

THE CANADIAN JUDICIAL COUNCIL

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

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

at Federal Court of Canada

180 Queen Street West, Courtroom No. 7A, Toronto, Ontario
on Wednesday, September 3, 2008 at 9:30 a.m.

APPEARANCES:

Earl Cherniak, Q.C.
Cynthia Kuehl

Independent Counsel appointed
pursuant to the *Complaints Procedure*

Chris Paliare
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for the Inquiry Committee

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1 Toronto, Ontario
2 --- Upon resuming on Wednesday, September 3, 2008
3 at 9:30 a.m.

4 THE CHAIR: Mr. Cherniak.

5 CONTINUED SUBMISSIONS BY MR. CHERNIAK:

6 MR. CHERNIAK: Thank you. Just
7 before we start, panel, we have handed up or made
8 available a cast of characters that gives the names
9 and some indication as to where they fit in to the
10 matter. It is under the headings of "Provincial
11 and Federal Crown Counsel" and "Police Officers",
12 and of course "Defence Counsel", and then "Others".

13 It is a bit of a work in progress,
14 because there is at least one officer that is not
15 in it, and we may make some of them, the police
16 officers, especially, alphabetical just to make it
17 easier to find them when you need to identify what
18 their rank is.

19 THE CHAIR: We are most
20 appreciative, Mr. Cherniak. Thank you very much.

21 MR. CHERNIAK: There will be a
22 further revision in due course. I don't really
23 think that needs to be an exhibit. It is just an
24 aide memoire for everyone.

25 We have made a list of exhibits,

1 which we will supplement as new exhibits are added,
2 which I believe that the panel has or is available
3 to the panel. There are some additional pages.

4 MS. KUEHL: There are four
5 additional pages that have been handed up this
6 morning that provide some additional context to the
7 Detective Inspector Bowmaster material that are
8 collected under 2(a).

9 I believe when Mr. Cherniak gets
10 to that tab, he will just indicate where they are
11 to be inserted, but they are one page immediately
12 before the page that is already in there and a
13 couple of additional pages in advance.

14 You will see that that section
15 begins by a reference to, "You previously told us
16 you were going to tell us about X", and the X is a
17 few pages before.

18 THE CHAIR: Thank you.

19 MR. CHERNIAK: Yes, thank you. We
20 were at page 9,328 in the Murphy cross-examination
21 of Constable Nooyen. I am going to try and short
22 circuit this, because I think it is one that can
23 be. She was the police officer who was the female
24 officer dealing with the accused on the early
25 morning of the 26th of August.

1 The issue of the cross-examination
2 was whether she did or did not talk to Detective
3 Inspector MacCharles during the period of time that
4 she was there and in the company of the accused,
5 and there is no doubt, and the evidence is clear,
6 that in her evidence in December of 1997 she did
7 not mention his name in connection with the notes.

8 She did mention his name some
9 years later when she gave a statement to the RCMP,
10 and on July 20th, 1999, when this transcript is,
11 the cross-examination was in connection with the
12 difference.

13 THE CHAIR: I am just trying to
14 pick up the page in the volume.

15 MR. CHERNIAK: That was at 9,328,
16 and it is under the tab dealing with Constable
17 Nooyen at 2(a).

18 THE CHAIR: Thank you.

19 MR. CHERNIAK: If you go to page
20 9,331 and 32, you will see that the witness was
21 given a transcript of her earlier evidence so she
22 could review it, which she did.

23 If you go to page 9,334, she
24 concedes that there is nothing in either her notes
25 nor the transcript about talking to Detective

1 Constable Lyle MacCharles, and what she says is
2 that -- if you go to page 9342, for instance, she
3 is still being cross-examined about the fact that
4 she does have a reference to Detective Inspector
5 McCallion speaking to her in her notes, but no
6 reference to MacCharles. And at page 9,342, she is
7 asked to explain that, and she says she can't:

8 "I didn't believe it was
9 relevant or had any bearing."

10 That's why it is not in her notes.

11 She says, I already knew I had to
12 make good notes. She repeats that she didn't
13 think it was relevant on that page and on page
14 9,343 about line 10. Then she is cross-examined.
15 She is referred to her earlier transcript, and
16 there is some question about whether the arresting
17 officers, Hurlbut and another officer, were or were
18 not there, which I won't bother with.

19 Then if we go to page 9,355, she
20 is then cross-examined by Mr. Humphrey after Mr.
21 Murphy's cross-examination is completed. He takes
22 her through the entries in her notebook, and, at
23 page 9,357 at line 24, he points out again there is
24 nothing about dealing with Inspector MacCharles in
25 the book.

1 Then at page 9,360 in the marked
2 passage, Mr. Humphrey asks her whether there is any
3 confusion in her mind as to whether she spoke to
4 Inspector MacCharles, and she says:

5 "Answer: As each day goes by
6 you get more confused about
7 something that's happened
8 four years ago, so what I --
9 today in court, there may
10 have been -- I remember
11 having a discussion of some
12 sort with Inspector
13 MacCharles, but it wasn't
14 anything that I felt was
15 relevant."

16 The question at line 18 is:

17 "Question: But I want to
18 ascertain as best we can what
19 your recollection is and what
20 the clarity of your
21 recollection is on three
22 issues."

23 And the witness says:

24 "Answer: Yes, I believe I
25 spoke to him."

1 Answer at line 29:

2 "Answer: I can't recall the
3 time."

4 The question at the bottom:

5 "Question: Today do you
6 recall what you spoke to him
7 about?

8 "Answer: I spoke to him
9 about I'd never been involved
10 in anything of this
11 magnitude. I was excited
12 that I was part of it, and
13 basically what could I do to
14 help.

15 "Question: Do you recall any
16 particulars beyond 'What can
17 I do to help'?

18 "Answer: No, other than what
19 he said to me, 'Just make
20 notes, make good notes', and
21 off and I went."

22 Then at page 9,363 at about line
23 20, there is an exchange from that point on that is
24 relevant and I want to read it.

25 The question at line 22 of 9,363:

1 "Question: Okay. What's
2 your recollection now?

3 "Answer: My recollection is
4 that I spoke chiefly with
5 Staff Sergeant McCallion and,
6 in that, I was taking all my
7 -- like he was the one I was
8 focusing on and finding out
9 if she was under caution and
10 this and that, the other
11 thing."

12 And then the Court says:

13 "The Court: Are you saying,
14 then, that it was not
15 Inspector MacCharles that
16 told you to make good notes
17 but it was Mr. -- it was
18 Inspector -- it was Sergeant
19 McCallion?

20 "The Witness: Yes, at that
21 time, Your Honour.

22 "The Court: I'm talking
23 about any time. Did both the
24 gentlemen tell you to make
25 notes or to make good notes?

1 "The Witness: I believe it
2 was just Staff Sergeant
3 McCallion, Your Honour."

4 Mr. Murphy says:

5 "Mr. Murphy: I have an
6 objection. I'm going to ask
7 the witness to be excused."

8 Mr. Murphy says:

9 "Mr. Murphy: I'm going to be
10 very careful about what I
11 say, Your Honour, but I have
12 a concern about suborning
13 perjury. What my friend has
14 just done is an echo of what
15 Mr. Ramsey did with
16 MacCharles and Laderoute that
17 it bears noting, as well.
18 What he has just invited this
19 witness to do is completely
20 contradict her earlier
21 testimony, repeated
22 cross-examination on the
23 issue of whether she was
24 confused, and my friend has
25 simply led her down the

1 garden path and invited her
2 to take the only escape that
3 exists for her at this point,
4 other than facing the
5 specified allegation of
6 misleading or giving false or
7 perjured evidence before the
8 court, and I have a concern
9 when a Crown stands in front
10 of the court and engages in
11 that kind of
12 cross-examination or
13 examination. I believe that
14 the court should be concerned
15 about it, too.

16 "The Court: Mr. Humphrey.
17 "Mr. Humphrey: Well, all I
18 can tell Your Honour is I
19 don't know the true state of
20 affairs at this point. I'm
21 simply endeavouring to
22 ascertain what this witness's
23 present recollection is. I
24 have reviewed her previous
25 evidence, I have seen that

1 she's given a different
2 recollection on a prior
3 occasion. In my respectful
4 submission, simple fairness
5 dictates that those passages
6 be put to her and she be
7 asked the simple question:
8 What's your recollection
9 today? Does your previous
10 recollection affect your
11 present recollection? You
12 know, ordinarily I would take
13 great umbrage at someone
14 suggesting I was suborning
15 perjury."

16 Mr. Murphy says:

17 "Mr. Murphy: I made no such
18 suggestion. The transcript
19 is what it is."

20 Then Mr. Murphy goes on on page

21 9,366:

22 "Mr. Murphy: The other fact
23 remains, and it's
24 self-evident on the record, I
25 asked this witness repeatedly

1 if she had any confusion as
2 to who she was speaking to on
3 that occasion, and there was
4 none. Her answers were
5 unequivocal. If a transcript
6 is necessary to establish
7 that, so be it. The fact is
8 my friend stood up and led
9 her down the proverbial
10 garden path to simply disown
11 her prior evidence. Perhaps
12 that goes to weight. It is a
13 troublesome and recurrent
14 aspect."

15 And then he refers to the same
16 thing with Constable Laderoute. Justice Cosgrove
17 says at the bottom:

18 "The device of the questions,
19 I think, is not
20 objectionable, and in
21 fairness to counsel, I should
22 tell you that the witness is
23 either a bald-face liar or
24 incompetent to be useful to
25 the court in this area under

1 questioning; I haven't
2 decided which. But please go
3 ahead."

4 Mr. Humphrey then goes on and
5 continues the examination, and the witness
6 elaborates on her evidence at the bottom of page
7 9,367:

8 "Answer: Hold on for a
9 moment. I don't want to
10 confuse the court and I'm
11 terribly sorry. I recall
12 speaking with Inspector
13 MacCharles at some point. I
14 believe it was after I dealt
15 with Ms. Elliott or Ms.
16 Elliott, and I had done my
17 notes -- was doing my notes,
18 because I had already spoken
19 to Staff Sergeant McCallion
20 about that. I had already
21 asked him and he said, you
22 know, just make notes,
23 whatever, blah, blah. And it
24 was after Ms. Elliott wanted
25 to provide a statement is

1 when I spoke to Inspector
2 MacCharles. It was like
3 later on in morning of that
4 same day when I said that she
5 wanted to provide a
6 statement. That's the only
7 time I could think of that I
8 spoke to him during the time
9 frame when Ms. Elliott was
10 there."

11 And then the court engages in an
12 examination of the witness at the bottom of the
13 page:

14 "The Court: Was there any
15 discussion at that time about
16 you making notes or making
17 good notes in your
18 conversation with Inspector
19 MacCharles?

20 "The Witness: Your Honour,
21 there may have. I recall --

22 "The Court: Well, why is
23 that, if you didn't take the
24 statement, but officers other
25 than you took the statement

1 subsequently?
2 "The Witness: Oh, I'm sorry,
3 I've got this -- they took --
4 I think he was -- when I
5 spoke to him about not being
6 involved in this and whatnot,
7 I said I'd never been
8 involved in a homicide
9 investigation and this was
10 interesting-type thing, and
11 that wasn't a detective
12 constable, but, you know, I
13 appreciated being part of
14 this and whatnot, and I guess
15 picking his brains and,
16 briefly, 'Is there anything
17 else I can do?' He says,
18 'No, just make good notes',
19 and that's all that was said.
20 "The Court: But your note
21 taking had been completed at
22 that time?"

23 And the examination goes on, and
24 it was on the basis of that evidence that the
25 Charter breach was found. If I can go on --

1 THE CHAIR: Just a moment, Mr.
2 Cherniak. You say that was the basis of the judge
3 finding a Charter breach. Can you just direct us
4 to the paragraph of his reasons dealing --

5 MR. CHERNIAK: Yes. If you turn
6 to the very first page under the tab Nooyen.

7 THE CHAIR: Yes.

8 MR. CHERNIAK: I referred to it
9 earlier, but you will see paragraph 307 and
10 paragraph 318 at the bottom of the page:

11 "I find that the evidence of
12 Cst. Cathy Nooyen that she
13 met and spoke to then Det.
14 Insp. MacCharles at the
15 Kemptville OPP Detachment on
16 August 26th, 1995 before her
17 overnight interrogation of
18 the applicant untruthful and
19 unreliable and given with the
20 intent to protect Det. Insp.
21 MacCharles, the case, and to
22 mislead the RCMP statement of
23 the RCMP and the Court. This
24 statement to the RCMP was the
25 first time it had been made

1 and was contrary to her
2 previous court testimony.
3 Cst. Nooyen was unable to
4 sustain this statement under
5 cross-examination. A breach
6 attaches."

7 And very much the same thing was
8 said at paragraph 318. Excuse me, I am going to
9 need some water and I see the pitcher, but I don't
10 see a glass.

11 MS. CHOWN: I have some glasses,
12 if that's of assistance.

13 MR. CHERNIAK: Thank you. With
14 respect to Bowmaster, which is the next tab, let me
15 refresh your memory. He was the detective
16 inspector who came into the case in August of 1998
17 when MacCharles was pulled off, and he was what's
18 called the case manager.

19 He explains in his evidence what a
20 case manager is, and he became the case manager of
21 both the Elliott case and the Cumberland/Toy case.
22 If you look at the first page under the tab, you
23 will see that Justice Cosgrove made a number of
24 adverse findings about Detective Inspector
25 Bowmaster deliberately false and misleading

1 evidence.

2 I won't take the time to read them
3 all, but they start at paragraph 166. The first
4 refers to his evidence on August 18th, 1998 with
5 respect to the decision to investigate MacCharles.

6 The second refers to evidence on
7 August 18th, September 8th and October 7th when he
8 actively misled the court into believing he had no
9 prior involvement or knowledge concerning the case
10 until August 11th, 1998, when in fact he knew
11 something about the Laderoute matter in
12 conversation with Detective Inspector Leo Sweeney;
13 and, thirdly, with respect to giving deliberately
14 false or misleading evidence on August 18th about a
15 conversation with Detective Constable Ball; and,
16 next, false and misleading evidence when he failed
17 to disclose that he had formed an opinion as to the
18 guilt of the applicant -- that is, she's guilty --
19 before the commencement of his initial meeting and
20 briefing with Crown McGarry on August 11th.

21 Then the false and deliberate
22 evidence on September 8th with respect to an entry
23 in his notebook for what occurred on August 20th;
24 next with respect to deliberately false and
25 misleading evidence about a trip to Barbados with

1 Staff Sergeant Scobie; and, next, relating to the
2 same matter, the trip to Barbados.

3 And we have extracted relevant
4 extracts of evidence on all those matters so the
5 panel can consider what occurred and deal with the
6 allegation.

7 The particular goes back to right
8 back to paragraph 2. It is with respect to the
9 suspicious attitude towards the Crown and
10 government agencies, including the police.

11 There are relevant Court of Appeal
12 findings that I will direct the panel to in
13 connection with this, and I believe the relevant
14 finding is at paragraph 138 of the Court of Appeal
15 reasons. There are also the general statements
16 about the Charter breaches, but this is what the
17 Court of Appeal says about deliberately misleading
18 the court:

19 "One of the many troubling
20 findings by the trial judge
21 was that senior police
22 officers, Crown counsel and
23 the Assistant Deputy Attorney
24 General deliberately misled
25 the court about the events

1 surrounding the August 20th,
2 1998 meeting and the decision
3 to refer Detective Inspector
4 MacCharles' investigation to
5 the RCMP. He further found
6 that this deliberate
7 deception violated the
8 respondent's Charter rights.
9 Like the other findings made
10 against Crown counsel and the
11 police, these were not
12 supported by the record."

13 And then the court goes on to deal
14 with a specific incident, but doesn't deal directly
15 with this officer. We go to paragraph 140:

16 "Information as to the exact
17 date when the RCMP were
18 called in to investigate
19 Detective Inspector
20 MacCharles' misconduct in the
21 Cumberland investigation and
22 who made the decision and who
23 knew about the decision was
24 immaterial to the
25 respondent's ability to make

1 full answer in defence.
2 Moreover, within days of the
3 decision being made,
4 respondent's counsel was
5 informed of the decision. No
6 one, least of all the trial
7 judge, was misled about
8 irrelevant facts. The
9 decision hadn't been made.
10 That will take some time to
11 complete the RCMP
12 investigation."

13 I am dealing here with the
14 specific findings against Detective Inspector
15 MacCharles.

16 HON. MACDONALD: Bowmaster.

17 MR. CHERNIAK: I am sorry,
18 Detective Inspector Bowmaster. The court on August
19 18th, 1998 calls Inspector Bowmaster to the stand
20 at the bottom of page 1,525, and Justice Cosgrove
21 wants to know about the process.

22 At page 1,527 Detective Inspector
23 Bowmaster simply underlines who he is. At line 22:

24 "I'm posted to the criminal
25 investigation bureau."

1 He says he has been with the OPP a
2 little over 30 years:

3 "I'm posted to the criminal
4 investigation bureau, major
5 cases section, Orillia. My
6 function is to manage major
7 investigations anywhere in
8 the province. Currently I
9 have been reassigned to this
10 investigation in this case,
11 as well as the other one that
12 involved Inspector MacCharles
13 and I have a number of other
14 cases ongoing."

15 We are still on August 18th. We
16 go to page 1,537. Superintendent Edgar of the
17 OPP's name is mentioned at line 15. He is the
18 director of the major cases section of the criminal
19 investigation branch.

20 At page 1,538, line 5, Bowmaster
21 says that he was not involved in this case in
22 January of 1998. This was at the time that there
23 was a call made for the investigation into the
24 Cumberland case.

25 Then he's asked, at the top of

1 page 1,539, of his knowledge of the case in January
2 of this year, and:

3 "Question: You had no
4 knowledge of this case?

5 "Answer: That's right.

6 "Question: None whatsoever?

7 "Answer: I knew there was a
8 -- I had no idea who the
9 people were involved. I knew
10 no names. I knew there had
11 been a homicide involving
12 body parts in the Kemptville
13 area and that was the extent
14 of my knowledge of the case."

15 Then at page 1,546, and we are
16 still on August the 18th, about line 10 Bowmaster
17 is asked about Detective Inspector George Ball.
18 George Ball was the lead investigator in the
19 Elliott case, and Bowmaster says:

20 "Answer: I know George, yes.

21 "Question: And you're
22 friends?

23 "Answer: Yes. We're not
24 socially involved off the
25 job."

1 At 1,547, line 8:
2 "Question: Can you tell us
3 about conversations that
4 you've had with him about the
5 case?
6 "Answer: None other than
7 yesterday.
8 "Question: None other than
9 yesterday. Okay.
10 "Answer: I saw him once
11 before. He walked into Mr.
12 McGarry's office last
13 Tuesday.
14 "Question: Yes.
15 "Answer: We did not discuss
16 the case.
17 "Question: What were you
18 doing there?
19 "Answer: I was there to see
20 Mr. McGarry and he briefed me
21 on this investigation.
22 "Question: Last Tuesday?
23 "Answer: Yes.
24 "Question: Which would have
25 been what date?

1 And he says August 11th, the day
2 after he was put in charge of the case.

3 Page 1,549, he is being asked
4 about his conversation with Ball. Again, at line
5 15:

6 "Question: -- George Ball,
7 the lead investigator on the
8 case, walks into Mr.
9 McGarry's office and your
10 evidence, sir, under oath
11 today is you didn't even know
12 why he was there?

13 "Answer: Yeah, that's right.
14 Under oath, sir."

15 And he goes on at line 19:

16 "Answer: Well, I'm doing a
17 proper job. I did not know
18 the facts of this case, I was
19 not about to get into a
20 discussion with Detective
21 Ball about something I knew
22 nothing about until I was
23 briefed by Mr. McGarry, who
24 had requested that I come up
25 there and talk to him. So I

1 think it would have been
2 premature to get in any kind
3 of discussion with Detective
4 Ball about this case, not
5 knowing the facts.

6 "Question: So why were you
7 talking to him yesterday?

8 "Answer: Why was I talking
9 to him yesterday?

10 "Question: That's the
11 question, yeah.

12 "Answer: He was in the
13 office yesterday when I was
14 in the office. I guess he
15 probably advised -- he might
16 have been one of the first
17 people I spoke to who advised
18 me that there had been a
19 motion for a stay of
20 proceedings in the court."

21 Then Mr. Murphy puts the question
22 to him at the top of the page 1,551, line 3:

23 "Question: Sir, let's try to
24 be -- in light of all the
25 lies that have been honed up

1 to --"

2 That must be "owned" up to:

3 "-- by OPP officers.

4 "Answer: I have not told any
5 lies in this court."

6 At the bottom of page 1,552,
7 Detective Inspector Bowmaster gives the role of a
8 case manager, the second last line:

9 "As a case manager, you try
10 and stay away from actually
11 hands-on investigation,
12 because you're going to end
13 up in the witness box."

14 Mr. Murphy says, line 22:

15 "Question: Are you a case
16 manager, in brackets, damage
17 control? Are you a case
18 manager, part-time
19 investigator? Are you a case
20 manager, coverup department?

21 What do you mean in this
22 case when you talk about case
23 manager?

24 "Answer: Which question
25 would you like me to answer

1 first?

2 "Question: I think they were
3 all one."

4 Then Mr. Bowmaster goes on to
5 further describe the role of a case manager. The
6 question of a conversation with Constable Ball
7 comes up again, and we're on still on August 18th
8 on page 1,555 at the middle of the page, line 13:

9 "Question: Are you saying,
10 sir, under oath in this case
11 after having been appointed
12 the investigator in this case
13 you haven't had a detailed
14 discussion with Detective
15 Constable Ball, the lead
16 investigator? Is that what
17 you're saying?

18 "Answer: That's what I'm
19 saying."

20 And he goes on to say that Ball
21 hasn't told him anything about it. Then at the
22 bottom of the page, Detective Inspector Bowmaster
23 says:

24 "Answer: The first person
25 that I heard that there had

1 been any kind of a motion
2 regarding -- well, can we say
3 breaches -- I heard from
4 Detective Inspector Leo
5 Sweeney --"

6 And the panel will remember he is
7 mentioned in one of the findings:

8 "-- whenever the first motion
9 was brought forward, or at
10 least there was a response by
11 His Honour, and my immediate
12 supervisor at that time was
13 Inspector Sweeney. And
14 that's the first I knew that
15 there were any allegations of
16 breaches in this case.

17 "Question: Okay. And when
18 would that have been?

19 "Answer: I knew you were
20 going to ask me that. It
21 would have been some time
22 after His Honour had written
23 to it, because I know he had
24 a written document.

25 "Question: What year are we

1 talking about?

2 "Answer: I would say 1998,
3 the first part of 1998,
4 because I was no longer there
5 after --

6 "Question: Why would you
7 have heard this from Sweeney
8 in 1998?

9 "Answer: Because he received
10 a copy of the judgment or
11 parts of it."

12 At page 1,557, there is an
13 exchange about what Bowmaster knew of that issue,
14 and the witness says, in answer to the question
15 from the court, in the middle of the page:

16 "The Witness: No, no. What
17 he addressed was brought to
18 my attention, and there was
19 really no reason for him to
20 bring it to me, because I was
21 not involved in the
22 investigation, other than the
23 fact that I was one of two
24 people who was responsible
25 for criminal investigations

1 -- not all -- some criminal
2 investigations in the region.

