair trial and that the proceedings against her thus constituted an abuse of process, warranting a stay.

[169] Second, the trial judge concluded that the respondent's right to be tried within a reasonable time under s. 11(b) of the *Charter* had been violated. In that regard, he held that by virtue of their misconduct, the police and Crown counsel were responsible for a host of inexcusable delays, as a result of which the respondent was deprived of her right to be tried within a reasonable time period. Accordingly, for that reason as well, the trial judge stayed the proceedings.

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[170] As we have said, on appeal, the respondent expressly disavows the reasons of the trial judge, both as they relate to his s. 7 abuse of process analysis and his s. 11(b) analysis. She nonetheless seeks to uphold his conclusion on the s. 11(b) issue for reasons that differ dramatically from those advanced by her trial counsel and accepted by the trial judge.

[171] In a nutshell, the respondent now concedes that her trial counsel was responsible for most of the delay occasioned after the commencement of her trial in the Superior Court. She seeks, however, to disassociate herself from his conduct and urges us to find her blameless. How does she do that? Quite simply, she maintains that unbeknownst to her, her trial counsel was incompetent and it would thus be unfair to characterize his actions as her actions. To the extent that she may have instructed him to proceed as he did, she should not be held responsible because her instructions were given under the mistaken belief that she was receiving effective legal assistance. Had she known that the motions brought by him were, for the most part, frivolous and vexatious and utterly without merit, she would not have countenanced them; nor would she have acquiesced in the long delays occasioned by these motions at the expense of her right to be tried within a reasonable time.

[172] Along these lines, the respondent asks rhetorically how she should have been expected to know that her counsel was incompetent when the trial judge appeared to be endorsing his conduct and Crown counsel did little, if anything, to put an end to it. The

following excerpt from pp. 802-803 of the respondent's factum captures the essence of her position:

> In the case at bar, the record discloses that the Respondent's counsel was woefully uninformed about the state of the law. The record also discloses that the learned trial judge shared many of Mr. Murphy's misapprehensions of law and fact. The incompetence of Mr. Murphy was thus officially endorsed by the Court. Meanwhile, the Crown never sought summary judgement of these unmeritorious motions and, instead, generally argued against the applications with prolix submissions of their own, thus giving the impression that the applications were actually meritorious and deserving of a reply.
>
> Make no mistake, this case was a three ring circus, with three ringmasters; and the three ringmasters cloaked these bizarre proceedings with the appearance of normality. How could a lay person possibly understand the impact of the proceedings on her s. 11(b) rights in this context? The situation not only suggests a lack of an *informed* waiver, it suggests an officially induced error of law [emphasis in original].

[173] In these circumstances, the respondent maintains that if anyone is to be held accountable for the unreasonable delay occasioned by her counsel's incompetence, it should not be her. Rather, it should be the Crown and the trial judge, each of whom bore the responsibility of preserving and protecting her right to be tried within a reasonable time period. The Crown and the judge, she maintains, were uniquely positioned to recognize and deal with her counsel's incompetence; and yet, neither did anything about it. On the contrary, the trial judge sanctioned it and Crown counsel took an active part in the charade.

[174] In sum, the respondent maintains that she was the victim of a system that failed her. But for the ineptness of her counsel, Crown counsel and the trial judge, she would have been tried within a reasonable time. As it is, through no fault of her own, she was deprived of that right. Accordingly, she requests that this court uphold the order of the trial judge staying the proceedings.

(a) Analysis

[175] Although the respondent raises issues of theoretical interest, we would not give effect to her position. In our view, her argument suffers from two fatal flaws.

[176] First, the respondent invites us to consider the record and make a finding of incompetence against her trial counsel based upon the manner in which he conducted the defence. To that end, she points to his unprofessional conduct and his persistent pursuit of motions, now described as frivolous and vexatious, and she submits that on any test, his conduct amounted to incompetence.

[177] With respect, we disagree. The respondent's argument rests on the faulty premise that a reprehensible trial strategy necessarily equates with incompetence. That simply is not true.

[178] Much as we deplore the tactics employed by trial counsel in this case, they do not necessarily equate with incompetence. On the contrary, they can just as easily be attributed to a trial strategy modelled on the belief that "the best defence is a strong

offence". In view of the strength of the Crown's case, it is certainly conceivable that the respondent and her counsel discussed the matter and formulated a strategy designed to try the police and the victim and avoid a trial on the merits at all costs. To the extent that such a strategy had a downside, it was that the respondent was likely to remain in custody while the proceedings dragged on. That prospect, however, was bearable considering that if the plan failed and she was tried and convicted of second-degree murder, the time spent in pre-trial custody would count toward her parole eligibility.

[179] On the plus side, even if the plan was not entirely successful, there was always a chance that it could result in a negotiated plea to a lesser charge. Alternatively, at the very least, it was likely to provide her counsel with ammunition to cross-examine the police and other Crown witnesses before the jury.

[180] In concluding, as we have, that the strategy just outlined may realistically have been the strategy adopted by the respondent and her counsel, we have not ignored the fact that such a strategy will normally fail. And so it should. In a word, we consider it to be deplorable. The fact that it succeeded in this case, at least temporarily, ought not to be taken as an indication that it or other like strategies should be pursued in the future. Regrettably, the strategy succeeded here because the trial judge failed in his duty to put a halt to it. Whether his failure stemmed from a misunderstanding of the basic principles that govern the *Charter* and its application or from his bias toward the Crown or both, we need not finally decide. For present purposes, all that need be said is that we are far from

persuaded that the strategy employed by defence counsel necessarily showed that he was incompetent.

[181] In turn, that exposes the second flaw in the respondent's argument. In a nutshell, it involves the failure on her part to file any evidence in support of her present position that she was in fact misled by her counsel whom she now claims was incompetent. Apart from her bald, unsubstantiated assertion, there is no reason to think that she was not fully aware of and complicit in a strategy that was designed, if at all possible, to avoid a trial on the merits. Accordingly, her argument cannot succeed.

(b) Conclusion

[182] There is no basis for finding that the respondent was not fully aware of and complicit in the conduct of her counsel. Accordingly, she cannot succeed in her argument that she should not be held responsible for the delays occasioned by her counsel due to the manner in which he conducted the defence. In short, she has not met her onus of establishing a breach of her rights under s. 11(b) of the *Charter*. That is the sole basis upon which she seeks to uphold the order below staying the proceedings. Manifestly, that order cannot stand.

VI Disposition

[183] In the result, we would allow the appeal, set aside the order of the trial judge staying the proceedings and order a new trial. The respondent does not seek to uphold the costs order imposed against the Crown. Accordingly, it too is set aside.

Released: DEC 04 2003

M. Rosenberg J.A.

J.A.

J.A.

N THE MATTER OF Canadian Judicial Inquiry of Justice Paul Cosgrove

Proceeding commenced at

TORONTO

RESPONDING MOTION RECORD OF INDEPENDENT COUNSEL
(Regarding the Constitutionality of s.63(1) of the *Judges Act*)

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