3 And the issue that was
4 brought forward was that
5 concerning the licence number
6 that had been entered in,
7 Constable, I believe it's
8 Laderoute's, notebook."

9 At line 10 on the next page,
10 1,558:

11 "Question: Now, are you
12 saying, sir, there was
13 Sweeney and you, you were
14 consulted about an
15 investigation of Ron
16 Laderoute arising from His
17 Honour's ruling?

18 "Answer: No, I wasn't
19 consulted.

20 "Question: You just became
21 aware that it had become an
22 issue?

23 "Answer: Yes.

24 "Question: From who?
25 Sweeney?

1 "Answer: Yes."

2 Then at the bottom of page 1,559
3 and 60, the witness is cross-examined again about
4 his conversation with Sweeney, and he is asked at
5 the bottom of the page:

6 "Question: Why do you even
7 know about Ron Laderoute?

8 "Answer: Because it was an
9 important part and an
10 important issue in a case
11 that came forward, and it's
12 like 'By the way, have you
13 seen this or have you heard
14 about this?' And I'm not
15 saying those were his words,
16 but we did talk and he did
17 say, 'Did you see this? This
18 is a judgment' or, 'I've
19 received this.'"

20 And what the witness is referring
21 to must be the finding by Justice Cosgrove in March
22 of 1998. The question next at line 12 is:

23 "Question: Let's stop right
24 there."

25 I think I should read the part,

1 the last few lines, because this is what Bowmaster
2 believed from his conversation with Sweeney:

3 "And the other part of it was
4 I believe His Honour did
5 write that while he found
6 that the officer had done
7 what he was accused of, that
8 there was no evidence to
9 substantiate that Inspector
10 MacCharles told him to do it.

11 And that was the extent of
12 what we talked about."

13 And then:

14 "Question: Let's stop right
15 there. Didn't you just tell
16 us, under oath, a few minutes
17 ago, that you came to speak
18 to Mr. McGarry knowing
19 nothing about this case on
20 August the 10th, 1998?

21 "Answer: Yeah. I don't
22 know. I know that about the
23 case. I know no detail.

24 "Question: Sir, are you
25 telling the truth or not?"

1 At the bottom of the page:

2 "Question: Just let me
3 finish the question. -- and
4 Laderoute, in the course of
5 this conversation you have
6 with Sweeney, months ago.
7 You said a minute before that
8 when you came to speak to Mr.
9 McGarry last Tuesday, you
10 came as somebody who knew
11 nothing about the case.

12 "Answer: Guilty. I did know
13 that about this case."

14 I just pause to observe here that
15 the panel will remember that this conversation was
16 volunteered earlier. The conversation with Sweeney
17 was volunteered earlier by the witness in answer to
18 a somewhat unrelated question.

19 "Question: What? Guilty of
20 what, sir? Are you lying to
21 us?

22 "Answer: I did -- no, I'm
23 not lying to you."

24 The witness resents being called a
25 liar. Then he's questioned again about being aware

1 of the issue arising from Ron Laderoute fabricating
2 a note, and he says at line 19:

3 "Answer: I did know -- I did
4 know about that, and that is
5 something I was told about."

6 Then on page 1,563, the witness is
7 asked about why Officer Sweeney told him about the
8 case. He says at line 22:

9 "Answer: I don't know why
10 Inspector Sweeney told me
11 about that on that day, other
12 than I knew MacCharles, he
13 knows MacCharles.

14 "Question: You're talking as
15 friends?

16 "Answer: Well, we're talking
17 as members of an organization
18 who talked back and forth on
19 a continuous basis, because
20 he was my direct supervisor
21 at that time."

22 On page 1,564 at about line 16:

23 "Question: Will there be any
24 investigation, to your
25 knowledge, of this case and

1 MacCharles' involvement in
2 this case?

3 "Answer: Not that I'm aware
4 of.

5 Then he goes back to the
6 conversation with Sweeney as to where it occurred,
7 and there he says it was at the Smith Falls,
8 regional headquarters. Answer at the bottom of the
9 page:

10 "Answer: I think he
11 mentioned it outside my
12 office, and I believe I
13 followed him down the hall
14 inside his office."

15 On page 1,566, Mr. Murphy is
16 questioning again about Sweeney at line 20, line
17 19:

18 "Question: If you're saying
19 that you had nothing to do
20 with it, why is he even
21 talking to you about it,
22 given that it is such a
23 sensitive matter?

24 "Answer: He showed me parts
25 of His Honour's ruling.

1 "Question: Did he say why?
2 Did he say, 'Hey, look at
3 this. I just spent the last
4 three hours going through the
5 latest judgments from the
6 General Division in
7 Brockville. You've got to
8 see this one; it's a doozy!'"
9 "Answer: No. This is a case
10 that obviously impacts the
11 OPP."

12 And he goes on to indicate why
13 that is. On page 1,568 at the bottom, the witness
14 says that he has never met Laderoute. He is asked
15 on page 1,569:

16 "Question: Why hasn't Ron
17 Laderoute been investigated
18 along with MacCharles? Or
19 why hasn't MacCharles'
20 incident involving Laderoute
21 been investigated?"

22 And he says he doesn't know.

23 We are still on August 18th and I
24 am over at page 1,576, and the witness is asked
25 about Detective Constable Cary Churchill, and he

1 says at the bottom of the page:

2 "Answer: I would've spoke to
3 him on the phone while I was
4 in McGarry's office. I know
5 he called the office and said
6 something to the effect, 'I
7 understand you've been
8 assigned the case. Good
9 luck.'"

10 MR. NELLIGAN: I am sorry, Mr.
11 Cherniak, but I am having great difficulty in
12 hearing you. I wonder if --

13 MR. CHERNIAK: I am sorry. I am
14 at the bottom of page 1,576.

15 MR. NELLIGAN: Yes, I am there.

16 MR. CHERNIAK: And it is a
17 conversation with Constable Cary Churchill, and the
18 witness says at the bottom of the page:

19 "Answer: Well, he probably
20 called it the case from hell
21 or something like that. I
22 don't recall his exact
23 words."

24 And at the bottom, there is a
25 cross-examination on that answer and the witness

1 says at line 25:

2 "Answer: I call a lot of
3 cases a case from hell."

4 Still on August 18th at page
5 1,595, the witness is asked about the MacCharles
6 investigation by Detective Inspector Grasman, and
7 he says at the bottom of the page:

8 "Answer: I believe he should
9 be finished this week."

10 On page 1596, line 22:

11 "Question: Is there any
12 outside agency, law
13 enforcement agencies
14 involved, as is customary in
15 investigations of one police
16 force by another? For
17 example, is the RCMP involved
18 at any stage in the initial
19 investigation?

20 "Answer: Not at this point.

21 "Question: They may become
22 involved?

23 "Answer: Again, that is
24 going to be up to
25 Superintendent Edgar.

1 "Question: That's one of the
2 options. I'm not asking you
3 to guess whether it will
4 happen."

5 The witness says:

6 "Answer: I'm sure that will
7 be one of his options."

8 At page 1,600 in the middle of the
9 page, the witness says he has known MacCharles for
10 many years on the force, and then at page 1,601 he
11 says -- this is still August 18th -- he has spoken
12 to Roy Scobie, who is a constable, in person on the
13 phone yesterday, and Scobie is the officer who had
14 done the investigation in Barbados. The witness
15 says at line 22:

16 "Answer: He did tell me the
17 substance of a couple of
18 people that he was involved
19 in who had been interviewed.

20 "Question: Witnesses?"

21 "Answer: Yes."

22 Then we go to September 8th, 1998.

23 We have Mr. McGarry who is speaking. McGarry is a
24 senior Crown on the case, and in the middle of the
25 page he is dealing with the stay application in the

1 Ontario Provincial Police investigation. The case
2 was adjourned, awaiting the result or awaiting the
3 report. And:

4 "Mr. Cavanagh delivered it to
5 my friend and he forwarded it
6 to you prior to the letter of
7 September 3rd. That was what
8 we were waiting for.

9 "Essentially, the report sets
10 out its conclusions and, as a
11 result of that report, as I
12 understand it, the OPP has
13 asked the RCMP to conduct an
14 outside investigation
15 pertaining to that case and
16 pertaining to the issues that
17 may arise in this case."

18 Then he refers to the stay of
19 application.

20 Mr. McGarry at page 1,618 refers
21 to the very thick report of Inspector Grasman into
22 the Cumberland/Toy investigation. He says it's
23 inconclusive. No doubt that was one of the reasons
24 for involving the RCMP.

25 That is elaborated on in the next

1 few pages. I am at page 1,620. Mr. McGarry at
2 line 8 refers to the Grasman report, and at the
3 bottom of the page at line 25:

4 "Having done that, as I
5 understand it, the Ontario
6 Provincial Police have asked
7 the RCMP to conduct an
8 investigation of those
9 allegations to determine
10 whether or not, for example,
11 there is criminal liability,
12 to determine those sorts of
13 issues, and also the OPP --
14 or the RCMP to conduct
15 inquiries into this case to
16 determine whether there was
17 any impropriety on the part
18 of Detective MacCharles in
19 this case."

20 He goes on on page 1,621, Mr.
21 McGarry, to say at line 22:

22 "I understand they've
23 contacted the RCMP."

24 They have agreed to do the
25 investigation, and the like.

1 On the same day, Detective
2 Inspector Bowmaster is called to give evidence, and
3 at page 1,643 the judge asks:

4 "The Court: Are you able to
5 advise the court with respect
6 to the particulars of the
7 terms of reference of the
8 RCMP investigation as it
9 pertains to this trial of
10 Julia Elliott and, for
11 example, the length of the
12 investigation?

13 "The Witness: Yes. The
14 formal terms of reference
15 have yet to be finalized. I
16 met with the RCMP last
17 Wednesday and outlined the
18 request that we were making
19 to them for an independent
20 investigation."

21 And he goes on to give some
22 details as to what that will be and his estimate of
23 the time involved. After the witness was
24 questioned by Justice Cosgrove, Mr. Murphy begins
25 his cross-examination at page 1,645:

1 "Question: Detective
2 Inspector Bowmaster, is this
3 the RCMP involvement that you
4 were asked about as being a
5 possibility when you were
6 here on the 18th of August?

7 "Answer: Yes."

8 And just for your reference, that
9 is back at page 1,596. I referred you to that:

10 "Question: This follows as a
11 result of Detective Inspector
12 Grasman's investigation, is
13 that right?"

14 And the question is, in effect:
15 Why is Bowmaster involved in the matter involving
16 Cumberland? And he says:

17 "Answer: I'm the case
18 manager for Project Toy."

19 Project Toy is the Cumberland
20 case. That was the other investigation. Then to
21 page 1,647, Mr. Murphy continues the
22 cross-examination. This is a reference to
23 Grasman's 500-page initial brief and that was into
24 Cumberland/Toy. There is a reference to certain
25 parts of that which I will not go into.

1 already been taken.

2 "Answer: No. And the short
3 answer is: That's my job."

4 And at the bottom of page 1,653
5 line 25:

6 "Question: Now you're
7 telling us, sir, under oath,
8 that on the very afternoon
9 you drew up a list with
10 Detective Constable Churchill
11 for the purpose of providing
12 it to the RCMP?

13 "Answer: No. We were -- at
14 least it was the intentions
15 of the OPP to ask for an
16 outside investigation.

17 "Question: When?

18 "Answer: I guess when we met
19 with the Crown attorney or
20 the regional acting Crown.

21 "Question: Who was that?

22 "Answer: Mr. Pelletier.

23 "Question: And when was
24 that?

25 "Answer: If you give me just

1 a moment --"

2 I am on page 1,654:

3 "Answer: If you give just a
4 moment, I'll answer that,
5 sir. I thought I had it down
6 here. It may have been the
7 20th of August. I met with
8 Detective Churchill as a
9 result of meeting with Crowns
10 Berzins and Pelletier on the
11 20th. At 1500 hours I
12 requested Churchill to
13 prepare a list of witnesses
14 that MacCharles would have
15 contact with, directed or
16 could have influenced. That
17 was on the 20th of August."

18 He says on page 1,655, about line
19 7 to 12, he corrects himself on the date and he
20 realizes it was August 20th. On page 1,657, he is
21 then asked about the August 20th meeting. This is
22 still the cross-examination by Mr. Murphy at the
23 top of page 1,637:

24 "Question: Now, the meeting
25 with Mr. Pelletier -- and who

1 else was present?

2 "Answer: Mr. Berzins.

3 "Question: Where was the
4 meeting?

5 "Answer: And Inspector --
6 Detective Superintendent
7 Edgar and Detective Inspector
8 Grasman, and it was held in
9 the regional director's
10 office at this courthouse."

11 This courthouse being Ottawa:

12 "Question: And what did you
13 discuss?

14 "Answer: What we discussed
15 was that the OPP were in fact
16 going to request an
17 independent investigation
18 from the RCMP and that
19 Detective Superintendent
20 Edgar would be making that
21 representation to the RCMP,
22 asking them to do the
23 investigation. And it was
24 further discussed as to who
25 would review that

1 investigation from the
2 Crown's point of view."

3 And at the bottom of page 1,658,
4 the question is asked at line 29:

5 "Question: What was the
6 basis for the decision? You
7 said a decision was taken at
8 that meeting -- August 20th
9 meeting, in this meeting that
10 held in the regional
11 director's office."

12 At line 10 on page 1,659:

13 "Question: Who led the
14 meeting, to begin with?

15 "Answer: Well, I don't think
16 it was anyone specifically
17 leading the meeting.

18 "Question: So what was it,
19 like an anarchists'
20 symposium, or did somebody
21 draw lots and decide who
22 would take notes?"

23 Mr. McGarry objects. And Mr.
24 Murphy goes on in that vein on page 1,660 at line 7
25 about the old political cartoon circle, a circle of

1 people standing next to each other. Who stole the
2 people's money?

3 The cross-examination eventually
4 continues at page 1,661 at line 5:

5 "Question: Okay. Let's go
6 around this round table at
7 which nobody is in charge.
8 Mr. Berzins, Mr. Pelletier,
9 Deputy Superintendent Edgar?
10 "Answer: Detective
11 Superintendent."

12 And he is identified. Then at
13 page 1,662, he is asked whether he has a record of
14 that meeting in his notebook, and he says he does
15 not have it in his notebook, question at line 6, 7:

16 "Question: What do you have
17 in your notebook for that
18 day?
19 "Answer: Well, at 1500 hours
20 I have: 'Met with Detective
21 Churchill as a result of
22 meeting with Crowns Berzins
23 and Pelletier. Request that
24 Churchill prepare a list of
25 witnesses that MacCharles

1 would have had contact with,
2 directed or could have
3 influenced in the
4 Foster/Elliott case.'

5 "Question: Did that include
6 police officers?

7 "Answer: The list?

8 "Question: Yes.

9 "Answer: Yes, it did.

10 "Question: Okay. That's
11 your entry for 1500 hours.
12 What's your entry for 0700
13 hours that day? Or what's
14 your first entry for August
15 the 20th, '98?

16 "Answer: 1500 hours was my
17 first entry."

18 This is relevant, because it turns
19 out there was another entry and the question was:
20 Was he asked about it, or was he not? So this is
21 what he says about his notebook.

22 Then he is asked about what he was
23 doing earlier in the day at line 28:

24 "Answer: I thought I had a
25 note of it, but I don't see

1 it here.

2 "Question: Well, you take as
3 much time as you need,
4 Detective Inspector
5 Bowmaster, as the lead
6 investigator on this case, as
7 somebody testifying under
8 oath now, the second time in
9 a row. Please look very
10 carefully and confirm to the
11 court, if you would, that you
12 don't have a note for that
13 day, other than commencing at
14 1500 hours after the meeting.
15 "Answer: Yeah, that's it."

16 And then he is asked about the
17 note-taking:

18 "Question: And do you have
19 any explanation as to why you
20 have no note of the meeting?"

21 That must mean the earlier
22 meeting:

23 "Answer: Well, I think the
24 Attorney General's direction
25 in case of notes are

1 addressed to evidence. The
2 fact that I had a meeting
3 with four other people to
4 discuss what action would be
5 taken -- and I don't know
6 that -- I did not discuss any
7 evidence of any investigation
8 before the courts. We
9 discussed very generally what
10 it was that we were
11 investigating, which everyone
12 knew -- specifically, the
13 Project Tory matter -- and I
14 mean, I probably have an
15 entry in my diary that that's
16 where I was at that time."

17 He says his diary is distinct from
18 his notebook.

19 Then the question of his notebook
20 is discussed again at page 1,665 at about line 22:
21 "Question: Now, the first
22 entry you have in your notes
23 at 1500 hours -- and this may
24 not seem this way to you, but
25 if I suggest to you that it's

1 deja vu of the highest order
2 -- 1500 hours you have
3 tasked, apparently, Detective
4 Constable Churchill to go and
5 draw up a list of people, and
6 I think the term -- or to
7 paraphrase what you said -
8 'who may have had contact or
9 with whom Detective Inspector
10 MacCharles may have had
11 contact'; correct?
12 Witnesses?

13 "Answer: Yes."

14 Then Bowmaster says at page 1,666
15 at line 20:

16 "The Witness: As a result of
17 that meeting, I spoke with
18 Detective Constable
19 Churchill, none of those
20 people who were at the
21 meeting in the regional
22 Crown's office were present
23 when I asked him to prepare
24 me a list of persons that
25 would have to be

1 interviewed."

2 Mr. Murphy says:

3 "Question: I'm not
4 suggesting they were, sir,
5 because you indicated who was
6 present, and I don't think it
7 included them. I'm
8 suggesting to you, sir, that
9 you've confirmed it, although
10 I'm not certain: Following
11 from the meeting in the
12 senior regional Crown's
13 office, on the 20th of
14 August, for which you have no
15 note, you have an immediate
16 first day entry -- first
17 entry of your notebook is for
18 1500 hours, at which you task
19 Detective Constable
20 Churchill, who's the
21 assistant to the lead
22 investigator, George Ball, on
23 the Elliott case, with
24 drawing up a list pertaining
25 to Detective Inspector

1 MacCharles' involvement in
2 this case with the witness?

3 "Answer: Yes."

4 Then at line 20:

5 "Question: So we have one of
6 the items that was discussed,
7 one of the agenda items from
8 the round table meeting.

9 What were the other agenda
10 items pertaining to
11 MacCharles that were
12 discussed?

13 "Answer: Well, again, what
14 was discussed was: How are
15 we going to handle this issue
16 from the other court case?

17 And it was agreed the OPP
18 would ask for an independent
19 investigation by the RCMP.
20 As to who would review that
21 case, Crown counsel-wise, Mr.
22 Pelletier was going to follow
23 that up."

24 And he goes on to enlarge on the
25 nature of the investigation, which I won't further

1 read. There is an exchange about the captain of
2 the Titanic on the next page which I won't trouble
3 you with either.

4 Then Mr. Murphy goes on, and we
5 are still on September 8th, 1998, at page 1,675 at
6 about line 18:

7 "Question: Can you explain
8 why there was a delay between
9 apparently the 20th of
10 August, when you're saying
11 today a formal decision was
12 taken, or a decision was
13 taken by those responsible to
14 refer the matter to the RCMP,
15 why nothing was communicated
16 to this court or to counsel
17 before September the 3rd in
18 Mr. McGarry's letter that you
19 have been asked about? "

20 And then there is a reference to
21 the letter from Mr. McGarry to Murphy on September
22 3rd, in which McGarry at the bottom of the page
23 advises that the Ontario Provincial Police have
24 asked the Royal Canadian Mounted Police to mount an
25 investigation into Detective Inspector MacCharles,

1 including his activities in the investigation of
2 the Julia Elliott case. And the cross-examination
3 goes on.

4 MR. PALIARE: Excuse me. It may
5 be useful at this point. You have skipped over the
6 captain of the Titanic point.

7 MR. CHERNIAK: If you would like
8 me to read that, I will.

9 MR. PALIARE: It may be useful. I
10 don't mean to interrupt, but at 1,669, Justice
11 Cosgrove does intervene and it seems appropriate to
12 at least put that on the record.

13 MR. CHERNIAK: I am happy to read
14 that in. I mean, all of this is the record, but
15 let's go back to 1,669:

16 "Question: Let me use the
17 analogy or the metaphor I
18 used the last time: If you
19 were the captain of the
20 Titanic, you would also be
21 the case manager in charge of
22 damage control, would you
23 agree with me, once the
24 iceberg struck the ship?

25 "The Court: No. This is

1 getting a little bit out to
2 sea in terms of what the
3 court called the officer
4 for."

5 Mr. Murphy goes on and we don't
6 have the entire exchange, but he starts it off by
7 saying:

8 "Mr. Murphy: All levity
9 aside, there is no other way
10 to describe this course of
11 circumstances, other than
12 completely discussing this
13 man who claims to be a police
14 officer, keeps no notes."

15 And the like. If there is
16 anything relevant in the following page, I will
17 produce it and ask it to be inserted.

18 I am back to the further
19 examination on September 8th, and the officer is
20 being examined on evidence that was given at an
21 earlier stage, probably August the 18th, and the
22 question at page 1,679 in the middle is:

23 "Question: Now, are you
24 suggesting, sir -- any
25 explanation for the delay for

1 the decision being taken on
2 than 20th which is what --
3 that was the \$64 question we
4 all wanted to know on the
5 18th of August -- can you
6 explain why nothing gets
7 communicated to this court or
8 to counsel until the 3rd of
9 September?"

10 And then the witness goes on to a
11 lengthy answer to that question. At page 1,681, at
12 the bottom, line 29:

13 "Question: Did the RCMP --
14 did you contact the RCMP
15 yourself?

16 "Answer: I did not make the
17 request. The detective
18 superintendent did to the
19 commanding officer.

20 On 1,682:

21 "Question: When?

22 "Answer: I believe -- now,
23 dates? Maybe if I get a
24 calendar out here. I believe
25 it was the -- well, it was

1 the week of the 23rd of
2 August, and I'm not sure
3 exactly what day. I
4 personally met on the 2nd of
5 September with Detective --
6 or Chief Superintendent
7 Lenton of the RCMP Police in
8 Ottawa. The commanding
9 officer, who Detective
10 Superintendent Edgar spoke
11 to, is in London at their
12 O-Division headquarters."

13 The witness goes on to say that he
14 did make contact with the RCMP on September 2nd, at
15 line 19, to brief them. He continues on the nature
16 of what he understood the RCMP investigation to be,
17 on page 1,683 at line number 20:

18 "Answer: If I may, Your
19 Honour. The investigation
20 we're asking the RCMP is not
21 to investigate everything
22 that these officers have done
23 in relation to any particular
24 case. What it is, it's
25 focussed specifically on an

1 incident that had to do with
2 one witness in the other
3 case.

4 "Question: Then why do we
5 have the expanded terms of
6 reference to include this
7 case with MacCharles?
8 "Answer: Well, because
9 disclosure laws, sir -- we
10 provided you with three
11 statements of three officers
12 who are subject of that
13 investigation and you've ran
14 with it from there. We've
15 only fulfilled out commitment
16 under disclosure."

17 And the questioning goes on again
18 as to why the Elliott case is being investigated.
19 I won't bother reviewing that.

20 The re-examination of Mr. McGarry
21 commences at page 1,686, and at the bottom of page
22 1,687 Justice Cosgrove questions the officer:

23 "The Court: Officer, at the
24 meeting of the 20th of
25 August, to which you've

1 referred, as I understand it,
2 at the meeting there were two
3 senior regional Crown, the
4 present senior regional
5 Crown, the senior Crown, who
6 acted in his absence,
7 yourself, and who else was
8 there? Elected in his
9 absence, who else was there?
10 "The Witness: Detective
11 Superintendent Edgar and
12 Detective Inspector Grasman.
13 "The Court: If you can
14 recall, who of those persons
15 present first raised the
16 issue of the expansion of the
17 inquiry of MacCharles from
18 the other case to the Elliott
19 matter?
20 "The witness: It may have
21 been Mr. Berzins.
22 "The Court: I take it that
23 then he and the other -- Mr.
24 Pelletier were present when
25 the decision was made to

1 the Ron Laderoute note
2 fabrication allegation?
3 "Answer: Yes, I was aware of
4 that.

5 "Question: Well, you just
6 said two second ago that
7 you're not aware of there
8 being any issues in
9 particular involving notes in
10 this case not being
11 produced."

12 Perhaps I should read the answer
13 -- the question, and the answer is at line 9 on the
14 same page:

15 "Question: Was it your
16 understanding -- did you have
17 any awareness from Mr.
18 McGarry or from anybody else
19 about particular issues and
20 incidents in which notes
21 haven't been disclosed in
22 this case or in which there
23 was an issue about the
24 origins of those notes or the
25 originals of those notes?

1 "Answer: No."

2 And going down to line 25, the
3 witness says:

4 "Answer: I believe those
5 notes were all produced.

6 "Question: Did you not
7 testify, sir, that you spoke
8 to Sweeney?

9 "Answer: Yes.

10 "Question: He called you
11 into his office some time in
12 the spring of this year, or
13 April or May or March -- he
14 called you into his office
15 and he asked you -- he talked
16 to you about the incident in
17 which Laderoute's notes
18 became a central issue in
19 this case?

20 "Answer: No, he didn't call
21 me into his office. We were
22 passing in the hall, and I
23 believe he had a copy of His
24 Honour's ruling on some
25 issues related to breaches of

1 the Charter and that
2 particular one was brought to
3 my attention."

4 There is a reference to evidence
5 given on August 18th and that relates to his
6 conversations with George Ball, and we go to page
7 3,252. He has refreshed memory on his evidence
8 earlier about George Ball, and then we are back to
9 Sweeney, so we are at the bottom of 3,252.

10 There is more reference to the
11 Sweeney conversation and the conversation in the
12 hall, and the question at line 7 on page 3,253:

13 "Question: Okay. I'll go
14 back to this, though. That
15 specific conversation was
16 about missing notes. In
17 fact, if I suggest to you
18 Laderoute's notes went
19 missing, are you saying you
20 had no awareness that became
21 an issue in this trial before
22 August of this year?

23 "Answer: I wasn't of the
24 understanding that there were
25 missing notes. The

1 conversation that I had with
2 Sweeney, and I'm not sure
3 when that took place, was
4 that an officer had changed
5 -- had added to his notes."

6 Then we are still on August 7th at
7 page 3,268. At about line 12, the witness says he
8 is not aware of Officer Sweeney having any other
9 involvement in this case. The answer is that, no,
10 no other involvement.

11 On page 3,271 there is reference
12 to the officer's August 20th notes. Mr. Murphy
13 says at page 3,271:

14 "Question: Sir, I'd like to
15 now refer to August the 20th
16 on your notes, please, and
17 that would be page 36 of your
18 Elliott case notes -- Foster
19 homicide case notes."

20 And Mr. Murphy asks him about
21 -- his questions about the fact that no notes were
22 taken at the August 20th meeting. At the bottom of
23 the page:

24 "Question: But can you
25 confirm again, looking at

1 page 36, that your notes for
2 August 20th start at 1500
3 hours, right?
4 "Answer: Yes.
5 "Question: And we'll go back
6 and overlap and fill in from
7 before. It says, 'Met with
8 Detective K. Churchill as a
9 result of meeting with Crowns
10 Berzins and Pelletier.
11 Requested Churchill prepare a
12 list of witnesses that
13 MacCharles would have had
14 contact with, directed or
15 could have influenced in
16 Foster/Elliott case', right?
17 "Answer: Yes.
18 "Question: Those are
19 basically the terms of
20 reference of Elliott being
21 tacked on, as it were,
22 included with the referral to
23 RCMP where MacCharles is
24 concerned, right?
25 "Answer: Yes.

1 "Question: What's your next
2 entry? Could you read it
3 slowly and clearly at 1600
4 hours on August 20th of 1998?
5 "Answer: With Edgar and
6 Grasman met Crowns McGarry,
7 Cavanagh, with Officers
8 Churchill and Walker present.
9 Advised of intention to have
10 an independent investigation
11 conducted re MacCharles,
12 Dougherty and Snider. The
13 RCMP will be asked and an
14 independent counsel to
15 review. Explain need to have
16 witness list for potential
17 subjects to be interviewed by
18 outside investigators.'
19 "Question: Sir, that note
20 seems to indicate that you
21 met with Mr. McGarry and Mr.
22 Cavanagh, who is at the
23 counsel table -- Mr. McGarry
24 is not here -- at 4 o'clock
25 on the same day of the August

1 20th meeting at which the
2 decision that is referred to,
3 in what you have just read,
4 had been taken, right?
5 "Answer: Right.
6 "Question: Now, you came to
7 court on the 8th of
8 September, correct?
9 "Answer: Yes, I believe that
10 was the date.
11 "Question: I'm going to
12 refer to the transcript, but
13 if I can summarize, there was
14 some concerns that were
15 raised that when you
16 disclosed on the 8th of
17 September the fact of this
18 meeting of August 20th having
19 occurred two days after you
20 testified in court, there
21 were concerns raised in my
22 cross-examination and in
23 submissions to His Honour,
24 why we didn't hear about the
25 decision before a letter was

1 sent to defence counsel by
2 Mr. McGarry on September 3rd
3 of this year; do you recall
4 that?"

5 Then there is reading from the
6 September 8th transcript, some of which I have
7 referred you to. At page 3,275 and 76 the witness
8 is cross-examined on his evidence on September 8th,
9 and the specific question at the top of page 3,276
10 is:

11 "Question: The decision was
12 taken August 20th. Why was
13 there delay until September
14 the 3rd before the court or
15 counsel were advised of the
16 recommendation?"

17 And the answer is then given, and
18 that material is in the earlier pages. The
19 question is:

20 "Question: Can you explain
21 -- are you aware of what we
22 have been consumed with in
23 the last month since we were
24 in court on the 8th of
25 September?"

1 "Answer: Quite frankly, I
2 don't know where all this is
3 going. I mean, I know people
4 are getting subpoenaed on a
5 daily and regular basis.
6 From my stand point of view,
7 I guess we're all kind of
8 bewildered -- we all know
9 there has to be an
10 investigation and there's a
11 need for one, and why isn't
12 the trial proceeding, unless
13 we want to delay the trial
14 until the investigation is
15 commenced, or concluded."

16 And the answer goes on:

17 "Answer: No, I really can't
18 say. I am entirely aware of
19 what the court is being
20 consumed with --"

21 I think he means: I'm not
22 entirely aware, but the transcript is as it is.

23 "-- a) we are never allowed
24 in court, except when you're
25 on the stand; and b) we can't

1 talk to anybody including
2 Crown attorneys."

3 Then Mr. Murphy says at about line
4 12:

5 "Question: Are you not aware
6 of the number of witnesses
7 we've called, including
8 Berzins, Pelletier, the
9 regional senior Crown,
10 Cooper, Bair, the Crowns on
11 the Cumberland case, and the
12 question we've been asking
13 all of them is: 'Why wasn't
14 this communicated earlier,
15 this decision of August 20th?
16 When did Mr. McGarry know
17 about it?' Were you not
18 aware of that?"

19 The witness says:

20 "Answer: I'm not aware of
21 what these other witnesses
22 have been asked in this
23 court, because everyone has
24 got explicit instructions not
25 to discuss what they are

1 being asked or their
2 testimony.
3 "Question: What about Mr.
4 McGarry?
5 "Answer: When you speak
6 about informing the court
7 regarding this investigation,
8 I think the key word is
9 formal and the meeting on the
10 20th was of five people who
11 had come to the conclusion
12 that we will request an
13 investigation from the RCMP.
14 I don't know if that's Mr.
15 McGarry's belief that that is
16 the formal request. We still
17 had to draw up some terms of
18 reference and the request has
19 to go through channels, in
20 fact, should go from our
21 commissioner to their
22 commissioner. They have to
23 review what's being requested
24 and they may, at any stage of
25 the game, say, 'Sorry. Not

1 us. Go elsewhere. See if
2 somebody else will help
3 you.' "

4 At line 15, Mr. Murphy asks:

5 "Question: Are you
6 suggesting that there is some
7 prospect now that this is
8 still not a formal request or
9 would you agree that a formal
10 request was made on the 25th
11 of this month?

12 "Answer: I would say -- and
13 I don't know the exact date
14 that the commissioner sent
15 it, but once our commissioner
16 sends a request, I would say
17 that's a formal request,
18 yes."

19 And then he says:

20 "Until the RCMP gets a formal
21 request, they won't enter
22 into an investigation."

23 Continuing on October 7th, 1998,
24 page 3,323, the witness is cross-examined at page
25 3,326 about what he had learned from the 10th of

1 August on, at the bottom of 3,326, and he says at
2 the top of 3,327:

3 "The Witness: On the 10th,
4 as well as the 11th of
5 August, I met with Mr.
6 McGarry. On the 11th of
7 August he gave us a more
8 comprehensive overview of the
9 investigation."

10 I think this is an added page.
11 There are some added pages here. I have added in
12 here three pages, page 3,334, 3,335, 3,336 and
13 3,344 -- actually, four pages -- for the context of
14 what occurs here.

15 MR. PALIARE: They go before or
16 after the pink sheet?

17 MR. CHERNIAK: They go after the
18 pink sheet. Page 3,334, the question is
19 surrounding the Barbados investigation, and
20 Detective Inspector Bowmaster is cross-examined
21 about an August 14th letter to Superintendent Edgar
22 asking for approval to go to the Barbados. The
23 letter of Bowmaster says that:

24 "-- McGarry requested a
25 number of interviews be

1 "Answer: Yes.

2 "Question: And what's the
3 reason that you abandoned
4 your trip, or postponed it?

5 "Answer: It was postponed, I
6 believe, because there was no
7 -- the trial date, I believe,
8 was put off and although the
9 authorization is still in
10 place -- I don't know if we
11 said what time we were to
12 travel on this.

13 "Question: Do you not have a
14 note, sir, much further on in
15 September advising that you
16 had notified Scobie, wrong
17 about the date and told him
18 to cancel the trip?

19 "Answer: Yes, yeah, because
20 it became apparent the trial
21 wasn't going ahead when we
22 thought it would be."

23 Then there is more discussion
24 about the Barbados investigation that I am not
25 going to read.

1 Then at page 3,358, Mr. Cavanagh
2 is re-examining. Crown Cavanagh is re-examining on
3 the note of 1600 hours on August the 20th, and he
4 refers to the entire note, to the extent it wasn't
5 all read in. The original reading of that note was
6 at page 3,272 that I referred you to.

7 Then we are to October 19th, 1998
8 and we are in the cross-examination of Officer
9 Ball. This is all still under Bowmaster, but there
10 are a few more pages that deal with other
11 witnesses.

12 We have been going an hour and a
13 half. I wonder whether the panel might think this
14 is an appropriate time for a recess.

15 THE CHAIR: Yes, right, 15
16 minutes.

17 --- Recess at 10:57 a.m.

18 --- Upon resuming at 11:15 a.m.

19 THE CHAIR: Mr. Cherniak.

20 MR. CHERNIAK: Thank you. I
21 thought the panel should know that after October
22 7th, 1998, Detective Inspector Bowmaster was never
23 called again to give evidence until July of 1999,
24 when he was there to deal with an unrelated
25 contempt charge that is the subject matter of

1 another particular; and, in particular, he was
2 never cross-examined on the issue of whether he had
3 deliberately failed to, for instance, disclose the
4 second note in his book on August the 20th. It was
5 never put to him.

6 So when we come back and look at
7 the findings in the ruling that are earlier in this
8 tab, and I will deal with this ultimately in my
9 argument, whenever that is, but I simply want to
10 remind the panel that the issue here in respect of
11 the particulars is not whether the finding of
12 Charter violations were right or wrong, but whether
13 the findings in this case, based on what I just
14 dealt with at paragraph 166 and 167 and 170, are or
15 are not evidence of the suspicion of the Crown and
16 the police. That's the subject matter of the
17 particular. That's what this is all about.

18 MR. PALIARE: I wouldn't want my
19 silence to indicate acquiescence in that position,
20 but we will deal with it.

21 MR. CHERNIAK: Of course my friend
22 has a different position. I'm simply indicating
23 independent counsel's position. Other counsel has
24 different positions. I just want to remind the
25 panel as to the purpose of referring to the

1 evidence in this detail.

2 We come to the evidence of
3 Detective Ball, which is relevant to the findings
4 at 168, paragraphs 168 and 169, and I am dealing
5 with October 19th at page 4,061, and Officer Ball
6 is asked -- this is cross-examination by Mr.
7 Murphy:

8 "Question: Have you had any
9 meetings with Detective
10 Inspector Bowmaster?
11 "Answer: I saw Bowmaster one
12 day when I came up here.
13 Bowmaster was sitting in --
14 that's the day I copied my
15 notes -- and Bowmaster was
16 sitting in the Crown's room
17 here with Des McGarry and
18 Jeff Bahm, and it was obvious
19 to me that they were talking
20 about the case and I just
21 left the room. I said, 'I
22 don't want to hear about it',
23 and, as I was going out the
24 door, Bowmaster, who I have
25 known for years from Kingston

1 when he worked in
2 intelligence and stuff, the
3 only thing he said to me is
4 'She's guilty', and that was
5 it. We never discussed the
6 case. Not anything about the
7 case."

8 Then over the page to 4,062 at
9 line 17:

10 "Question: Would that have
11 been on the 10th or 11th of
12 August?

13 "Answer: It was at the time
14 that Bowmaster was taking
15 over the case, whatever date
16 that was.

17 "Question: Since you -- he
18 made the comment 'she's
19 guilty' in parting, did you
20 have any subsequent
21 discussion with him about the
22 case?

23 "Answer: No, I did not.

24 "Question: Have you since
25 that time had any subsequent

1 discussions about the case?

2 "Answer: I have not."

3 He is asked why he didn't, and he
4 says at page 4,063:

5 "Answer: Because the case --
6 I know the case. I know who
7 the detective inspector was
8 originally. Bowmaster can't
9 -- and I don't mean this to
10 sound -- Bowmaster can't tell
11 me anything more about this
12 case than I already know, so
13 why talk to him?"

14 He has been the lead investigator
15 for some time. At page 4,064 -- perhaps I will
16 read the question at the bottom of 4,063:

17 "Question: Well, sir, that's
18 somewhat of a softer
19 position, if I suggest, than
20 what you said in this court
21 probably on five or six
22 occasions, at least, under
23 oath, that you'd effectively
24 made up your mind that -- to
25 use Bowmaster's phrase --

1 'she's guilty', within days
2 of her being arrested.
3 "Answer: Well, certainly, I
4 still believe that. There's
5 reasonable and probable
6 grounds to arrest her. There
7 was reasonable and probably
8 grounds to charge, and I
9 certainly wouldn't have laid
10 the charge had I not felt
11 that she was guilty, and I
12 still do to this day."

13 He repeats something along the
14 same line at page 4,065 at line 8. After being
15 asked why he left McGarry's office:

16 "Answer: Why wouldn't it?
17 Why would I want to sit in
18 there, the way this case has
19 gone, and listen to them go
20 over a case that I already
21 know, and then be accused of
22 conspiring against Julia
23 Elliott, which I know not to
24 be true. She did it plain
25 and simple. All the evidence

1 will support it and when
2 those 12 people hear the
3 evidence, I have to believe
4 in my mind they will come to
5 that decision. If not -- the
6 people have heard the case."

7 He says on the next page at line
8 25:

9 "Answer: -- as far as I'm
10 concerned, Julia Elliott is
11 responsible for this
12 homicide. Forensic evidence
13 will prove that."

14 MR. PALIARE: Sorry, Mr. Cherniak,
15 is this evidence related to Bowmaster?

16 MR. CHERNIAK: Yes.

17 MR. PALIARE: Okay.

18 MR. CHERNIAK: He is being
19 cross-examined about the comment that Bowmaster
20 made to him when he is alleged to have said she is
21 guilty.

22 MR. PALIARE: Right. When he
23 first got on the case?

24 MR. CHERNIAK: It was never put to
25 Bowmaster, but this is the evidence of others.

1 MR. PALIARE: I thought you just
2 said Bowmaster wasn't called after this.

3 MR. CHERNIAK: He was not called
4 after this; that's right.

5 MR. PALIARE: Right. So others
6 are saying that's what he said. Okay, go ahead. I
7 am sorry, I am just having difficulty sorting
8 through this. I apologize. Go ahead.

9 MR. CHERNIAK: At page 4,069, the
10 witness is still being cross-examined on the
11 meeting of August 10th or 11th, and he indicates
12 that he didn't want to be or need to be at that
13 meeting.

14 To do this in order, the next
15 passages deal with Scobie and the Barbados issue,
16 if you could turn later in the tab to last few
17 pages, which is November 3rd, 1998 in the
18 cross-examination of Crown McGarry, starting at
19 page 5,112. I will come back to the previous
20 pages, but they deal with a different issue.
21 McGarry is being cross-examined on the August 11th
22 meeting:

23 "Question: Sir, to what
24 extent is the -- you had your
25 meeting with Bowmaster, the

1 first meeting with him, of
2 any substance, I suggest on
3 August 11th of this year?

4 "Answer: I can't remember
5 the exact date. It would
6 have been around that time,
7 yes.

8 "Question: And Staff
9 Sergeant Bahm?

10 "Answer: Yes, if I remember
11 correctly, Bahm did arrive
12 with him.

13 "Question: And you went
14 through what you considered
15 to be pertinent facts of the
16 case and evidence based on
17 witness statements, correct?

18 "Answer: Yes. Well, based
19 on a summary prepared from
20 witness statements.

21 "Question: Was that your
22 conventional approach or your
23 unconventional approach,
24 based on the order witnesses,
25 that you alluded to earlier?

1 "Answer: No, that wasn't
2 based on the order of
3 witnesses at all. It was
4 simply a chronological
5 run-through of the events as
6 I understand them.

7 "Question: Now, is it fair
8 to say that Detective
9 Inspector Bowmaster had no
10 prior detailed understanding
11 of the case?

12 "Answer: As far as I know,
13 he didn't, yes.

14 "Question: And part of the
15 purpose was that you would
16 brief him so that he would
17 have a full understanding of
18 the case?

19 "Answer: Right.

20 "Question: So that he can,
21 amongst other things,
22 undertake further
23 investigation as required?

24 "Answer: Yes, so he'd have a
25 general overview of what was

1 going on so he could focus on
2 the specific things that
3 needed doing.

4 "Question: Okay. A general
5 overview. If I suggested to
6 you, sir -- first of all, let
7 me ask you this: Why wasn't
8 George Ball the lead
9 investigator at the meeting?

10 "Answer: It was a meeting
11 between myself and Inspector
12 Bowmaster.

13 "Question: Was George Ball
14 around?

15 "Answer: Not that I'm aware
16 of, no.

17 "Question: I'm going to
18 indicate to you, sir, if you
19 will hold on a second, that
20 Mr. Ball's recollection of
21 that meeting is that he was
22 there, and I will read you
23 what he says."

24 Mr. Murphy reads from the earlier
25 transcript that I just read to you about what

1 Officer Ball said about his presence in the
2 vicinity of that meeting. The answer at page
3 5,114, line 10:

4 "Answer: I don't
5 specifically recall that. I
6 don't specifically recall --
7 I know that Ball wasn't
8 present when I reviewed the
9 case with Bowmaster because
10 it was me, Bowmaster and
11 Bahm.
12 "Question: Well, he's saying
13 that he saw you and Bahm and
14 Bowmaster.
15 "Answer: Well, he may have
16 been in the area, but I know
17 he wasn't present when I was
18 doing the summary. What he
19 was doing -- he may have been
20 in the area. I can't comment
21 on that."

22 Then there is a question about
23 Bowmaster's cross-examination and what he knew
24 about the case before August 11th. At page 5,115:

25 "Question: So we have George

1 Ball saying, yes, I did see
2 Bowmaster there. Yes, I did
3 see McGarry there. I did see
4 Bahm. And I told them I
5 don't want to know anything
6 about it, and you're saying
7 you don't recall that, or is
8 that not significant to you?
9 "Answer: No. I don't recall
10 Ball being present that day,
11 although, as I say, he may
12 have been around the area.
13 If he was photocopying his
14 notes, the photocopying
15 machine in our office is
16 right outside where I would
17 be sitting.
18 "Question: Mr. McGarry, what
19 he's saying is he's
20 addressing this comment to
21 those present, 'I don't want
22 to hear about it.'
23 "Answer: I don't recall
24 that."
25 The cross-examination goes on and

1 Mr. McGarry simply says, "I simply don't recall
2 that".

3 He is asked, for instance, on page
4 5,116 in the middle of the page what did Ball mean
5 that he doesn't want to know anything about it,
6 because he had to know about the case:

7 "Answer: I can't explain
8 what George Ball meant by the
9 comment. I don't recall him
10 saying it."

11 It is then put to Mr. McGarry at
12 the bottom of page 5,117, after referring to some
13 of George Ball's evidence and the look that Mr.
14 Ball says Mr. McGarry gave him, Mr. McGarry says:

15 "Answer: I don't recall
16 that. And I certainly --
17 that's an awfully
18 communicative look to convey
19 all that. I think it far
20 more likely if I didn't want
21 George Ball in my office I
22 would say 'go on out, George,
23 and I'll talk to you later.'

24 "Question: So, Ball, your
25 lead investigator, is lying

1 then?

2 "Answer: I don't recall that
3 happening."

4 The issue is whether he is lying
5 or mistaken, or the like. The cross-examination
6 goes on. The witness says at the bottom of page
7 5,118:

8 "Answer: I'm not lying about
9 it. I just don't recall
10 that."

11 Page 5,119:

12 "Question: You don't recall
13 Bowmaster on the first
14 meeting saying 'She's
15 guilty.'

16 "Answer: No.

17 "Question: Wouldn't that
18 stick out in your mind?

19 "Answer: Again, not
20 particularly.

21 "Question: The lead -- the
22 chief investigator in your
23 case is meeting with you for
24 the first time and he makes
25 this comment to George Ball,

1 your lead investigator, and
2 that doesn't stick out in
3 your mind?

4 "Answer: Not particularly,
5 no. I don't recall any
6 conversation with George Ball
7 at that meeting.

8 "Question: What about the
9 comment by Bowmaster?

10 "Answer: I don't recall him
11 saying that.

12 "Question: So, Ball is again
13 -- what motive would Ball --

14 "Answer: I do recall --

15 "Question: -- have for lying
16 about a senior officer?

17 "Answer: I do recall at the
18 end of my summary, Mr.

19 Bowmaster expressed the view
20 at the end of my summary that

21 he thought the evidence was
22 convincing that she was

23 guilty, but that was at the
24 end of the summary and that

25 was the context of

1 conversation after I had run
2 through it with him.

3 "The Court: You might think
4 he jumped to conclusions by
5 giving that opinion at the
6 beginning of your summary?

7 "The Witness: I don't recall
8 him doing that at the
9 beginning, sir.

10 "The Court: If he did do
11 that, would you think he was
12 jumping to conclusions?

13 "The Witness: If he did, he
14 was jumping to conclusions.
15 And, I can tell you that in
16 my experience from dealing
17 with Inspector Bowmaster, he
18 doesn't jump to conclusions,
19 but he listens and then he
20 comments. So, I don't recall
21 him saying that."

22 That's the evidence on the "she's
23 guilty" finding. Coming back to the evidence of
24 Scobie that deals with the Barbados issue, this is
25 at page 4274. "Are you aware that" --

1 THE CHAIR: Just a minute, please.

2 MR. CHERNIAK: I am sorry. I have
3 gone back in the tab, page 4,274. It is right
4 after the last extract of the evidence of Ball at
5 line 5:

6 "Question: Sir, are you
7 aware that Bowmaster, within
8 four days of taking over the
9 case, within four days, was
10 writing to Detective
11 Inspector Edgar and asking
12 for authorization for a trip
13 to the Barbados?

14 "Answer: Was I aware that he
15 was writing to Superintendent
16 Edgar asking for
17 authorization? No, I was not
18 aware of that."

19 He repeats that at the top of page
20 4,276 that he was not aware of that correspondence.

21 Line 20 at page 4276:

22 "Question: Were you aware
23 that he was planning on
24 making a request?

25 "Answer: I was aware that

1 Detective Inspector Bowmaster
2 asked me for information
3 concerning a trip to
4 Barbados. I'm aware of that.
5 "Question: For what purpose?
6 "Answer: For the purpose of
7 him and I travelling to
8 Barbados."

9 THE CHAIR: Just a minute.

10 MR. NELLIGAN: I am having a
11 problem with my volume here.

12 MR. CHERNIAK: I last read from --

13 MR. NELLIGAN: I am okay, thank
14 you.

15 MR. CHERNIAK: I last read from
16 4,276, and I am going to 4,285 at the bottom, line
17 30:

18 "Question: But you also said
19 you didn't have -- when I
20 asked you a number of
21 questions, you indicated in
22 your evidence, sir, under
23 oath, that you didn't have
24 even any inkling, if I can
25 put it that way, that plans

1 were being made for you and
2 he to travel to Barbados?

3 "Answer: I do not agree that
4 I said that, sir.

5 "Question: In any case, you
6 agree that, as of the 13th--"

7 That would be August:

8 "-- the plans have
9 crystallized?

10 "Answer: As of the 13th the
11 plans for me to travel to
12 Barbados?

13 "Question: Yes.

14 "Answer: Yes."

15 Then we have October 21st, 1998,
16 page 4,303. Scobie is cross-examined again:

17 "Question: What other reason
18 do you have to go back there
19 to try to, in effect, get a
20 fourth or fifth or sixth
21 statement, when you already
22 have three that are
23 presumably reliable and would
24 meet the criteria of
25 necessity and reliability?

1 "Answer: Well, we were going
2 back there to prepare
3 witnesses to attend for this
4 trial and we were going to
5 re-interview everyone.

6 "Question: Well, sir, I'm
7 asking specifically about the
8 whole thrust of obtaining a
9 KGB statement from Gillian
10 Lowe."

11 A KGB statement, I'm instructed,
12 is one that can be cross-examined on.

13 At page 4,304 in the middle of the
14 page, line 15:

15 "Question: Can you go to
16 your note for August 18th, at
17 15:30?

18 "Answer: Yes, sir.

19 "Question: It says:
20 'Contacted by Bowmaster,
21 discuss Barbados
22 investigation.'"

23 Down to line 26:

24 "Question: Now, 19:30 hours:
25 'Detective Inspector

1 Bowmaster advised that motion
2 commenced this date was put
3 over until September 8, 1998.

4 Request that I tentatively
5 set travel plans for myself
6 and Detective Staff-Sergeant
7 Bahm for later that week',
8 right?

9 "Answer: Yes.

10 "Question: 'Make
11 notification through External
12 Affairs, set plans for
13 airfares since it would be
14 cheaper to book in advance,
15 check re insurance for
16 cancellation re possibility
17 of stay in proceedings that
18 would make trip
19 unnecessary.' "

20 "Answer: Yes."

21 At line 15, and this is the August
22 18th date:

23 "Answer: I came here to meet
24 with Detective Inspector
25 Bowmaster and the Crown to

1 have a meeting re travelling
2 to Barbados and what was to
3 be done there.

4 "Question: So you're saying
5 he knew when he was at the
6 meeting before he got on the
7 witness stand?

8 "Answer: That's correct.

9 "Question: So he knew when
10 got on the witness stand that
11 he told you to make plans to
12 go to Barbados later that
13 week, but to get cancellation
14 insurance in case there is a
15 stay of proceedings, right?

16 "Answer: Just a minute, sir.
17 Yes.

18 "Question: You agree with
19 that?"

20 And the witness agrees with that.

21 And on page 4,306 at line 9:

22 "Question: Before he got on
23 the witness stand on the
24 afternoon of August 18th,
25 right?

1 "Answer: Yes."

2 And Mr. Murphy puts to the witness
3 at the bottom of page 4,306:

4 "Question: He told the
5 court, sir, that no decision
6 had been made with respect to
7 an issue that had arisen
8 before this court on the
9 issue of MacCharles'
10 allegations in Project Toy,
11 and that we would have to
12 await the conclusion of a
13 report by Inspector Grasman
14 and that, for that reason,
15 the matter was adjourned --
16 this case was adjourned until
17 September 8th. Did he ever
18 make you aware that he came
19 into court and said that?

20 "Answer: I was not aware of
21 that, sir."

22 At the bottom of the page, the
23 question at line 26:

24 "Question: Did he say he
25 thought the proceedings were

1 going to be stayed?
2 "Answer: He said there was a
3 motion before the court and,
4 based on the motion before
5 the court and the uncertainty
6 of what's going to happen,
7 'don't make any concrete
8 plans'. In other words,
9 tentatively set plans but
10 make the plans so they could
11 be changed. That's basically
12 the information I got, sir."

13 Then at on October 22nd, 1998,
14 page 4,442, the witness is asked whether he spoke
15 to Inspector Bowmaster, and he says at the top of
16 the page that:

17 "Answer: We spoke about
18 everything except what to do
19 with the case."

20 At the bottom of the page:

21 "Question: Did you talk
22 about your planned trip to
23 Barbados?

24 "Answer: We did not discuss
25 that.

1 "Question: Are you still in
2 physical possession of the
3 tickets for that trip?

4 "Answer: Yes, I am.

5 "Question: Have you set new
6 departure dates?

7 "Answer: The tickets were
8 non-refundable,
9 non-transferrable; they're
10 dead.

11 "Question: The tickets are
12 dead?

13 "Answer: Yes.

14 "Question: And are you
15 planning to return to
16 Barbados any time real soon?

17 "Answer: I'm not planning to
18 do so. The decision would be
19 the Crown's."

20 At the middle of the page:

21 "Question: Just to be clear,
22 are you saying that to your
23 awareness today, that
24 Detective Inspector Bowmaster
25 or some other police officers

1 have made definite plans to
2 renew their plans to go to
3 the Barbados?

4 "Answer: As of right now?

5 "Question: Yes.

6 "Answer: The plans have not
7 been renewed."

8 And then he says there would be an
9 intention eventually.

10 In the middle of page 4,444, he is
11 asked about Gillian Lowe, and his answer at line 13
12 is:

13 "Answer: Well, my knowledge,
14 sir, is that several times
15 when trial dates have been
16 set, I have left to come to
17 meetings with the Crown. At
18 those meetings there was
19 something else going on
20 before the courts that we
21 couldn't make definite plans
22 and, up until now, although
23 we had tickets to go to
24 Barbados, we were unable to
25 meet with the Crown for him

1 to tell us what he wanted
2 from Barbados. So my most
3 correct answer and truthful
4 answer to you is that when we
5 meet with the Crown, he will
6 tell us which witnesses he
7 wants us to prepare."

8 Then he is asked on page 4,445 at
9 the top:

10 "Question: Why was Mr.
11 Bowmaster in court today; do
12 you know?

13 "Answer: I have no idea,
14 sir.

15 "Question: So he didn't talk
16 to you today about going to
17 Barbados again?

18 "Answer: No, we did not,
19 sir."

20 Page 4,446, line 12:

21 "Question: Have you spoken
22 to any OPP officers with
23 respect to this investigation
24 yesterday or on the day
25 before?

1 "Answer: Yesterday.

2 "Question: Bowmaster
3 included?

4 "Answer: Yes, Inspector
5 Bowmaster showed up here
6 yesterday.

7 "Question: Why?

8 "Answer: I don't know.

9 "Question: What did you
10 speak about?

11 "Answer: Greetings, 'How are
12 you doing? How is it going?'
13 And that was about it.

14 "Question: Nothing about
15 going to Barbados?

16 "Answer: No, we did not
17 discuss Barbados."

18 That's evidence on the Barbados
19 issue that was the subject matter of the finding,
20 as I understand it.

21 I come to Inspector Scobie, the
22 tab dealing with Detective Sergeant Linroy Scobie.

23 The finding is that:

24 "There was false and
25 misleading testimony given to

1 this court, in which he
2 positively --"

3 This is 173 at the bottom of the
4 excerpt:

5 "-- positively and repeatedly
6 testified with respect to his
7 initial non-disclosure of 60
8 pages of his duty notes --
9 that they contained nothing
10 of an 'investigative nature'
11 about the applicant's case,
12 knowing that statement to be
13 untruthful and misleading to
14 the Court is a breach of the
15 applicant's Charter rights."

16 174:

17 "The false and misleading
18 evidence given by Detective
19 Staff Sergeant Scobie about
20 his reason for failing to
21 disclose his notes for
22 October 17th, 1997 of his
23 investigation on that date on
24 the instructions of Crown
25 Flanagan of a

1 contact them personally by
2 telephone, by fax, both to
3 their home address and their
4 last work location, with the
5 following order: They are to
6 comply with your request for
7 production of notes to you no
8 later than Wednesday, that's
9 the 21st. The notes are to
10 be delivered to the Crown for
11 production to defence counsel
12 no later than Thursday the
13 22nd."

14 Then over to page 3,981 at about
15 line 8:

16 "The Court: And would you
17 advise each of these officers
18 that if they have not
19 complied with the production
20 of these notes as ordered,
21 then they shall attend at
22 this court at 10 o'clock,
23 Friday the 23rd, when it is
24 my intention to cite them for
25 contempt of my order."

1 On October 20th, Scobie gives
2 evidence, cross-examined by Mr. Murphy, a 23-year
3 officer based in Orillia. He is being
4 cross-examined and he tells at page 4,208 of his
5 dealings with Detective Constable Walker, and he
6 says at the bottom of the page:

7 "Answer: I did advise her I
8 had no investigative notes
9 relating to the investigation
10 during the time period."

11 There was a specific time period
12 that was being requested in respect of these notes,
13 which was September 28th, 1997 to the present;
14 obviously, not all the notes from the original
15 investigation. September 28th, 1997 was
16 approximately the time of the start of the trial.
17 Scobie says:

18 "Answer: I advised her I had
19 no investigative notes."

20 Then Mr. Murphy shows him a letter
21 that says at the top of 4,209:

22 "I enclose the notes of
23 Detective Staff-Sergeant Roy
24 Scobie. He provided these
25 notes to us today, signed by

1 Cavanagh."

2 And Mr. Murphy refers to "a swath
3 of legal length pages" at about line 20, "45 or 50
4 pages -- pages 1 to 60." Scobie agrees there is
5 60 pages of notes in that binder.

6 At the top of 4,210 Scobie
7 explains:

8 "Answer: At the time the
9 notes were requested from me,
10 I was not involved in an
11 investigation. I had notes
12 that were notes of dates and
13 times of what I considered
14 administrative and not
15 investigative. I was told
16 yesterday you wanted anything
17 I had in notes that pertained
18 to this matter and I supplied
19 them.

20 "Question: Sir, would you
21 agree that if one goes
22 through the notes you
23 provided that these notes
24 indeed refer to not just
25 administrative, but to a

1 number of substantial areas
2 of the investigation that you
3 have been involved with?

4 "Answer: Notes referred to
5 the investigation I was
6 involved in?

7 "Question: Yes.

8 "Answer: Yes, notes
9 involving this investigation.
10 Not notes pertaining to
11 investigation that was done
12 by me during that period.

13 "Question: What's the
14 distinction you're making,
15 sir?

16 "Answer: The distinction,
17 sir, is that I was doing no
18 investigation during that
19 period. Notes applying to
20 this investigation, yes, but
21 I was not assigned as an
22 investigator during the
23 period."

24 Then he is asked this question
25 that relates to an earlier allegation, in

1 particular with respect to Bowmaster:

2 "Question: And, sir, were
3 you not sitting outside of
4 this court on the 8th of
5 October, waiting with
6 airplane tickets for you and
7 Detective Inspector Bowmaster
8 to travel on the 7th of
9 October with airline tickets
10 for the following day, the
11 8th, to travel to Barbados to
12 renew your investigation that
13 you commenced three years
14 ago?

15 "Answer: That's correct.

16 "Question: Now, if you can
17 explain to His Honour how it
18 is that that would disqualify
19 the possibility of you having
20 notes of any type -- and
21 you're indicating that to
22 this court in your previous
23 answers -- what possible
24 sense does that make?

25 "Answer: Sir, there is no

1 question I did not supply the
2 notes to you. As you just
3 mentioned, 'renew my
4 investigation', okay. I did
5 the investigation in Barbados
6 commencing on August of '95
7 as you said. I came back to
8 Canada in October of '95, I
9 continued investigative steps
10 at that point. I was
11 reassigned to different -- I
12 went back to my present
13 assignment, and I've been
14 reassigned to different
15 assignments at that point."

16 Then he is cross-examined on what
17 he was doing on October 17th, 1997 at the bottom of
18 page 4,211, and there is a cross-examination about
19 a visit to company called Canadian Viewpoint
20 Incorporated. That is referred to on page 4,212,
21 and his notes show at the top of page 4,213:

22 "Received a call from George
23 Ball, Mr. Flanagan advises
24 that I should not do the
25 interview re complaint by

1 Murphy to the Solicitor
2 General. Advise him of the
3 fact that interview was
4 complete, results of
5 interview and persons
6 requesting same.'
7 "Question: Sorry. The last
8 thing that you read?
9 "Answer: 'Results of
10 interview and person
11 requesting same.'
12 "Question: We've heard Mr.
13 Flanagan's name, we've heard
14 the name of the survey
15 company. You travelled to
16 Toronto on that date; what
17 case was this done in respect
18 to?
19 "Answer: On this matter."
20 Then Mr. Murphy refers to various
21 complaints that he made to the Ontario government,
22 and over to page 4,217, about line 12:
23 "Question: Detective
24 Sergeant Scobie, I'm
25 approaching to show you a

1 copy of your notes, it's
2 opened at the page that
3 includes the entry for
4 Wednesday, October 5th, 1997,
5 and if you will just peruse
6 that, will you agree that the
7 page ends with an entry --"

8 Et cetera. And he says at the
9 bottom of the page:

10 "Question: You didn't
11 disclose your notes for
12 October 17th, the ones you
13 read before, will you agree
14 with me?

15 "Answer: Until yesterday, I
16 agree.

17 "Question: Sir, I'm telling
18 you that the 17th is
19 conspicuously missing from
20 this package. It's not in
21 here.

22 "Answer: From that package?

23 "Question: Yes.

24 "Answer: I'm sorry, I was
25 not aware of that.

1 "Question: Are you saying it
2 is an accident?

3 "Answer: Yes, I am.

4 "Question: Are you saying
5 there's another copy --
6 there's another disclosure
7 package?

8 "Answer: I'm saying that if
9 you haven't got them, it was
10 an oversight or an accident.

11 I copied all my notes that I
12 had or believed I had
13 yesterday. If it was not
14 disclosed, it's an accident."

15 This is at line 17:

16 "Question: Can you indicate,
17 sir, the time in your notes,
18 the ones you didn't disclose
19 October 17? What time did
20 you get the call from Mr.
21 Flanagan essentially calling
22 you off from what you were
23 doing?

24 "Answer: At 14:15 hours I
25 received a call from

1 Detective Constable Ball.

2 "Question: And he indicated
3 in that phone call that
4 Flanagan said to stop what
5 you were doing?

6 "Answer: Mr. Flanagan
7 advised that I should not do
8 the interview, yes. He asked
9 me to stop.

10 "Question: And, sir, you
11 were aware, when you went
12 there, that it was a polling
13 firm that had been
14 commissioned by the defence
15 counsel in this case?"

16 And he says he believes that there
17 was a copy of a report filed through a Brockville
18 police officer:

19 "And I was asked to go and
20 interview them and see what
21 -- what I'd get from them."

22 Over to page 4,219 at line 12,
23 line 10:

24 "Question: And what,
25 specifically, did he want you

1 to do?"

2 That's Flanagan.

3 "Answer: He wanted me to
4 follow up the report and see
5 what the polling firm was
6 about, who they were, et
7 cetera."

8 Then at line 18:

9 "Question: Okay. Now, sir,
10 with respect to these notes,
11 I want to come back to the
12 key question I asked you at
13 the beginning. Are you
14 saying that when you told
15 Constable Walker you had no
16 notes, you were telling the
17 truth to her?

18 "Answer: Yes.

19 "Question: And yet you've
20 produced 60 pages of notes?
21 And just going back to the
22 very first page, you'd agree
23 with me, before I go back to
24 the first page of your
25 photocopies, that that would

1 constitute an investigation
2 during the relevant period
3 for which notes were sought,
4 the incident on October 17th,
5 right? It was an
6 investigation pertaining to
7 Elliott?
8 "Question: Mr. Murphy, it
9 was an investigation
10 pertaining to Elliott. It
11 was notes that I had, and in
12 my understanding of the
13 notes, it was administrative
14 as related to this case. I
15 can stand corrected, in that
16 I had notes mentioned in this
17 matter. I was not
18 investigating the matter at
19 the time, except for the
20 matter that you just
21 discovered and I'd forgotten
22 about. I was not an
23 investigator assigned the
24 case at the time. There were
25 times that I had meetings --"

1 "Question: Yeah.

2 "Answer: No, I don't stand
3 corrected, but they're notes
4 pertaining to the
5 investigation."

6 At page 4,245 the witness says:

7 "Answer: Sir, I did not
8 agree with you that I
9 consider them investigative
10 notes.

11 "Question: You don't
12 consider what I've just
13 reviewed to be investigative
14 notes?

15 "Answer: No, sir.

16 "Question: Or notes
17 pertaining to this case?
18 Calling up witnesses in
19 Barbados, inquiring about the
20 status of witnesses in
21 Barbados, making inquiries to
22 Superintendent Greaves of the
23 Royal Barbados police; that
24 doesn't constitute
25 investigation pertaining to

1 this case?

2 "Answer: Not in my opinion,
3 no, sir.

4 "Question: Does it pertain
5 to this case?

6 "Answer: Yes, it does
7 pertain to this case."

8 And then over to page 4,246:

9 "Question: Then what sense
10 do you make of all these
11 entries that you have in this
12 notebook that say you're
13 involved in contacting
14 witnesses, in following up on
15 witnesses, and you're
16 planning an investigative
17 trip back to Barbados, right?

18 "Answer: I don't understand
19 the question fully.

20 "Question: Doesn't that
21 pertain to that case? Isn't
22 that part of the case that
23 you were asked to provide
24 notes for?

25 "Answer: Yes, it's part of

1 the case that I was asked to
2 provide notes for.

3 "Question: And you denied
4 the existence of any notes?

5 "Answer: I deny the
6 existence of any notes
7 relating to my
8 investigation."

9 Then he goes on to say at the
10 bottom of the page:

11 "Answer: Yes, sir, I do have
12 notes pertaining to this
13 case."

14 And that he did not deny the
15 existence of the notes. Then the cross-examination
16 of Scobie continues on October 21st. Question at
17 about line 12:

18 "Question: I covered the
19 request for assistance. In
20 the more recent sphere, you
21 would agree with me that
22 every page of your notes,
23 carrying through the period
24 of September 28th through
25 August of this year, is

1 replete with references to
2 this case and your
3 involvement in contacting
4 witnesses and putting
5 witnesses like Tammy Boles--"
6 She is a Barbados witness:
7 "-- under surveillance and
8 further investigative
9 inquiries and telephone calls
10 and conferences; you'd agree
11 those references are replete
12 for the balance of your
13 notes?
14 "Question: Are your notes
15 filled -- the 60 pages that
16 you provided us are filled
17 with references to the
18 Elliott case, right?
19 "Answer: It's also filled
20 with references to matters
21 that are not related to this
22 case in the 60 pages. It is
23 not 60 pages of notes that is
24 totally involved in this
25 case."

1 Mr. Cavanagh cross-examines at
2 page 4,489 about the polling firm and the
3 administrative notes issue. He says at line 24:

4 "Question: Thank you. And
5 when your attention was drawn
6 to the October 17th note, you
7 indicated you stood
8 corrected, that would be, I
9 suppose, what you would call
10 an investigative note, is
11 that fair?

12 "Answer: Yes, that's fair.

13 "Question: All right.
14 However on October 17th, you
15 told us you were interrupted
16 at the polling firm before
17 you completed the interview
18 you were carrying out there,
19 is that correct?

20 "Answer: I had completed the
21 interview I was doing at that
22 location. I was going to
23 continue on, but I was
24 interrupted.

25 "Question: All right. Did

1 you collect any actual
2 evidence about the activities
3 of the firm in relation to
4 the Elliott matter?

5 "Answer: No, I did not.

6 "Question: Thank you. And
7 can I ask you to summarize
8 the type of activity that is
9 recorded in those 60 pages,
10 which you have described as
11 administrative activity?
12 What is the type of
13 activity?"

14 And he says at line 18:

15 "Answer: I was removed from
16 this matter as an
17 investigator. As the trial
18 went on, each time a
19 tentative trial date was set,
20 I would be contacted by
21 someone, either from the OPP
22 or on behalf of the Crown,
23 saying, 'Okay, a tentative
24 trial date has been set up
25 for so and so date, get ready

1 to prepare the witnesses --'"

2 Et cetera. Over to page 4,491, at
3 line 12 he is asked this question:

4 "Question: Do the notes
5 refer to any collection of
6 evidence, in the sense of
7 obtaining statements over
8 this time period?

9 "Answer: None of them do.

10 "Question: Or in the sense
11 of seizing exhibits over this
12 time period?

13 "Answer: No, sir, none of
14 them do.

15 "Question: Or conducting any
16 search over the period of
17 this time period of these
18 notes, September 28th to
19 present?

20 "Answer: No, sir, they
21 don't."

22 Scobie is cross-examined again on
23 October 23rd. It is still on October 23rd, and
24 page 4,507, we are still dealing with the October
25 17th, 1997 event. Mr. Murphy suggests it is a

1 deliberate falsehood, the evidence that he gave to
2 Mr. Cavanagh.

3 Then there is a cross-examination
4 on page 4,512 and following about the Barbados
5 investigation, and at page 4,513 his note for
6 August 12th, 1998:

7 "It says: 'Meeting with
8 Crown attorney, Desmond
9 McGarry, re Larry Foster
10 homicide and Barbados
11 investigation. "

12 Over to the next page, 4,514,
13 continuing with the notes, the witness says at line
14 8:

15 "Answer: 'Find out if
16 witnesses were tampered by
17 anyone.'

18 "Question: Is that not an
19 investigative activity to
20 find that out, sir?

21 "Answer: That is an
22 investigative activity.

23 "Question: And, sir, does
24 that not involve interviewing
25 of witnesses?

1 "Answer: Sir, 'to do' to me
2 indicates things to be done
3 in the future."

4 Then page 4,515 he is referring to
5 the travel plans with Bowmaster that we have
6 already heard about. Then over to page 4,520 at
7 line 8, this is again by Mr. Murphy:

8 "Question: How you do you
9 explain Mr. Cavanagh -- the
10 answer you gave to Mr.
11 Cavanagh this morning before
12 lunch when he asked you about
13 your 60 pages of notes: 'Do
14 the notes refer to any
15 collection of evidence in the
16 sense of obtaining statements
17 over this time period?' Your
18 answer: 'None of them do.'

19 "Answer: That is my answer
20 now too.

21 "Question: How can you
22 explain that, given what
23 you've just confirmed about
24 what your notes refer to and
25 what was discussed at the

1 meetings that your notes
2 refer to, the notes which you
3 originally denied the
4 existence of?

5 "Answer: Well, with -- this
6 time period, as you just read
7 the question, sir, refers to
8 the time period September to
9 even including now, and those
10 statements are not taken,
11 they are things to do. So,
12 yes, over that time period,
13 that is what my answer is,
14 sir."

15 Then the witness is questioned in
16 the middle of the page 4,521, line 13:

17 "Question: Sir, I have read
18 to you the context of the
19 answer and it was by way of
20 reaffirming what you
21 attempted to tell this court
22 yesterday with respect to the
23 explanation of your denial of
24 having any notes, and that
25 was that you only thought you

1 were being asked for
2 investigative notes?

3 "Answer: That's correct.

4 "Question: And when Mr.
5 Cavanagh produced the missing
6 pages for October 17th of
7 last year, you indicated this
8 morning that's the part you
9 stood corrected on with
10 respect to how you
11 interpreted the original
12 request that you denied,
13 right?

14 "Answer: Yes, that's right."

15 At the bottom of the page:

16 "Question: I have gone
17 through these notes with you,
18 sir, on this point, the
19 distinction between
20 investigative versus
21 administrative, because we've
22 read through it all a second
23 time today, that these are
24 references in August of this
25 year -- these are references

1 to the investigation in
2 Barbados, not to
3 administration. So you
4 understand well, I suggest to
5 you, the context of these
6 questions and what we're
7 really trying to get at,
8 don't you?

9 "Answer: I understand the
10 questions. I answered and I
11 understand them as I've
12 explained to you and nothing
13 will change that."

14 At about line 17, Mr. Murphy says
15 to the witness:

16 "Question: I think you've
17 committed perjury. Would you
18 not agree with that obvious
19 inference?

20 Mr. Cavanagh objects and Mr.
21 Cavanagh says:

22 "Mr. Cavanagh: Clearly
23 improper to suggest that.
24 It's argumentative with the
25 witness. The witness has

1 given his explanation. My
2 friend is simply being
3 insulting with the witness.
4 I trust the court will not
5 permit that to continue.

6 "The Court: Mr. Murphy, the
7 question has been asked three
8 times."

9 Then we go to the bottom of page
10 4523. The witness is asked this question at line
11 28.

12 "Question: So how can you
13 hang any great weight on this
14 distinction that you didn't
15 -- that there's no specific
16 reference to statements in
17 these August '98 notebook
18 entries?

19 "Answer: Because, as -- if
20 you remember from my notes,
21 on October 17th, I went to
22 the location and I conducted
23 interviews. Even when I was
24 told to call it off, I told
25 them the interviews were

1 already completed. The notes
2 that you're referring to
3 here, sir, is a to do list,
4 they were things to do that
5 were not done. That's how I
6 make the distinction."

7 Cross-examination by Mr. Cavanagh
8 at the bottom of page 4,524:

9 "Question: Just to make it
10 clear, you have already
11 indicated what your
12 understanding of my question
13 was, officer, and maybe just
14 to make it plainer: Did you,
15 in fact, reduce to writing
16 any witness statements over
17 this time period from
18 September 28th 1997 to the
19 present?

20 "Answer: No, sir, I did
21 not."

22 That concludes the evidence with
23 respect to the finding with respect to Scobie. I
24 am going to move on to the Laderoute matter, which
25 loomed large in this trial.

1 Just to refresh the memory of the
2 panel, Officer Laderoute was the officer of the
3 Kempville police who stopped Julia Elliott in a
4 RIDE program on the evening of August 18th, 1995,
5 and the issue was whether he stopped Julia Elliott
6 or whether he made notes in his notebook, and
7 whether the reference to the licence plate of the
8 car was added at a later time at the suggestion of
9 Officer MacCharles, as opposed to being put in his
10 book on the evening of August 18th, 1995 at the
11 time of the other information concerning the
12 Barbados passport and the address of Ms. Elliott.

13 We have if the panel wishes to
14 have it, we have copies of the notebooks of the
15 officer if the panel ever wishes to see that.

16 The relevant Court of Appeal
17 findings are extracted past the -- perhaps I will
18 refer to the reasons, the excerpt from the reasons
19 of Justice Cosgrove on March 16, 1998 with respect
20 to the findings, and he refers to the facts.

21 And the finding is at page 16.
22 After referring to what is in the notes with
23 respect to the Barbados passport, misspelled in his
24 notes and apparently in the passport "Barbasos",
25 Justice Cosgrove says:

1 "I have concluded that
2 Officer Laderoute somehow
3 obtained the information with
4 respect to the licence plate
5 and inserted it in his
6 notebook and the statements
7 on the night of August 24th."

8 MR. NELLIGAN: I am sorry. Did
9 you say that was on page 16?

10 MR. CHERNIAK: Yes, it is page 16
11 of the reasons of Justice Cosgrove on March 16,
12 1998. If you look in this tab under Constable
13 Laderoute, it is the second of the pages.

14 MR. NELLIGAN: Yes.

15 MR. CHERNIAK: This is all part of
16 Justice Cosgrove's decision on the first stay
17 application. The findings of the Court of Appeal
18 on this issue are extracted, and the relevant
19 findings are at page 18, starting at paragraph 59
20 of the Court of Appeal reasons, and the Court of
21 Appeal refers to the incident and provides a useful
22 summary of the evidence and the answer that was the
23 basis of the finding of the fabrication by Justice
24 Cosgrove.

25 At paragraph 64 of the Court of

1 Appeal reasons, the court refers to the ultimate
2 conclusion of Justice Cosgrove that:

3 "Constable Laderoute did not
4 record the licence plate on
5 the evening but rather
6 somehow subsequently obtained
7 that information."

8 The Court of Appeal continues at
9 page 66. The Court of Appeal notes that there was
10 never any question that Constable Laderoute did in
11 fact stop Julia Elliott on August 18th, 1995.

12 HON. MACDONALD: Page 66?

13 MR. CHERNIAK: I am sorry,
14 paragraph 66 of the Court of Appeal reasons.
15 Although I don't think it is in this brief, there
16 are other paragraphs of the Court of Appeal reasons
17 that have some relevance. They are at paragraphs
18 145 and 146 of the Court of Appeal reasons.

19 Paragraph 145 says that the
20 evidence -- perhaps I will read it:

21 "The trial judge made
22 numerous findings that police
23 officers had committed
24 perjury or had given false or
25 misleading evidence in the

1 course of testifying at the
2 trial and on the various voir
3 dires, and therefore breached
4 the respondent's Charter
5 rights. The evidence
6 supports none of these
7 findings. A fair reading of
8 the record shows that the
9 officers did not give
10 deliberately false evidence.

11 At worst, on some occasions,
12 sometimes due to the
13 complexity of defence
14 counsel's questions, officers
15 may have given mistaken
16 evidence. None of those
17 occasions could have amounted
18 to a breach of the
19 respondent's Charter rights.

20 Paragraph 146:

21 "One example will suffice to
22 show the trial judge's
23 erroneous approach to these
24 issues. The trial judge made
25 findings against Constable

1 Laderoute based on the August
2 18th, 1995 RIDE stop of the
3 respondent's when she was
4 driving the deceased's motor
5 vehicle. The RCMP as part of
6 the MacCharles investigation
7 looked into the defence
8 allegation that Constable
9 Laderoute has altered his
10 notebook. They concluded
11 that he did not. A fair
12 review of the evidence
13 supports that conclusion.
14 What is of particular concern
15 with the trial judge's
16 approach to this issue is
17 that there was never any
18 dispute that Constable
19 Laderoute did stop the
20 respondent, and at a time
21 when she was driving the
22 deceased's vehicle. Any
23 controversy about the
24 notebook could not have
25 impaired the respondent's

1 right to a fair trial."

2 This evidence is going to review
3 Constable Laderoute's evidence at various stages of
4 the issue and the evidence of certain other
5 witnesses around the time.

6 Again, the particulars are put in
7 here with respect to the attitude that the judge
8 adopted towards the Crown and the police, and you
9 will see, when I get to it in the extracts of
10 evidence, that I am going to read that during the
11 course of the cross-examination of Constable
12 Laderoute and before there was argument that led to
13 the March 16th, 1998 finding, the judge in effect
14 made a finding that he stated on the record that he
15 disbelieved Constable Laderoute.

16 I will start with the February 12,
17 1998 evidence and the cross-examination by Mr.
18 Murphy of Constable Laderoute, and at page 6,225:

19 "Question: First of all,
20 sir, if you turn to the
21 August 24th notes that you
22 have in your notebook, the
23 first entry?

24 "Answer: Yes, sir."

25 And he reviews that entry. He is

1 asked at the bottom of 6,226 and over to 6,227:

2 "Question: Sir, I think in
3 your evidence yesterday at
4 the very end you said that
5 after your meeting with
6 MacCharles at the detachment,
7 you were told to go and make
8 notes."

9 Perhaps to put this in context, I
10 should remind you that what occurred was that on
11 August the 25th, I believe it was Steven Foster,
12 the victim's son, went to his father's apartment in
13 Kemptville just to check on him, and he found the
14 apartment in disarray and he called the police.

15 And it happened that Constable
16 Laderoute answered the call and visited and met Mr.
17 Foster there. At about the same time, and I may
18 have the sequence not exactly right, but it will
19 appear in the evidence, but at about the same time
20 Constable, I think it was, Ball of the OPP showed
21 up, because they were investigating a murder
22 because, at that time, they had identified by some
23 means the person whose body parts had been found in
24 the river; and, by coincidence, I guess they
25 arrived at the Foster apartment at the same time as

1 Laderoute and Steven Foster, the son, were there.

2 Laderoute who was a member of the
3 Kemptville police at that time also became involved
4 in the OPP investigation that commenced from that
5 time forward. We are at the top of page 6,227.

6 HON. MACDONALD: Can you give me
7 about five seconds? Which officer was it that
8 joined Laderoute by coincidence?

9 MR. CHERNIAK: What happened was
10 Laderoute and another officer had stopped Ms.
11 Elliott at the RIDE program on the evening about 10
12 o'clock p.m. on August 18. With respect to
13 Laderoute, nothing else happens until I think it
14 was August 25th, the 24th, that he is called.

15 He just happens to be the officer
16 called to the Foster apartment by Steven Foster,
17 who had come there to check on his father, and
18 didn't like what he found in the apartment. His
19 father obviously wasn't there. His father was
20 dead, but he didn't know that.

21 So Laderoute and Steven Foster are
22 at that apartment and an OPP officer, I believe it
23 was Ball -- I think it was Officer Ball who was
24 from that time on the lead investigator -- shows up
25 at the apartment and sees Laderoute and Foster

1 there, and that's how Laderoute becomes involved in
2 that investigation.

3 MacCharles is also there. He is
4 the case manager. He's been the case manager. The
5 OPP knew, from the time they found body parts
6 floating in the river, including the head and the
7 arms, they knew they had a murder case, and it took
8 them a while to figure out who the victim was.

9 The portion that I'm reading now
10 is the initial stages of the investigation, and
11 that's how Laderoute, the Kemptville officer,
12 happens to be involved in the OPP investigation
13 that is going on at the OPP detachment in
14 Kemptville.

15 HON. MACDONALD: Thank you.
16 That's all.

17 MR. CHERNIAK: I'm at the top of
18 page 6,227:

19 "Question: Now, what notes
20 -- given that you've just
21 said that you started making
22 notes in the early afternoon,
23 or in the late afternoon when
24 you first received the report
25 from Steven Foster and you

1 are making them
2 contemporaneously as you go
3 along?
4 "Answer: Yes, sir.
5 "Question: What notes are
6 they telling you to go and
7 make at that point?
8 "Answer: They didn't
9 specifically say notes. They
10 just said, 'Make notes'. I
11 was making notes.
12 "Question: You were already
13 making notes?
14 "Answer: Yes, sir.
15 "Question: Were they telling
16 you to make them up?
17 "Answer: No, sir.
18 "Question: Well, if you've
19 already got notes, did you
20 say to them, 'It's okay, I'm
21 already making notes'?
22 "Answer: Well, I was making
23 notes as I was going; it
24 didn't -- he didn't say
25 specifically what notes to

1 make. He just said, 'Make
2 sure your notes are -- are
3 up', or 'Make your notes'.
4 "Question: And this is,
5 correct me if I'm wrong --
6 this is after you've had a
7 discussion with Detective
8 Inspector MacCharles in which
9 you recall having stopped a
10 black woman from the Barbados
11 on August the 18th
12 approximately six days
13 earlier?
14 "Answer: Yes, sir, but
15 that's when I came back
16 after."

17 At the bottom of the page:

18 "Question: And you recall
19 that you had stopped this
20 black female? How did that
21 come up in conversation?"

22 And then he says that it dawned on
23 him. When he went to pick up a rental car when he
24 was home, it dawned on him. This is 6,228. He
25 said:

1 "There was a poster, an
2 advertising poster in Mr.
3 Foster's apartment, and it
4 said 'Barbados', one of those
5 travel posters."

6 And the witness says that is what
7 made it twig in his memory. He repeats that at
8 6,229 about line 24:

9 "Answer: I just remember
10 seeing a poster and it said
11 'Barbados'. It was the word
12 'Barbados'. I couldn't
13 recall what the picture was.
14 That's when I thought
15 Barbados. I stopped somebody
16 from Barbados. I haven't
17 stopped that many people from
18 Barbados."

19 He says, "I never made a
20 connection", and this is page 6,230 at line 10:

21 "Answer: I never made a
22 connection until I was at
23 home changing."

24 Then over to page 6,231, he is
25 asked on the page before whether there was a

1 photograph of Ms. Elliott in the Foster apartment
2 on the afternoon of August 24th, and the witness
3 says at the top of page 6,231 he didn't pay
4 attention to it. And then at line 12:

5 "Question: Sir, Mr. Steven
6 Foster told you his father
7 had a girlfriend from
8 Barbados, correct?

9 "Answer: That is correct.

10 "And that was also that
11 afternoon, late afternoon, at
12 his father's apartment,
13 correct?

14 "Answer: Yes, sir. Several
15 times he mentioned that.

16 "Question: The same --
17 almost at exactly the same
18 juncture you were handed
19 these photographs?

20 "Answer: Yes, sir.

21 "Question: And you're saying
22 you didn't make any
23 connection at that time?"

24 And he repeats he didn't make any
25 connection at that time. Mr. Murphy points out to

1 him at the bottom of page 6,232 that Steven Foster,
2 who has already testified, said that Officer
3 Laderoute made the connection right there and then
4 when he was looking at the photograph of Ms.
5 Elliott in the Foster apartment.

6 Mr. Flanagan says, "I'm not sure
7 that's the evidence", and the cross-examination
8 continues. There is a discussion on page 6,234 as
9 to what it was that Mr. Steven Foster had testified
10 to, and Mr. Flanagan disputes the accuracy of it.
11 Over at 6,235, in the middle line 15:

12 "Question: And what I'm
13 suggesting, sir, is that
14 Steven Foster's sworn
15 testimony to this court is
16 that he recalls you referring
17 to having stopped Ms. Elliott
18 or this black person from
19 Barbados, this black woman,
20 either in the apartment when
21 you were with him that
22 afternoon before going to the
23 detachment or going home, but
24 if not at that time, then
25 shortly after when you

1 initially left the apartment.
2 "Answer: I could very well,
3 sir, have mentioned it to him
4 at that time, something about
5 Barbados, yes, sir."

6 Then over to 6,237 is -- referred
7 I think to his evidence at the preliminary inquiry,
8 and let's see what he said at the preliminary
9 inquiry on this issue at the bottom of 6,236 and
10 the top of 6,237. His answer was:

11 "Your Answer: 'I mean, after
12 I had gone through the
13 apartment and seen different
14 -- When I was in Mr.
15 Foster's apartment seeing
16 different things; and one,
17 there was a big picture on
18 the wall that said
19 'Barbados', it kind of rang a
20 bell. Not at that time, but
21 when I got home.'

22 "Answer: And, sir, yes, sir,
23 that's correct.

24 "Question: Did you not just
25 say when I suggested to you

1 that Mr. Foster's -- Steven
2 Foster's evidence was that he
3 was either in the apartment
4 or shortly after in the
5 cruiser --
6 "Answer: No. Now that you
7 mention it, sir, I believe I
8 mentioned something to him
9 about Barbados. I said
10 Barbados at the apartment,
11 yes."

12 The cross-examination on this
13 issue goes on at page 6,239, and he gets to his own
14 notebook at page 6,239 and I will read starting at
15 line 11 on page 6,239.

16 Probably this is a good time to
17 have the lunch break for one hour, sir.

18 THE CHAIR: Yes, okay. We will
19 take our one-hour break.

20 --- Luncheon recess at 12:31 p.m.

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

22 THE CHAIR: Mr. Cherniak?

23 MR. CHERNIAK: Yes, thank you. I
24 wanted to take you to page 6239, at Line 15, where
25 the question is asked:

1 "Q. Well, what are you
2 saying, Sir?

3 A. I'm saying, Sir, that
4 when I was at home, mmm, it
5 kind of -- I thought, 'Geez,
6 I did stop somebody from
7 Barbados, and I made a note
8 of it.' And I went back and
9 checked my notebook and yes,
10 I -- I had just made a note
11 of it --

12 Q. When did you check your
13 notebook?

14 A. When I was at home there
15 that -- changing.

16 Q. You checked your note at
17 that time?

18 A. Yes, Sir. I knew I had
19 made a note of it at the back
20 of my notebook, and it gave
21 the date and time and -- and
22 who I stopped. I didn't even
23 know if there was any
24 connection with this person I
25 stopped.

1 Q. Well, let's deal with
2 things one at a time, Sir.
3 I'm asking you whether in
4 fact you didn't recall -- you
5 didn't make the connection
6 between the picture you were
7 looking at, identified to you
8 as being -- by Mr. Steven
9 Foster as being his father's
10 girlfriend from Barbados --
11 in the apartment that
12 afternoon with Mr. Foster,
13 that identification is made
14 by him to you. Right?
15 A. Yes, Sir, that's
16 correct."

17 Then there is a further
18 cross-examination on when he made the link, and on
19 page 6241, at Line 7:

20 "Q. You didn't make the
21 connection, you said under
22 oath at the preliminary
23 inquiry in 1996 -- you didn't
24 make that connection until
25 you went home, having been

1 once at the Detachment
2 already. And now you're
3 saying it may well have been
4 that Mr. Foster's
5 recollection is correct; that
6 you mentioned it to him that
7 afternoon before you ever
8 went with him to the
9 Detachment and before you
10 went home.

11 A. Sir, mmm, I didn't get
12 into details -- I believe
13 that when I was speaking with
14 him I just kept saying,
15 "Geez, I stopped somebody
16 from Barbados", I -- I never
17 said anything further, or
18 made a connection, you could
19 say, to the point that -- I
20 never put a connection from
21 Barbados as a time that I had
22 actually stopped somebody. I
23 just kept saying, "Barbados,
24 Barbados". And when I was at
25 home, I thought, `Geez, I had

1 stopped somebody from
2 Barbados'. That's how I kind
3 of, you know --

4 Q. Let's just look at your
5 notebook again, if I might.
6 Your August 24th entry starts
7 on page 67. Correct?

8 A. Yeah. Yes, Sir."

9 Moving to page 6242, Line 12:

10 "Q. So, you keep your notes
11 in chronological order from
12 the starting time of the 27th
13 of August, '94, the starting
14 date, through to October 3rd
15 of '95. Correct?

16 A. Yes, Sir.

17 Q. Can you explain to me,
18 then, why the note for --
19 "August 18th of 1995; 10:05
20 P.M.; Barbados; DOB, Date of
21 Birth, 60-06-17; Julia
22 Elliott; New Orleans; Apt.
23 430, Donald Street; License
24 Plate 301-HOM" -- that's the
25 note you claim you made

1 A. Yes, Sir.

2 Q. And your notes for August
3 18th, which you claim under
4 oath at the preliminary, and
5 today you've re-affirmed it,
6 and yesterday too -- the note
7 for August 18th with respect
8 to the RIDE stop appears out
9 of sequence at page 100.
10 Would you agree with that?

11 A. Yes, Sir.

12 Q. How do you explain that?

13 A. I just made it to keep
14 them in order, Sir, mmm --
15 At the back you will notice,
16 I've had several other notes
17 that I've made, mmm --
18 basically to keep them in
19 sequence until I get more
20 information.

21 Q. Sir, would you agree with
22 me that one of the important
23 things about keeping notes is
24 that they are accurate; and
25 that because, as you've

1 admitted, they are used to
2 give evidence sometimes years
3 later, there's a proper
4 procedure for taking notes in
5 chronological sequence.
6 Correct?
7 A. That's correct, Sir, yes.
8 Q. How do we have any
9 indication of the -- Given
10 that that's out of sequence
11 -- it's at page 100 of your
12 notebook and it's 24 pages in
13 your notes after your entry
14 for the date that follows it,
15 for August 24th -- how do you
16 explain that?
17 A. I just did, Sir. Like I
18 say, I was just making a note
19 and once I got the required
20 information, I would take it
21 off. If she didn't return, I
22 had enough information on
23 this note, mmm, to try and
24 locate her: an address; her--
25 Q. Sir, before we get into

1 the information that you have
2 for August 18th -- that note
3 is out of sequence. Agreed?
4 A. Yes, Sir. It's out --
5 Yes, Sir.
6 Q. And, Sir, I suggest to
7 you that it leaves open the
8 very strong inference, does
9 it not, that you made the
10 note out of sequence
11 chronologically, too. Do you
12 understand my question?
13 A. Mmm -- August the 18th
14 note, Sir?
15 Q. You said under oath that
16 you made that note at the
17 time of the RIDE stop.
18 Right?
19 A. Yes, Sir.
20 Q. On August 18th.
21 A. Yes.
22 Q. As it was happening.
23 A. Yes, Sir.
24 Q. That's true?
25 A. Yes, Sir!

1 Q. Yet, the note that you're
2 referring to as having been
3 made at the time appears on
4 page 100.

5 A. Yes, Sir."

6 At Line 27:

7 "Q. Your book is not in
8 order, I suggest to you, Sir.

9 It's all over the place.

10 A. Well, like I say, all I
11 can say to you, Sir, is I
12 just made a note of it. I
13 expected her to return, and
14 it would have been written,
15 the rest of the information,
16 on the ticket.

17 Q. Sir, you gave evidence
18 yesterday in-chief; questions
19 for the Crown Attorney --
20 correct me if I'm wrong --
21 that you told her to return,
22 with respect to the
23 violations that you had noted
24 on the seat-belt and the lack
25 of ownership and proof of --

1 or proof of ownership and
2 driver's license, etc., which
3 I will get to in a second --
4 you indicated under oath
5 yesterday that you told her
6 to come back on the 21st of
7 August.

8 A. Yes, Sir."

9 There is then a discussion about
10 which day she was asked to come back.

11 Page 6247, Line 20:

12 "Q. In other words, do you
13 agree with me that your
14 evidence is contradictory?
15 The first time at the
16 preliminary inquiry you say
17 you told her to come back
18 Saturday; yesterday you
19 changed that to saying that
20 you told her to come back on
21 Monday -- on the Monday, the
22 21st. Right?

23 A. Yes, Sir.

24 Q. How do you explain that
25 contradiction?

1 A. I can't, Sir.

2 Q. How do you even know what
3 it was you stopped her for?

4 A. Oh, there's no doubt
5 there, Sir. I stopped her in
6 a RIDE program; she didn't
7 have her seat-belt on -- no
8 doubt whatsoever."

9 It goes on at the bottom of the
10 page to talk about how he had changed his mind
11 about telling her when to come back.

12 Over to page 6250, about Line 18:

13 "Q. And my friend made a
14 point of asking you
15 yesterday: "She never came
16 back!". How would she come
17 back if you hadn't given her
18 a ticket? Do you generally
19 issue verbal warnings to
20 people and expect them to be
21 enforced?

22 A. Mmm -- Yes, Sir.

23 Q. This is a person, Sir,
24 you've described as being
25 "evasive"?

1 A. Yes, Sir.

2 Q. A person you've described
3 as "suspicious"?

4 A. Yes, Sir.

5 Q. A person you even said,
6 you claim, that for all you
7 knew, she could be driving a
8 stolen vehicle and you needed
9 this documentation.

10 A. Yes, Sir.

11 Q. So you let her go --
12 right?

13 A. Yes, Sir.

14 Q. -- with a verbal
15 notification to come back the
16 following day?

17 A. Yes, Sir. It was my
18 decision.

19 Q. And you don't have any
20 record of it.

21 A. No, Sir.

22 Q. Now --

23 A. Other than I stopped her
24 on August the 18th, and her
25 name, date of birth, address.

1 Q. Well, we'll get to that
2 in a second."

3 Over to page 6252, at Line 20:

4 "Q. Well, you didn't ask her
5 the question, did you! You
6 didn't say, "Whose car is
7 this? Who is your friend?",
8 did you!

9 A. No, I asked her whose --
10 who owned the car, and she
11 said it belonged to a
12 friend."

13 At the bottom of the page, there
14 is the question:

15 "Q. If you were suspicious
16 enough to tell her that it
17 wasn't adequate, what she had
18 in the way of documentation,
19 and that the car might in
20 fact be stolen and you had to
21 be persuaded or have it
22 established otherwise, -- why
23 wouldn't you say, "What's
24 your friend's name?"?

25 A. I can't answer that,

1 Sir."

2 At Line 13:

3 "Q. Well, the next question,
4 Sir, might have been -- would
5 it not have logically been,
6 "Well, who is your friend?
7 What's your friend's name?
8 Where do they live?"?

9 A. That's -- Logical step,
10 Sir, would have been: run a
11 28 on it and find out who
12 owned the car.

13 Q. What's a 28?

14 A. Mmm, registration of the
15 vehicle.

16 Q. That's the logical thing?
17 The usual thing?

18 A. That's what I should have
19 done, Sir.

20 Q. Why didn't you?

21 A. I can't say, Sir."

22 Over onto the next page, Mr.

23 Murphy is still cross-examining at Line 5:

24 "Q. And you claim you wrote
25 down the license plate number

1 at the time. Right?

2 A. Yes, Sir, it was 301-HOM.

3 Q. Well, I know you know it
4 by heart now, -- correct?

5 A. Yes, Sir.

6 Q. Did you write down the
7 colour of the car?

8 A. No, Sir.

9 Q. Did you write down the
10 make of the car?

11 A. No, Sir."

12 At the bottom of page 6255, Line

13 22:

14 "Q. Well, I suggest to you,
15 Sir, that in fact she may
16 have produced that
17 documentation and you still
18 kept asking for me. I
19 suggest to you she produced
20 a --

21 A. Yes, Sir, you can --

22 Q. -- Barbados driver's
23 license --

24 A. -- suggest what you want,
25 but I just asked her for

1 ownership, insurance and
2 license.

3 Q. Sir, I'm suggesting to
4 you, Sir, -- okay? -- and you
5 are the one who doesn't have
6 notes of anything, other than
7 what we've covered -- you
8 don't even have the make of
9 the car. And that's another
10 point, isn't it! Yesterday
11 you said, when Mr. Flanagan
12 asked you right at the
13 beginning, "Can you describe
14 the vehicle that you
15 stopped", or "Can you
16 describe how this individual
17 was stopped" --

18 A. Yes, Sir?

19 Q. And your answer was --
20 your evidence was, 'I believe
21 it was a Ford.'

22 At the bottom of page 6258:

23 "Q. But you don't have any
24 note of what you did say,
25 other than what you are

1 recalling. Right?

2 A. No, no note of that, but
3 I know I didn't say that,
4 Sir."

5 "That" being that you need an
6 Ontario driver's license, which is on the previous
7 page.

8 "Q. So the only thing she
9 has with her, according to
10 you, on the 18th of August of
11 '95, is this Barbados
12 passport. Right?

13 A. Yes, Sir.

14 Q. And what's the notation
15 -- Tell me what the
16 information is that you've
17 gleaned from that, looking at
18 that passport. Did you take
19 the passport and look at it?

20 A. Yes, Sir.

21 Q. And what was the
22 information? What was her
23 name listed as?

24 A. Mmm, it said "Julia
25 Elliott", mmm -- and then it

1 gave her date of birth and
2 that.

3 Q. Where was the date of
4 birth, Sir?

5 A. Mmm -- I believe, Sir, --
6 I'd be just guessing at this
7 point, but I believe it was
8 just right below her name
9 or --

10 Q. And was that the only
11 name -- Were those the only
12 names that appeared on the
13 license?

14 A. Mmm, that I recall, yes,
15 Sir.

16 Q. So it just said, "Julia
17 Elliott".

18 A. Julia Elliott, yes, Sir."

19 And then, at the bottom of the

20 page:

21 "Q. What other information
22 did you get off the passport?

23 A. Mmm -- To be honest with
24 you, Sir, I got the apartment
25 430, Donald Street, New

1 Orleans, and I can't recall
2 whether I got that off the
3 passport or there was a piece
4 of paper in it, or -- or she
5 told me that. I can't really
6 recall."

7 He is then asked about where
8 Donald Street is, and he doesn't really know where
9 Donald Street is in New Orleans, as his book says.
10 In the middle of page 6260, at

11 Line 22:

12 "Q. Would you agree with me
13 that that's not an accurate
14 or a usual street address for
15 somebody?

16 A. The only thing I could
17 say, Sir, is that's what I --
18 I copied. The only
19 identification was this
20 passport and I had copied
21 everything that was out of
22 the passport.

23 Q. Okay. There was no
24 driver's license?

25 A. No, Sir.

1 Q. There was no other
2 document? No ownership?

3 A. No. No, Sir, nothing.

4 Q. No insurance?

5 A. No, nothing."

6 Over to the next page:

7 "Q. And the only name, that
8 you say you've taken down
9 exactly, and everything that
10 was there in the way of a
11 name, -- that it's Julia
12 Elliott on the passport?

13 A. Yes, Sir. Yes.

14 Q. I'm going to show you a
15 copy of the passport that's
16 been provided by the Crown.
17 Do you recognize that, Sir?
18 Do you recognize this as a
19 passport of Barbados? That's
20 what it says on it?

21 A. Yes, Sir."

22 And then he goes through what it
23 says on the passport, and on page 6252:

24 "Q. It says, Sir, does it
25 not, "Mrs. Julia Yvonne

1 Elliott" and then underneath
2 Elliott it says "Williams".
3 Right?

4 A. Yes, Sir.

5 Q. That's not "Julia
6 Elliott", is it! Completely.

7 A. No, Sir."

8 And he goes through the issue as
9 to whether there are two names, or three names.
10 On page 6263, in the middle of the
11 page:

12 "Q. There is, in fact, more
13 information in the way of
14 names there than just Julia
15 Elliott, isn't there?

16 A. Yes, Sir."

17 And he then takes the witness
18 through the other information in the passbook, and
19 at Line 19 on page 6264:

20 "Q. Sir, the last entry you
21 have at page 100 of your
22 notes, out of sequence to
23 your August 24th entry at
24 pages 67 to 76, is: "License
25 plate, 301-HOM". Right?

1 A. Yes, Sir.

2 Q. You didn't run the
3 license plate number. Right?

4 A. That's correct, Sir.

5 Q. Would you agree with me
6 that the logical, usual
7 sequence you'd follow in a
8 case such as this -- I think
9 you agreed before -- was that
10 you would have run a 28, as
11 you called it?

12 A. Yes, Sir."

13 Over to page 6265, starting at

14 Line 7:

15 "Q. And, Sir, you were made
16 aware, I suggest to you, in
17 the meeting at the Kemptville
18 O.P.P. Detachment on the 24th
19 when you had suddenly, in
20 your words, or -- it "dawned"
21 on you, I think were your
22 words, and you came back and
23 advised MacCharles -- I
24 suggest to you that at that
25 point is when you were told

1 to go and make notes. Is
2 that accurate?

3 A. Mmm, he suggested it, but
4 like I've already previously
5 stated, I had been making
6 notes off and on, yes, Sir.

7 Q. Well, here's what I'm
8 suggesting to you today, Sir:

9 Given everything you've
10 said --

11 A. Yes, Sir?

12 Q. -- about reading your
13 evidence over 30 times from
14 the prelim, and all about
15 your notes, and all your
16 explanations, -- I'm
17 suggesting to you, Sir, that
18 as soon as Detective
19 Inspector MacCharles and your
20 Chief became aware that you
21 had stopped this person, the
22 finger immediately pointed at
23 you because you had no record
24 of it!

25 A. Mmm, I wouldn't agree

1 with that at all, Sir.

2 Q. That they went on, Sir,

3 and told you, in no uncertain

4 terms, "You had better go

5 make some notes of that".

6 A. Didn't say that, Sir.

7 Q. Well, you said before

8 that they told you to go and

9 make notes even though --

10 A. I didn't say "they".

11 Q. -- you'd been keeping

12 notes all along!

13 A. I said Inspector Charles

14 (sic) said, "Make notes".

15 Q. Why would he tell you

16 that?

17 A. I don't know, Sir, I

18 always was -- I was already

19 making notes.

20 Q. Can you tell me why

21 Detective Staff Sergeant

22 McCallion, the very next day,

23 August 25th, would request a

24 statement from Bill Holmes,

25 who was your partner on the

1 RIDE program from the 18th?
2 Why, seven days later, he'd
3 be asking him for a statement
4 with respect to the RIDE stop
5 of Ms. Elliott?
6 A. I can't answer that, Sir.
7 I don't know why.
8 Q. Well, let me suggest this
9 to you: You dropped the
10 ball! You didn't make a note
11 of any license plate, because
12 if you had, Sir, I suggest
13 logically you would have
14 found out right away that the
15 car belonged to Lawrence
16 Foster, and then the police
17 would have been able to link
18 Ms. Elliott to what they
19 knew, as of August 24th, was
20 a homicide investigation
21 involving the registered
22 owner of that car. And I'm
23 suggesting further to you,
24 Sir, that because you didn't
25 have a note, they told you to

1 go make one up, and that's
2 what you did!

3 A. No, Sir, I did not.

4 Q. You go and make up a
5 note --

6 A. No, Sir, --

7 Q. -- and that note --

8 A. -- I did not.

9 Q. -- contains the most
10 important piece of
11 information, "Julia Elliott";
12 the second most important
13 piece of information,
14 "301-HOM", -- information
15 that you never recorded at
16 the time; that you recorded
17 later, on the 24th, after
18 you'd realized what you had
19 failed to do on the 18th, and
20 that you went back and, out
21 of sequence in your notebook,
22 you wrote down exactly what
23 they told you they needed.

24 A. No, Sir.

25 Q. And, Sir, I suggest to

1 you further -- are you aware
2 of the importance of the
3 license plate number that you
4 purportedly recorded at the
5 time?

6 A. I did record, Sir.

7 Q. Are you aware of the
8 importance of that license
9 plate number?

10 A. I am now, yes, Sir.

11 Q. Were you aware -- I
12 guess you wouldn't have been
13 aware, Sir, on the 25th of
14 August, that that license
15 plate information and the
16 details about your RIDE stop
17 were put directly into search
18 warrant applications with
19 respect to this
20 investigation? Were you
21 aware of that?

22 A. Mmm, no, Sir.

23 Q. Were you aware that your
24 RIDE stop was referred to by
25 Detective Constable Ball? It

1 was one of the links between
2 Ms. Elliott and the crime
3 scene --
4 A. No, Sir.
5 Q. -- and the vehicle?
6 A. I'm sorry?
7 Q. You weren't aware of
8 that?
9 A. No, Sir.
10 Q. At the time you weren't?
11 A. No, Sir.
12 Q. Are you aware of it now?
13 A. Yes, Sir. You just told
14 me.
15 Q. You didn't know that
16 before?
17 A. No, Sir. No.
18 Q. I'm suggesting to you,
19 Sir, that you provide a very
20 important link in the chain
21 that leads to Detective
22 Constable Ball swearing
23 search warrant informations;
24 that that information, the
25 license plate in particular,

1 was never recorded by you,
2 because if it had been you
3 would have known right away
4 who the owner of the car was.
5 You don't have the name
6 correct, do you! You have
7 "Julia Elliott". By your
8 account, that's all that was
9 in the passport. Right?
10 A. Yes, Sir.
11 Q. I suggest to you that if
12 you had written down what was
13 in the passport that I've
14 just showed you, you would
15 have had more than just
16 "Julia Elliott". Do you
17 agree?
18 A. No, Sir.
19 Q. Where are the other two
20 names?
21 A. I didn't write them down.
22 Q. Why not?
23 A. (No verbal response)
24 Q. I suggest it's because
25 you never saw them in the

1 passport.

2 A. She said it was a
3 passport. It said -- I'm
4 sure it said "Passport" on
5 the front. Where did I get
6 the information, Sir?

7 Q. Where? Well, if you've
8 only got Julia Elliott --

9 A. Sir, on August the 18th,
10 '95, at 10:05, and as I'm
11 talking to her I'm writing
12 this information down.

13 Q. Okay, and this is
14 important information.
15 Right?

16 A. Yes, Sir.

17 Q. Okay. You've got, like,
18 seven or eight lines for
19 August the 18th of '95;
20 you've got almost 10 pages
21 for your meeting in the
22 Detachment -- your encounter
23 with Mr. Foster, your
24 attendance at apartment 8 of
25 140 George West, and about

1 half of those 10 pages of
2 notes pertain to the meeting
3 with Detective Inspector
4 MacCharles in the Detachment
5 where you suddenly recall
6 this incident."

7 At this point, Justice Cosgrove
8 says: "Oh, no, no. You'd better start over again.
9 You lost me a couple of minutes ago, Counsel.
10 Start with a question, please."

11 "Q. You have 10 lines for
12 August 18th of 1995; you've
13 got 10 pages for August 24th.

14 A. Yes, Sir.

15 Q. And I suggest to you that
16 you were playing catch-up,
17 Sir, and you were playing
18 damage control, and you were
19 instructed by MacCharles or
20 another senior investigator
21 to make a note of your
22 encounter on August 18th,
23 because you didn't at the
24 time.

25 A. Yes, Sir! That would be

1 correct.

2 Q. That would be correct?

3 A. Well, when I tell him the
4 information that I stopped
5 this person --

6 Q. Yes?

7 A. Okay? -- mmm, I didn't
8 know whether there was
9 anything to it. That's where
10 the connection of "Barbados",
11 and I'm thinking 'I stopped a
12 person from Barbados'. I go
13 back and I tell them, "On
14 such and such night, at such
15 and such time, I stopped this
16 person", and I give the
17 information I have right
18 here, and he did say, "Go
19 make notes."

20 Q. Why would you go make
21 notes when you've already got
22 notes?

23 A. I was --

24 Q. Supposedly.

25 A. -- making the notes on

1 the missing person report as
2 I was going along, and he
3 said, "Make notes" -- well, I
4 already was making notes.
5 Q. Well, that's my point.
6 Why would he tell you to go
7 do something you'd already
8 done, or why would you go and
9 make notes when you'd already
10 made them? If they are the
11 same notes --
12 A. I mean the notes --
13 Q. -- that you are being
14 asked to make.
15 A. -- of stopping this lady
16 on August the 18th on the
17 24th, because all this was
18 was just a note. It was a --
19 Q. "Just a note"!
20 A. Yes, Sir.
21 Q. What do you mean, "just a
22 note"?
23 A. It was a note, mmm --
24 like I said, enough
25 information for a ticket.

1 Q. For a ticket.

2 A. It was a Ride program; a
3 seat-belt ticket."

4 He then goes on and discusses what
5 information he got, and what information he did not
6 get.

7 I just want to stop there to
8 remind the panel that on page 6269, that is the
9 critical passage that was relied upon for the
10 proposition that MacCharles got Laderoute to
11 fabricate his notes of the stop on the RIDE
12 program, or at least part of them.

13 The other piece of evidence I
14 would remind you of, and we have the notes here, is
15 that the August 18 note talks about "Barbasos", and
16 that is what was in the passport. That is the
17 spelling of Barbados in the passport.

18 The passport itself was not
19 secured by the police until after the search
20 warrant was executed on August 26 or so.

21 So at no time on August 24 or 15
22 did the police, any police, have the Elliott
23 passport in their possession. Given the
24 significance that this answer at page 6269 assumed
25 later, nothing was made of it at the time.

1 MR. PALIARE: By whom?

2 MR. CHERNIAK: By anyone. The
3 record shows what it shows.

4 The cross-examination goes on at
5 page 6271 and following, and goes through the
6 events of the RIDE stop.

7 I won't bother reading it, but
8 there is a discussion about how long the RIDE stop
9 was, and Mr. Murphy makes a reference to the notes
10 of Holmes, Laderoute's partner on the RIDE program
11 on August 18.

12 Mr. Murphy says at the bottom of
13 page 6272:

14 " Your Honour, my notes of
15 Sergeant Holmes' evidence are
16 that it was a 5 to 10 minute
17 period from the time he first
18 saw the vehicle with Ms.
19 Elliott until the time it
20 left; that he situated that
21 in respect of the time at
22 which the lights normally go
23 off, being between --
24 some-where between 9:50 and
25 9:55, and that he did not

1 notice the vehicle right
2 away; he noticed it as it
3 came across into the
4 Petro-Can Station, which
5 would -- based on what this
6 witness has said, that it was
7 a matter of within a minute
8 or so of encountering the
9 vehicle that he had the
10 vehicle drive across to the
11 Petro-Can Station --"

12 Mr. Flanagan then says:

13 "With all due respect, it
14 wasn't stated accurately,
15 Your Honour. The note I have
16 in relation to the evidence
17 is that Officer Holmes
18 indicated that: "I see Ron
19 Laderoute with a Taurus --"

20 And the Foster vehicle was a Ford
21 Taurus.

22 "-- closer to 9:55 p.m.
23 Didn't notice the Taurus
24 right away; did not see Ron
25 stop motor vehicle, but did

1 see him drive on the lot."

2 Mr. Murphy then goes on in the
3 cross-examination on the link of the time of
4 stopping Ms Elliott and the vehicle she was in.

5 I won't bother reading that in, as
6 not much turns on whether it was five to ten
7 minutes, or twenty to twenty-five minutes.

8 But I will refer you to the bottom
9 of page 6281, at Line 30:

10 "Q. You can say anything you
11 want now, I suggest, but I'm
12 asking you about what you
13 wrote down, and you didn't
14 write anything down for that
15 25 minute period you claim
16 you spent with her other than
17 what you have conveyed, which
18 was 10 lines.

19 A. Yes, Sir.

20 Q. And that's half the time
21 that you were on the RIDE
22 program.

23 A. Yes, Sir."

24 At the bottom of page 6282:

25 "Q. Yet, she drives off.

1 You don't even give her a
2 ticket, and you don't even
3 have an accurate record of
4 her name or of the address
5 that she -- that you said was
6 in her document.

7 A. That's the information I
8 took down, Sir; that's all
9 she had on her.

10 Q. Apartment 430 Donald
11 Street, New Orleans.

12 A. That's what I put, Sir,
13 yes.

14 Q. And then right underneath
15 is the license plate number.

16 A. Yes, Sir.

17 Q. With no check being done;
18 no 28, as you call it.

19 A. That's correct, Sir."

20 The next document is the
21 transcript from February 17, 1998, which is five
22 days later, and Mr. Murphy is talking about the
23 voir dire.

24 There is a motion now on the voir
25 dire, and Mr. Murphy says in the middle of the

1 page, at Line 22:

2 "I think, to this point on
3 the evidence, we have
4 confirmed that -- at least
5 with respect to the narrowest
6 issue of the voir dire as
7 we've set out, if not the
8 only issue, was -- what
9 happened to the original
10 statements on which Laderoute
11 says he based his testimony.
12 But, Your Honour, I hasten to
13 add: we have evidence from
14 Constable Laderoute, and it's
15 in the transcript, in which
16 he affirms the fact that he
17 was instructed to make up a
18 note of -- that he claimed in
19 his preliminary inquiry
20 evidence he made at the time,
21 meaning August 18th at the
22 RIDE stop. If you read his
23 evidence, the transcript of
24 his evidence which was
25 immediately prior to us

1 embarking, or almost
2 immediately prior to us
3 embarking on the voir dire --
4 at one point he confirms my
5 suggestion to him that he was
6 playing catch-up and that he
7 was instructed to make a note
8 on the 24th of August with
9 respect to what happened on
10 the 18th because he hadn't
11 done so at the time -- on the
12 18th, that is. So that, as a
13 result of cross-examination,
14 Laderoute precipitated the
15 issue about what he's basing
16 his evidence on and whether
17 -- and confirming that he
18 made up a note under
19 instructions from a senior
20 investigator, -- that is on
21 the record. And then, Your
22 Honour, we go on to ask him
23 in cross-examination, what's
24 the basis for his other
25 testimony or for his

1 testimony as far as things
2 that were contained in his
3 so-called follow-up reports,
4 and it's at that point that
5 we arrive at the mystery of
6 where the originals are and
7 when they were obtained,
8 because obviously it was
9 relevant to the fact that he
10 has conceded, under oath, in
11 cross-examination that he
12 has, in effect, fabricated
13 evidence on instructions of
14 Detective Inspector
15 MacCharles."

16 Mr. Murphy then reads the
17 transcript of the passage that I have already to
18 you.

19 After reading that passage, the
20 Court says at the bottom of page 6606:

21 "THE COURT: So, whether you
22 describe it as damage control
23 or catch-up, -- You went on
24 further and used the word
25 "fabricate" this morning; you

1 didn't use the word
2 "fabricate" in your question
3 of the Officer.
4 MR. MURPHY: Well, that's --
5 Your Honour, the fact is, I
6 was rather caught off-guard
7 when Constable Laderoute made
8 that admission, because as
9 Your Honour will know and
10 Your Honour commented, he was
11 all over the map with respect
12 to just about every
13 conceivable issue as to his
14 recollection, and only when
15 the transcript -- and that's
16 why we asked for the
17 transcript, --
18 THE COURT: Yes.
19 MR. MURPHY: -- when we go
20 back over it, he's
21 confirming, "Yes, Sir! That
22 would be correct." He's
23 playing catch-up; he's
24 playing damage control, and
25 he's saying he was instructed

1 by MacCharles or another
2 senior investigator to make a
3 note of his encounter on
4 August 18th because he didn't
5 at the time. And, Your
6 Honour, his evidence at the
7 preliminary inquiry, which he
8 confirmed, in '96, was that
9 he did make a note of the --
10 that the RIDE stop note with
11 the license number on it was
12 made at the time, so he is,
13 in effect, Sir, admitting to
14 fabricating evidence."

15 Mr. Murphy then goes on to talk
16 about the admission at the trial of fabricating the
17 note, and he argues on page 6608 what follows from
18 that.

19 He continues at some length on
20 page 6609, and then at page 6610, Line 7, he says:
21 "Your Honour, I'm only going
22 into this because we started
23 out from -- you know, great
24 oak trees from little acorns
25 grow, and that's what we've

1 got on this voir dire. We've
2 got a widening question mark,
3 an enlarging question mark
4 over the continuity, the
5 source of sworn testimony on
6 a murder trial, from an
7 officer who has admitted
8 concocting a note under
9 instructions from the senior
10 investigators on the case,
11 the O.P.P. -- the Provincial
12 Police of Ontario. We've got
13 his evidence under oath that
14 he fabricated that note under
15 instructions on the 24th."

16 And he goes on to talk about the
17 note, and speaks on the next page about the circle
18 of suspicion in light of other matters.

19 The next page in the transcript is
20 on March 12, 1998. It is important for the panel
21 to appreciate what happened in the interval, and
22 this material is in another volume.

23 So let me take you to Volume II,
24 Exhibit No. 5, Tab 2(C), page 7629 from March 5,
25 1998.

1 The context here is that Ramsay is
2 the Crown, and the issue is whether Findlay, the
3 assistant Crown at the time, should be called as a
4 witness. That is the issue of argument on March 5,
5 1998.

6 At the bottom of page 7628 and
7 7629, there is a discussion -- a heated discussion,
8 judging from the exclamation points in the
9 transcript -- about what a witness was told, and
10 what he wasn't told.

11 At the bottom of page 7629, Mr.
12 Ramsay says at Line 23:

13 "MR. RAMSAY: The evidence
14 has been called with respect
15 to whether Constable
16 Laderoute made notes, when he
17 made them. It's suggested
18 he's admitted fabricating a
19 note.

20 THE COURT: No, it's not
21 "suggested"; it's alleged,
22 and I can put you at ease, --
23 I accept that the Officer has
24 said in this court that he
25 did do that!

1 MR. RAMSAY: That he
2 fabricated a note?

3 THE COURT: That he
4 fabricated his evidence!
5 That he said -- That he said
6 at the preliminary that the
7 notes were made at the time,
8 and in this court he admitted
9 that he made the notes at a
10 later time and had
11 misinformed the preliminary
12 hearing court and this court
13 in-chief. I accept that as
14 the evidence of Officer
15 Laderoute before me.

16 MR. RAMSAY: I trust that at
17 the appropriate time in this
18 course of this motion, Your
19 Honour will allow me to
20 address that in argument.

21 THE COURT: Please go ahead.

22 MR. RAMSAY: But at this
23 time --

24 THE COURT: You began by
25 saying it was "suggested".

1 MR. RAMSAY: Well, I'm saying
2 it is suggested. I'm saying
3 -- Yes, I'm saying -- I will
4 be arguing to Your Honour
5 that you should not take that
6 position. You should not
7 make that finding on the
8 evidence.

9 THE COURT: Go ahead.

10 MR. RAMSAY: But for the
11 purposes of whether Mr.
12 Findlay testifies, the point
13 is: Mr. Findlay doesn't know
14 anything about this, other
15 than what he's been told in
16 briefing. He has no
17 information as a witness on
18 this. And I could make the
19 same point as we go down the
20 list, about the various
21 points that were raised."

22 And Mr. Ramsay goes on to talk
23 about what Mr. Findlay does not know, and at the
24 bottom of page 7632, the Court says to Mr. Ramsay:

25 "Do you consider asking

1 leading questions an
2 acceptable procedure of
3 gathering evidence that's
4 valid for the Court?

5 MR. RAMSAY: It depends on
6 the circumstances."

7 Mr. Ramsay then goes on to explain
8 why he says that.

9 At page 7634, he elaborates -- and
10 some of this will become more relevant to the
11 question of the disqualification of the Crown
12 attorneys, and the orders made with respect to what
13 they should do.

14 Mr. Ramsay states:

15 "One would expect a Crown
16 Attorney, or any lawyer, to
17 be conducting witness
18 preparation interviews close
19 to the time that they are
20 about to testify. The notion
21 that any Crown Attorney would
22 welcome this sort of addition
23 in the face of a previous
24 inconsistent statement is
25 illogical."

1 And he goes on in that vein.
2 Justice Cosgrove, at page 7637, makes a ruling with
3 respect to Mr. Findlay, and he says at Line 23, on
4 page 7637:

5 "In the Court's view in this
6 case, the evidence that the
7 Court has heard on this
8 application is that the
9 investigation, the evidence
10 led thus far of witnesses so
11 far in the trial, and of
12 which the Court is aware is
13 intended to be led, is
14 replete with evidence of
15 possible abuse of process."

16 He goes on, on page 7638:

17 "There's the evidence of
18 Officer Laderoute who, in
19 this Court, in this trial
20 before the Jury, indicated
21 that he had told the
22 preliminary hearing court,
23 and this court initially,
24 that the note made of him,
25 supposedly on the night that

1 he observed the accused in a
2 RIDE stop, was made that
3 night. There was a note
4 introduced into his police
5 pad that contained
6 significant information; the
7 license plate and the name
8 and address of the accused
9 before the Court. Under
10 cross-examination the officer
11 admitted that that note in
12 fact was not made on the
13 night of the investigation;
14 that he was instructed to and
15 completed that note, and
16 further evidence
17 subsequently, which was, of
18 course, opposite to the
19 evidence which he had
20 initially placed before the
21 Court. It's argued that that
22 evidence is evidence of
23 perjury or of criminal
24 conspiracy. The Court was
25 concerned about that area of

1 the evidence, and at the
2 outset of this motion invited
3 Counsel, because Officer
4 Laderoute's cross-examination
5 had not been completed at the
6 trial, that either Defence
7 might continue with his
8 cross-examination of the
9 officer, or the Crown might
10 want to call the officer.
11 Before this motion
12 recommenced this afternoon,
13 Crown declined to argue that
14 the officer should be
15 recalled. The Court accepts
16 that evidence on its face,
17 and it is disturbing to the
18 Court in the context of abuse
19 of process."

20 The Court goes on in its reasons,
21 with respect to Ramsay, on page 7649:

22 "Under the circumstances, in
23 my view Crown Findlay should
24 be called. His evidence is
25 relevant, necessary and,

1 without it, the potential
2 prejudice to the accused, in
3 this type of case, is quite
4 real."

5 Unfortunately, the next page,
6 7650, is not in its proper sequence here.

7 If I could ask you to turn to Tab
8 I in Volume II, you will see there are a number of
9 tabs under Tab I. If you look at the very first
10 tab (ii), you will see that after the third of the
11 blue sheets, page 7650.

12 It is the next page from the next
13 day of the transcript I was just reading from,
14 Friday, March 6.

15 Mr. Ramsay states:

16 >Your Honour, I am moving for
17 a mistrial on the basis of a
18 reasonable apprehension of
19 bias. The basis of my motion
20 is the following three
21 things, or in the
22 alternative, the cumulative
23 effect thereof. The first
24 ground is Your Honour's
25 cross-examination of

1 Detective Constable Ball with
2 respect to matters concerning
3 the t-shirt; the second
4 matter is Your Honour's
5 cross-examination of
6 Detective Constable Churchill
7 on the same issue; and the
8 third basis, certain of Your
9 Honour's reasons with respect
10 to yesterday's ruling having
11 to do with whether Mr.
12 Findlay could be called as a
13 witness. In my submission,
14 with respect to the first
15 two, it's a case of the Court
16 being seen -- and Your Honour
17 will appreciate, I'm talking
18 perceptions and reasonable
19 perceptions and I'm not
20 accusing anyone of --
21 certainly I'm not accusing
22 the Court of anything, and
23 Your Honour will also
24 appreciate that I am making
25 this motion in the discharge

1 of my duties and it is a
2 strictly -- strictly forensic
3 exercise."

4 It goes on, and in the middle of
5 page 7651:

6 "I do make this motion
7 seriously and sincerely, and
8 ask Your Honour to grant it.
9 With respect to the first
10 two items I mentioned, it's
11 the reference in the
12 jurisprudence to "descending
13 into the arena" and taking
14 part in the litigation in a
15 manner that's apart from the
16 usual manner of simply -- of
17 course, the Judge has a right
18 to ask questions to clarify
19 matters, but in my
20 submission, these two matters
21 more take the form of, or at
22 least appear to take the form
23 of descending into the arena,
24 as it's called, and taking
25 part and making an active

1 inquiry and independent
2 inquiry of that which is put
3 before the Court by Counsel.
4 On the third head, it's -- I
5 believe the Courts refer to
6 "the Judge tipping his hand".
7 In other words, that there
8 is a perception that there --
9 there could be a perception
10 by a reasonable and detached
11 observer that on key facts
12 upon which the motion has not
13 yet been finished, all the
14 evidence has not been in,
15 that an opinion has been
16 reached. On that basis, I am
17 moving for a mistrial. Those
18 are my submissions, Your
19 Honour."

20 Mr. Murphy, at some length,
21 responds to Mr. Ramsay's submissions, and at page
22 7656, Mr. Murphy refers in his argument to the
23 evidence from Constable Laderoute, and the
24 conspiracy to lie to the court.

25 Mr. Ramsay replies starting at

1 page 7663, and he refers, at the bottom of page
2 7665 to, among other principles, to "whether
3 there's an appearance that the Judge made up his
4 mind too soon, or at least let people know too
5 soon," and that is at Lines 22 to 25.

6 Justice Cosgrove then rules on the
7 motion at page 7666, and he dismisses the
8 application.

9 On page 7670, at Line 20, Justice
10 Cosgrove says:

11 "In terms of the perception
12 of what was said by the Court
13 yesterday in ruling on the
14 motion as to the
15 compellability of Mr.
16 Findlay; I, as well, agree
17 with Defence Counsel that the
18 Court has taken effort to say
19 to Counsel, as I did the day
20 before yesterday, that I
21 would not make a decision on
22 the application for stay of
23 this very serious charge
24 until all of the evidence was
25 before me. In effect, what I

1 was doing was charging myself
2 as I have charged the jury on
3 a couple of occasions in this
4 case that they should not
5 make preliminary judgments
6 based on some of the evidence
7 that comes before it. I did
8 that; I've told the jury that
9 they shouldn't make
10 preliminary decisions because
11 it may be that after all of
12 the evidence is before them,
13 they may find it awkward to
14 change their minds."

15 And he dismisses the application
16 for a mistrial.

17 We can now go back to the first
18 volume, to the March 12, 1999, transcript.

19 Mr. Ramsay is examining Laderoute,
20 and he says at Line 12:

21 "Q. At a page towards the
22 rear of the book there's a
23 note headed "August 18/95",
24 and it mentions a "Julia
25 Elliott", address, license

1 plate, and so on. Is that
2 the entry about which you
3 have testified previously?

4 A. Yes, Sir, it is.

5 Q. When did you write that
6 in your notebook?

7 A. On that day, Sir, and at
8 that time when I was speaking
9 with, umm -- Mrs. Elliott.

10 Q. "That day and that time"
11 meaning the day and time that
12 you've written?

13 A. Yes, Sir, at 10:05.

14 Q. All right. Now, looking
15 further back, later in the
16 notebook, are there notes
17 about other cases?

18 A. Yes, Sir.

19 Q. All right. Do you have a
20 practice of writing things in
21 the back of your notebook
22 sometimes?

23 A. Yes, Sir, I do."

24 And he goes to indicate when it is
25 he does that.

1 On page 8165:

2 "Q. And here's a page marked
3 "August 24th, '95, at 4:50
4 P.M."?

5 A. Yes, Sir.

6 Q. The first thing that's
7 written, "Missing person"?

8 A. Yes, Sir.

9 Q. And then, that follows an
10 account of your -- what you
11 were doing with respect to
12 the missing person
13 investigation respecting Mr.
14 Foster?

15 A. Yes, Sir, it is.

16 Q. When did you make that
17 note?

18 A. Umm, I made that note,
19 Sir, at the office, or I
20 started to make that note,
21 umm -- I was sitting at the
22 desk and, uhh -- when the
23 call came in, I -- I started
24 writing it out."

25 And then at page 8172, at Line 25,

1 Mr. Ramsay says:

2 "Q. Do you remember
3 testifying when you were last
4 here?

5 A. Yes, Sir, I do.

6 Q. Do you remember when you
7 were being asked questions by
8 Mr. Murphy?

9 A. Yes, Sir, I do.

10 Q. Did you give any answers
11 which you -- in which you
12 meant to say --

13 THE COURT: No. No, no, no."

14 And that was the discussion about
15 the leading question, and the Court says:

16 "THE COURT: You can't put
17 the words in his mouth.

18 MR. RAMSAY: The words are
19 already in his mouth. The
20 words have been said. And
21 I'm asking him what he meant
22 by them.

23 THE COURT: Well then, ask
24 him that.

25 MR. RAMSAY: All right.

1 THE COURT: Refer him to the
2 verse and page and line, and
3 ask him if he said that. Ask
4 him what he meant."

5 That is what Mr. Ramsay does on
6 page 8174, he reads some question and answers, and
7 on page 8176 he says at Line 12:

8 "Now, do you know the -- do
9 you know the testimony I'm
10 talking about?

11 A. Yes, Sir, I do.

12 Q. Do you remember giving
13 that testimony?

14 A. Yes, Sir, I do.

15 Q. The question on page 177:

16 "And I suggest to you that
17 you were playing catch-up,
18 Sir, and you were playing
19 damage control, and you were
20 instructed by MacCharles or
21 another senior investigator
22 to make a note of your
23 encounter on August 18th
24 because you didn't at the
25 time. Answer: That -- Yes,

1 Sir, that would be correct."
2 When you said "that would be
3 correct", what did you mean?
4 What would be correct?
5 A. Umm -- That the Inspector
6 said, "Make" -- stated "Make
7 notes". I was saying that
8 that's what he said. At that
9 time I already -- I had
10 already made my note on the
11 first encounter with Mrs.
12 Elliott. When I made my
13 notes I was making my notes
14 for the missing person
15 report, which I had already
16 started. He just made that
17 brief statement, "Make
18 notes".
19 Q. All right. I'll take the
20 transcript back --
21 A. I don't know whether I've
22 explained myself. It was
23 obvious on that day I didn't
24 explain myself very well.
25 Q. Did you ever get the idea

1 from any senior officer that
2 you spoke to that you were
3 supposed to be making any
4 false entries in your notes?

5 A. No, Sir, none. None
6 whatsoever.

7 Q. Did you make any false
8 entries in your notes?

9 A. No, Sir, I did not."

10 Mr. Murphy then cross-examines and
11 at page 8177 he says:

12 "Constable Laderoute, I'm
13 going to suggest something
14 else to you today, Sir! I
15 suggest that you're playing
16 catch-up now, you're playing
17 damage control again, and the
18 reason you're here today
19 testifying about the way you
20 are is because of what you
21 said under oath when you were
22 here -- the part my friend
23 just went over with you, and
24 that you're doing damage
25 control again!

1 MR. LADEROUTE: I don't agree
2 with you at all, Sir.

3 MR. MURPHY: No more
4 questions."

5 There is some other evidence that
6 is around this issue, that is germane with respect
7 to what actually happened to the notebook.

8 Eventually, in July 1999, Mr. Laderoute was called
9 again having regard to the RCMP investigation.

10 The first is on October 16, 1998,
11 and this is the evidence of McCurly, being examined
12 by Cavanagh at page 3902.

13 McCurly was Laderoute's chief at
14 the Kemptville police in August 1995. In the
15 interim, they were taken over by the OPP and
16 McCurly became a sergeant, I believe, in the OPP.

17 At Line 20 on that page:

18 "You indicate, in the second
19 paragraph of your will-say,
20 that the Kemptville police
21 service played no role in the
22 investigation until August
23 24, 1995, is that right?

24 A. Yes, sir.

25 Q. And at that point, you

1 received a call from
2 Constable Laderoute, is that
3 right?

4 A. Yes, sir.

5 Q. And he advised you of
6 being at 140 George Street
7 with Mr. Steven Foster, is
8 that correct?

9 A. Yes, sir.

10 Q. And that Mr. Foster had
11 reported his father missing?

12 A. Yes."

13 He goes on to say that he was
14 called by Laderoute, and there is an answer at Line
15 8 on page 3904:

16 "A. I believe that's how the
17 conversation started and, in
18 actual fact, I think he said:
19 'You better sit down for
20 this.' And I suggested to
21 him that, you know, to secure
22 the scene. And he said:
23 'Well you know, I've already
24 met the OPP at the scene',
25 and he then went on to tell

1 me that there was an
2 inspector at the OPP
3 detachment at Kemptville, and
4 he wanted to see me right
5 away up at the detachment."

6 And at Line 20, McCurly says he
7 did attend at the Kemptville OPP detachment.

8 Over to page 3908, Mr. Cavanagh
9 asks Sergeant McCurly to tell him about his degree
10 of involvement on the 24th of August, and he says
11 at the top of page 3909 that Laderoute made the
12 introduction to Inspector MacCharles, who then
13 introduced McCallion.

14 Then he says at Line 20:

15 "A. Constable Laderoute was
16 having conversation with
17 George Ball, and he had some
18 photographs. The photographs
19 had a lot of different people
20 in them, as I recall, and
21 they were having a
22 discussion. Inspector
23 MacCharles asked me to come
24 on out to the garage at the
25 sally-port area. The

1 explanation for that was that
2 the detachment commander
3 frowned upon smoking inside
4 the building. So we went out
5 to the garage area, where he
6 briefed me on the course of
7 their investigation and the
8 numbers of twists and turns
9 that it had taken until they
10 had, as I recall, positively
11 identified one of the body
12 parts from a partial
13 fingerprint, through the RCMP
14 lab."

15 At page 3910, McCurly talks about
16 fulfilling his duty by reporting to the mayor, and
17 then at Line 14:

18 "At some point through the
19 discussion, Constable
20 Laderoute had brought forward
21 information that, during the
22 RIDE spot-check, I think on
23 the 18th of August, that he
24 had stopped a vehicle and he
25 had made some sort of

1 notations, and that there was
2 a flurry of discussion taking
3 place in the coffee room.
4 The course of action then was
5 that I was taken downstairs
6 and shown the location where
7 they were going to run the
8 investigation out of, and the
9 investigation basically got
10 off and running."

11 Then he talks about the role he
12 played in the investigation, which had not been too
13 substantial.

14 At page 3921, McCurly is being
15 cross-examined by Mr. Murphy, and he says:

16 "-- on August 23rd, that I
17 had checked with the local
18 dealerships in Kemptville,
19 looking for anyone who may
20 have rented a vehicle out
21 during that time frame to a
22 non-white female. I had
23 negative replies there. And
24 I omitted advising the court
25 that I was aware that on

1 August 18th that Constable
2 Laderoute, while working the
3 RIDE program, had stopped a
4 vehicle, and I didn't know at
5 the time who the operator was
6 - he advised me as to the
7 unusualness of the stop.
8 MR. MURPHY: Sir, the date
9 of this that you're
10 recalling?
11 THE WITNESS: I have here the
12 18th of August, and I believe
13 that it was in fact the 18th
14 of August, around 11 o'clock
15 at night. And I believe the
16 conversation was with
17 Constable Laderoute at the
18 Kemptville restaurant, having
19 coffee, that he was with
20 Sergeant Holmes, from the
21 OPP, and I was with Sergeant
22 Vic Weldon from the OPP RIDE.
23 And during conversation over
24 coffee, Constable Laderoute
25 had made comment that he had

1 an unusual stop where the
2 lady identified herself using
3 a passport, I believe is what
4 the conversation was about.
5 And I was aware that that
6 information, Constable
7 Laderoute had passed on to
8 the OPP investigators."

9 At the bottom of page 3922, the
10 witness goes on to talk about the incident in the
11 coffee room, he says, would have been the 24th of
12 August.

13 On the next page, he is asked
14 about the coffee room and what transpired:

15 "THE WITNESS: There was -
16 there was a flurry of
17 conversation and the
18 conversation appeared to be
19 between Constable Laderoute
20 and George Ball, as I recall.
21 There were other officers in
22 the room, but the
23 conversation seemed to be
24 between Constable Laderoute
25 and George Ball.

1 THE COURT: And it was with
2 respect to, as well, the
3 stopping?

4 THE WITNESS: I believe so,
5 yes, sir, that he - he had
6 his memo book and he had
7 these photographs, and it's
8 my recollection that it had
9 to do with the traffic stop
10 and something to do with the
11 license plate number.

12 THE COURT: You can't be
13 anymore specific as to what
14 the details of the
15 conversation were?

16 THE WITNESS: Just that
17 Constable Ball was fairly
18 excited about the whole
19 conversation. But at - at
20 that point, I had come in
21 from the garage with, I
22 believe, Inspector
23 MacCharles; we had had our
24 conversation and I had phoned
25 the chair of the police

1 services board and I was
2 walking in on this goings on
3 in the coffee room.

4 THE COURT: Did I understand
5 you to say that Officer
6 Laderoute had his - you said
7 a memo book - was that his
8 notebook?

9 THE WITNESS: Yes, sir, he
10 had his - his notebook there
11 in his hand, and it was
12 discussion dealing with a
13 license plate number."

14 That brings us to October 19,
15 1998, and the evidence of Officer Ball. He is
16 cross-examined by Mr. Murphy, and he is asked to
17 refer to his notes of August 24, 1994, at Line 24:

18 "Q.If I can just go through
19 this with you. I know you've
20 been through this before, but
21 can you confirm, sir, for the
22 court, that your entry for
23 17:32 is with respect to you
24 speaking to Constable Ron
25 Laderoute of the Kemptville

1 Police Service at the point
2 at which you encountered him
3 and the victim, Mr. Foster's
4 son, Steven, outside the
5 apartment building at 140
6 George Street West in
7 Kemptville.

8 A. Yes.

9 Q. You identified yourself,
10 according to this notebook
11 entry, along with Detective
12 Constable Bolger, is that
13 correct?

14 A. Yes.

15 Q. According to your note,
16 you informed Constable
17 Laderoute that this was a
18 possible crime scene?

19 A. Yes.

20 Q. The next entry at 17:35,
21 Constable Bolger went in to
22 guard the scene, Constable
23 Laderoute was instructed by
24 you to take Mr. Foster,
25 Steven Foster, to the OPP

1 Kemptville detachment,
2 because Detective Inspector
3 MacCharles wished to speak to
4 him, is that correct?

5 A. Yes."

6 There is then a discussion about
7 carpeting, and at page 3991:

8 "Q. At 17:37, you have a
9 notebook entry: "At
10 detachment, Detective
11 Constable Churchill and I
12 immediately interviewed
13 Steven Foster" - can you read
14 the rest of that notation,
15 sir, on page eight.

16 A. 'Advised that he also was
17 also suspicious because his
18 father was a neat person and
19 everything was in shambles.
20 Steven mentioned his father's
21 acquaintance from the
22 Barbados. Steven said his
23 father told him she was
24 coming for a visit. Her name
25 is Yves. Steven made

1 comments about me having to
2 tell him something grim, I
3 told him yes.' "

4 Then at page 3993, Officer Ball
5 was cross-examined about what Officer McCurly said,
6 and I have read that passage to you already.

7 At the bottom of page 3994,
8 Officer Ball is cross-examined on that:

9 "Q. Now, would you agree
10 with me, sir, that that puts
11 you right in the detachment
12 coffee room at a time when
13 you've just confirmed, and
14 your notes indicate for that
15 day that you were consumed
16 entirely with the interview,
17 according to you, of the
18 victim's son, Steven Foster,
19 with Detective Constable
20 Churchill in the interview
21 room?

22 A. No, I would not agree. I
23 said I was in and out.

24 Q. Sir, I was careful, was I
25 not, to ask you whether the

1 extent of being in and out
2 involved any discussions with
3 other officers and you
4 confirmed in the negative,
5 sir, didn't you?

6 A. I don't recall that
7 interview or speaking to
8 them.

9 Q. Now, you're saying you
10 don't recall the interview--?

11 A. I recall the interview
12 with Steven Foster and I have
13 in my notes that I was in and
14 out, but I don't recall a
15 conversation with McCurley."

16 Then on page 3996, at Line 22,
17 Officer Ball says that he is not saying McCurley is
18 mistaken; he simply doesn't recall it.

19 At page 3997:

20 "Q. But not had a
21 conversation with Laderoute?

22 A. I do not recall a
23 conversation with Laderoute.

24 The only conversation I
25 recall with Laderoute was at

1 the crime scene.

2 Q. So Chief McCurley is
3 wrong?

4 A. I'm not saying he's
5 wrong, I just don't recall
6 that."

7 And he repeats that several times
8 on that page.

9 On page 3998, Mr. Murphy says, at
10 Line 5:

11 "Q.Sir, if I can suggest to
12 you this would be the
13 proverbial smoking gun that
14 puts you where your notes
15 disclose that you're not even
16 there and where your own
17 evidence today confirms the
18 accuracy of your notes, that
19 your notes don't indicate
20 that you were in the coffee
21 room - I'm suggesting to you
22 this is the smoking gun, sir.

23 This is Chief McCurley
24 placing you in the coffee
25 room on Thursday, August the

1 24th, 1995, apparently having
2 an animated, excited - his
3 word is - conversation with
4 Laderoute about a license
5 plate number, the license
6 plate that he wrote in his
7 notebook, I'm suggesting,
8 301HOM, which you then took
9 and inserted in the search
10 warrants that you completed
11 for this investigation,
12 almost immediately after
13 completing those duties that
14 night.

15 A. That is totally
16 incorrect.

17 Q. What other explanation do
18 you have, sir?

19 A. For?

20 Q. For what McCurley is
21 saying.

22 A. I already gave you my
23 explanation.

24 Q. Well, you've given an
25 explanation."

1 Mr. Crown objects at that point,
2 and there is an argument about the question. Mr.
3 Murphy alleges on page 4001 that Mr. Cavanagh is
4 trying to rewrite history, and alleges on page 4002
5 that Mr. Cavanagh is mis-stating the evidence.

6 And then he says in the middle of
7 page 4002:

8 "Your Honour made a ruling on
9 March the 16th, and this is a
10 fair question, it's an
11 obvious question and, in my
12 submission, the interruption
13 is timed to obfuscate and to
14 obscure what has already been
15 made a finding of fact by
16 this court.

17 THE COURT: I agree with your
18 submissions, Mr. Murphy.

19 Would you recall the
20 witness."

21 Officer Ball is then recalled, and
22 asked the same question, and on the following page:

23 "Q. Sir, what I'm suggesting
24 to you is that there's no
25 other reasonable explanation

1 that's consistent with
2 Laderoute's own evidence, his
3 admission before this court
4 that he fabricated a note and
5 a license plate number in
6 that note subsequent to
7 August 18th, that he did so
8 on the 24th. There's been a
9 finding by His Honour on that
10 point, and I'm suggesting to
11 you, sir, the only plausible
12 explanation is that you were
13 the one who instructed him to
14 fabricate the 301HOM license
15 plate note; do you not agree
16 with that?

17 A. No.

18 Q. What other explanation
19 can we find?

20 A. For?

21 Q. For that fabrication.

22 A. I don't know how he got
23 that license plate number.

24 Q. Who else was he speaking
25 to?

1 A. I don't know.

2 Q. Would it have been --

3 A. Maybe he was doing
4 security detail at the
5 apartment. The car was
6 parked there, sealed up."

7 And then the answer in the middle
8 of the page:

9 "A. I have no idea how
10 Laderoute got that in his
11 notebook."

12 The witness is cross-examined as
13 to the search warrant issued following what
14 happened on August 24.

15 At the top of page 4004, the
16 question is asked:

17 "Q. Who makes immediate use of
18 301HOM, sir, apart from you?"

19 A. I guess the people that
20 drafted up the search
21 warrants would gather that
22 information and draft the
23 search warrants, it would be
24 Robins and Teeple."

25 He goes on to explain who they

1 are, and then:

2 "Q. And you state that you
3 were informed, in paragraph
4 14, you, the informant, were
5 informed by Constable
6 Laderoute that he had stopped
7 a vehicle bearing that
8 license plate number driven
9 by the accused. You signed
10 your name to that warrant,
11 sir, and you swore to its
12 truth.

13 A. That's correct.

14 Q. So who bears
15 responsibility for that,
16 Teeple and Robins?

17 A. They may have received
18 the information from
19 Laderoute and put it in that
20 paragraph and subsequently
21 they say - because I read it
22 in the end - that it was
23 information passed on to me
24 and I act on it as being
25 truthful."

1 And the witness says on page 4005:
2 "They typed the search
3 warrants. I had nothing to
4 do with typing the search
5 warrants. I never typed one
6 search warrant in this
7 investigation."

8 And later on the page:
9 "-- and because I believed
10 that they would be truthful
11 with me about what they put
12 in there, after I read it,
13 they would say - it would
14 say, "I was informed".
15 Q. So it's their fault?
16 A. I'm not - I'm not blaming
17 them."

18 And then on page 4007, Line 12:
19 "Q. So how is it - if you
20 proof read them, it was
21 presumably as to their
22 accuracy and truth, correct?
23 A. Yes, I believed that what
24 they had put in the search
25 warrants was information they

1 had gained from
2 investigators, there were a
3 number of investigators
4 involved, and that that
5 information to be the truth
6 and I read it and I acted
7 upon it."

8 We then go to October 20, 1999,
9 when Mr. Crown cross-examines Mr. Ball, and he says
10 at the top of page 4201:

11 "Q. Detective Constable
12 Ball, I have a few questions.
13 You were asked a number of
14 questions about Laderoute
15 meeting Miss Elliott in a
16 RIDE stop on, I think, August
17 the 18th of 1995. Do you
18 recall being asked those
19 questions?

20 A. Yes.

21 Q. Are you able to tell the
22 court when you first became
23 aware that Laderoute had met
24 her at that RIDE stop on
25 August the 18th?

1 A. At some point late in the
2 evening of the 24th or early
3 hours of the 25th of August."

4 He then refers him to his
5 notebook:

6 "Q. And there's an entry
7 with regard to Laderoute, is
8 that correct?

9 A. Yes.

10 Q. And that's at what time,
11 please?

12 A. 19:38 hours.

13 Q. Thank you. And do I
14 understand that correctly
15 that that is part of the
16 notes which begin on page 10
17 for the 25th of August, 1995?

18 A. Yes."

19 And on page 4202:

20 "Q. And are you able to tell
21 the court how it is that you
22 made that note at that time
23 of that encounter between
24 Laderoute and Miss Elliott?

25 A. I don't know if I

1 received that information
2 directly from him or
3 indirectly through perhaps
4 Detective Sergeant Cook who
5 took possession of his notes.

6 Q. And in terms of the
7 conversations you had on the
8 24th of August, 1995, with
9 Constable Laderoute, you've
10 testified to my friend that
11 you recall speaking to him
12 when you first arrived at 140
13 George Street?

14 A. I did.

15 Q. And do you recall any
16 conversation with Constable
17 Laderoute about the traffic
18 stop once you were back at
19 the detachment that night?

20 A. I do not recall any
21 personal conversation with
22 him."

23 We have been going for an hour and
24 twenty minutes. Perhaps this is a good time for a
25 break?

1 THE CHAIR: All right, we will
2 take our break.

3 --- Recess at 2:50 p.m.

4 --- Upon resuming at 3:09 p.m.

5 THE CHAIR: Mr. Cherniak?

6 MR. CHERNIAK: Yes, at page 4113,
7 Officer Ball is still being cross-examined on the
8 search warrant, and he says in the middle of the
9 page that it was Teeple and Robins who typed up the
10 warrant.

11 He is then examined on certain
12 evidence given by Officer Churchill -- I think you
13 are missing pages 4114 and 4116, is that correct?

14 THE CHAIR: Yes, I am missing
15 those pages.

16 MR. CHERNIAK: There was
17 obviously a photocopying problem. Nothing much
18 turns on it; it deals with whose responsibility it
19 was for the search warrant.

20 MR. NELLIGAN: There is another
21 problem with page 4117, and the next page is 9389.

22 MR. CHERNIAK: Yes, page 4117
23 should have been placed before the blue divider,
24 and 9389 starts the new tab in July 1999.

25 But we will fix everyone's book

1 tomorrow.

2 He says this at Line 12:

3 "Q. But before that, you
4 took us into some explanation
5 about Robins. Now, my next
6 question: When would you have
7 spoken to Laderoute in order
8 to be informed of this
9 information, or are you
10 saying you never spoke to
11 him?

12 A. I spoke to him initially,
13 as I stated yesterday, at the
14 apartment building when he
15 was doing the missing - the
16 missing person report. He
17 had a number of documents in
18 his hand, some photos which
19 he had recovered from the
20 residence. Some of those
21 photos depicted Miss
22 Elliott."

23 He then goes on to say what he
24 told Laderoute to do.

25 We fast-forward to July 1999, and

1 that is where page 9389 starts.

2 What happened in the interim is
3 that the RCMP investigation had been completed, and
4 the report was delivered to Mr. Murphy some time in
5 June, and Officer Laderoute was recalled to give
6 further evidence, and he was cross-examined on the
7 statement he gave to the RCMP.

8 At Page 9389:

9 "Q. You're talking to the
10 RCMP about something,
11 presumably you're very
12 concerned about, right?

13 A. Okay. Maybe I should
14 have said I was there in
15 court for three and a half
16 days, off and on.

17 Q. That's not what you said,
18 though, is it?

19 A. Well, no - no, sir, it's
20 not."

21 The cross-examination goes on with
22 respect to the amount of time he was in court, and
23 then at page 9393, Line 20, he is examined on what
24 he said about the note he made at the time:

25 "Q. Okay. And what you're

1 saying to the RCMP is all
2 that the person you stopped
3 at the RIDE program ever gave
4 you was a Barbados passport,
5 right?

6 A. Yes, sir, that's all she
7 gave me.

8 Q. And you even said earlier
9 in your answers to some other
10 questions, when they asked
11 you what your actions were
12 during that RIDE stop, you
13 told the investigators for
14 the RCMP, that you had to use
15 the headlight of the OPP
16 cruiser in order to read it,
17 right, to read the passport?

18 A. I can still - that's
19 what I said to them. I could
20 still read it without the
21 headlight, but it helped,
22 yes, sir."

23 He is then cross-examined on how
24 he got the address, and that is at page 9395 and
25 9396, and it clear that the Ottawa address he took

1 down is not in the passport.

2 At the bottom of page 9396, he
3 says that license plate wouldn't be in the
4 passport, but there is where he got the information
5 from: "I didn't pick it out of my head."

6 He is then cross-examined about
7 how got the address, and at page 9400 he is asked:

8 "Q. Do you recall telling
9 the officers I've just named,
10 who were there with you, that
11 you had stopped a black lady
12 from the Barbados, an
13 African-American lady, or
14 somebody of that description?

15 A. I never used
16 African-American. If I did,
17 I would say Barbados or Bajan
18 or --

19 Q. Are you saying you did
20 have such a conversation or
21 you don't remember?

22 A. I don't - I honestly
23 don't remember, sir. How
24 long - that's four years
25 ago."

1 He is then cross-examined on his
2 shorthand and whether he had been drinking, and at
3 page 9405 there is the question:

4 "Q. Do you recall Mr. Ramsay
5 asking you questions when you
6 went to court and got on the
7 witness stand, concerning
8 Inspector MacCharles giving
9 you instructions about your
10 notes with respect to this
11 case?

12 A. Mr. MacCharles never gave
13 me any instruction on my
14 notes."

15 He is then examined on what his
16 evidence was when he was examined by Ramsay, and at
17 page 9407:

18 "Q. You just said a second
19 before I read you that
20 question that he never told -
21 Inspector MacCharles never
22 told you to do anything with
23 your notes?

24 A. You said - you said
25 "instruct me" on making my

1 notes. He never - he said,
2 "make sure your notes are
3 up-to-date or make --

4 Q. Did you ever - did he
5 ever tell you to make good
6 notes?

7 A. I don't recall him saying
8 that, sir, no."

9 Mr. Humphrey then cross-examines
10 Laderoute starting at page 9408, and he is asked
11 about the passport at Line 18:

12 "Q. When you were finished
13 writing down the information
14 from passport and/or the
15 piece of paper, what did you
16 do with the passport and the
17 piece of paper?

18 A. I gave them back to - to
19 Miss Elliott.

20 Q. And after that, did you
21 ever see this piece of paper
22 again?

23 A. No, sir, in fact, the
24 next time I seen the passport
25 was in court. I never seen a

1 piece paper when Mr. Murphy
2 showed me the passport the
3 last time we were in court.
4 This is - that would be the
5 only - the second time I
6 seen that passport."

7 We then go to August 4, 1999, in
8 what appears to the argument on the stay motion.

9 At page 10254, at Line 20, Justice
10 Cosgrove says:

11 "-- the court has the formal
12 request that findings of the
13 court be reopened and be
14 revisited by defence. In
15 addition to that, the RCMP in
16 a - presumably in a criminal
17 - in an investigation which
18 contemplated the licitness or
19 illicitness of certain acts
20 of officers offered an
21 opinion which, of course,
22 runs into one of my findings
23 and one of my earlier
24 orders."

25 He then talks about how it is, in

1 effect, an appeal of himself, and on page 10255,
2 Mr. Humphrey says:

3 "It's helpful to know, as I
4 understand what Your Honour
5 is saying, it's helpful to
6 know that Your Honour would
7 entertain further argument
8 and reconsideration on
9 something like the Laderoute
10 issue."

11 Mr. Humphrey then makes
12 submissions on the Laderoute issue, and says at
13 Line 8 on page 10256:

14 "Your Honour made the finding
15 that if one reviews the
16 transcript of Constable
17 Laderoute's evidence of
18 February the 12th, I believe
19 it was, before the jury, it's
20 capable of being interpreted
21 as an admission by him. I
22 didn't wish to reargue that
23 point in the absence of an
24 invitation from Your Honour
25 but, in light of what Your

1 Honour has said, I may well
2 make some submissions to you
3 in that regard."

4 And Mr. Humphrey goes on to deal
5 with the crucial answer, and he makes the point at
6 page 10257, at Line 10:

7 "What's significant is that
8 there is no, if I can put it
9 this way, there's no, 'Aha!'
10 moment in the
11 cross-examination. There's
12 no, 'Aha' from Mr. Murphy,
13 'Finally, I got the
14 admission! Now let's deal
15 with who told you. I just
16 put it to you --"

17 MR. PALIARE: I wonder if you
18 could read-in the entire paragraph? You have
19 skipped over what is a concession by Mr. Humphrey
20 and --

21 MR. CHERNIAK: I would be happy
22 to read it in:

23 "Now, it's an ambiguous
24 answer, I concede. Your
25 Honour was there, Mr. Murphy

1 was there, I was not, and
2 sometimes much of what is
3 being communicated is only
4 really detectable by the
5 people who were there. But,
6 in my respectful submission,
7 it's not a clear admission,
8 and what is significant is
9 really two things. I am
10 sort of arguing the point -
11 I'm into it, I might as well
12 continue it, if I might, Your
13 Honour. What's significant
14 is that there is no, if I can
15 put it this way, there's no,
16 'Aha!' moment in the
17 cross-examination. There's
18 no, 'Aha' from Mr. Murphy,
19 'Finally, I got the
20 admission! Now let's deal
21 with who told you. I just
22 put it to you it was either
23 MacCharles or some other
24 senior officer, you've just
25 admitted it, let's follow-up,

1 okay. Which one was it?
2 When did they do it? Where
3 did they give you the
4 instructions?' Because if
5 there really was a clear
6 admission on the record, in
7 my respectful submission, a
8 skilled and tenacious
9 cross-examiner like Mr.
10 Murphy would hear it, would
11 seize on it and would follow
12 up on it. And again, further
13 on - and in fact I may have
14 some of these transcripts
15 with me. But further on in
16 the cross-examination that
17 day, Constable Laderoute is
18 again asked what he made a
19 note of during the stop, and
20 he says - I recall his
21 evidence was, 'Well, I wrote
22 down what's here.' -
23 obviously referring to the
24 memo book which is in his
25 hands. And it appears he's

1 denying that he backdated the
2 note."

3 Mr. Humphrey reads part of the
4 evidence again and, at page 10259, Mr. Humphrey
5 says:

6 "So pausing there, in my
7 respectful submission, the
8 witness might well have
9 interpreted the question
10 really to be about whether he
11 was told by MacCharles or
12 another senior investigator
13 to make a note of the
14 encounter, and he missed the
15 last clause in the question,
16 "because you didn't at the
17 time", and the answer is,
18 "Yes, Sir! That would be
19 correct." And the follow-up
20 questions I have just read
21 seem to suggest that maybe
22 Mr. Murphy understood the
23 question the same way, that
24 it was really focussed on,
25 and the answer was focussed

1 on whether he was instructed
2 by MacCharles or another
3 senior investigator to make a
4 note."

5 And Mr. Humphrey makes the "no
6 ah-ha" point again, and then Mr. Humphrey deals at
7 some length with the surrounding evidence,
8 McCurly's evidence and the evidence about
9 note-taking.

10 At page 10262, Mr. Humphrey notes
11 at Line 8:

12 "-- it makes sense that on a
13 RIDE stop one of the things
14 you record is the license
15 number of the vehicle. If
16 you're bothering to make some
17 notes, if you're bothering to
18 record some information to be
19 able to track this person
20 down if they don't come in,
21 it does, on a common sense
22 level, make sense that one
23 would record at the time the
24 license plate number."

25 Mr. Humphrey then makes a

1 reference to the mis-spelling of Barbados in the
2 passport -- which we have here, and just looked at
3 during the break -- and Mr. Humphrey submits at
4 page 10263:

5 "Ff Your Honour sees fit to
6 reconsider that issue, there
7 is real doubt, in my
8 respectful submission, as to
9 whether one can really say
10 what happened --"

11 And at Line 20:

12 "You have the sworn evidence
13 of Constable Laderoute that
14 he didn't backdate the note.
15 You have his explanation
16 that he never meant to admit
17 it, supplemented by however
18 persuasive they may be, my
19 submissions in that regard.
20 You have the absence of any
21 confirmatory evidence in the
22 forensic examination - I
23 don't want to overstate
24 that."

25 And on page 10264, Mr. Humphrey

1 says:

2 "So in my respectful
3 submission, it is a case
4 where Your Honour can and
5 ought, if you reconsider, to
6 conclude that the allegation
7 has not been made out on a
8 balance of probabilities."

9 The Court then asks about the
10 notebook, and Justice Cosgrove refers to the
11 evidence about what kind of a note-taker Mr.
12 Laderoute is, and at page 10267 he raises the
13 question:

14 "-- how do you explain the
15 fact that he's made two notes
16 of part of the same
17 occurrence? In any event,
18 it was that - that was part
19 of my reasoning and my
20 decision of March of last
21 year that led me to the
22 conclusion that the license
23 plate entry was introduced at
24 a time other than the date
25 that appears at the top of

1 the note and, certainly, when
2 you've had an opportunity, I
3 would appreciate further
4 submissions on this."

5 Mr. Humphrey makes further
6 submissions, and the Court makes a comment about
7 the passport.

8 Mr. Humphrey says, at the bottom
9 of page 10269:

10 "Where could he have gotten
11 that information if it wasn't
12 on the 18th? Where could he
13 have gotten that from, to put
14 it in a note on the 24th, as
15 opposed to late in the day on
16 the 25th?

17 THE COURT: He may have got
18 part of it from the passport.

19 I would not change my
20 observation there that
21 "Barbasos" having appeared in
22 the passport appears in his
23 notes, and I would bet a case
24 of beer on that, but it's the
25 license.

1 MR. HUMPHREY: Fair enough.
2 Where does the address come
3 from?

4 THE COURT: I don't know and
5 I don't know where the
6 license plate comes from --

7 MR. HUMPHREY: Well, in my
8 respectful --

9 THE COURT: -- because he
10 makes no reference, no
11 reference anywhere to taking
12 down the license plate and he
13 spends five or ten pages
14 creating a chronology in his
15 so-called missing persons,
16 and I suspect after he
17 realized that there were big
18 things happening so he went
19 back to make notes. His
20 original notes were the notes
21 that I've indicated that are
22 four or five lines long on a
23 scrawl on the back of his
24 book. Then, when he realized
25 that this was an important

1 thing and he was told, 'have
2 you got notes', he went back
3 and made his notes, and he
4 made about ten or 12 pages of
5 them. Went into great
6 detail, great particular
7 particularity. There's no
8 reference to him taking down
9 the license number. There is
10 no reference to him having a
11 piece of paper, other than
12 the passport.

13 MR. HUMPHREY: In his notes
14 on the 24th?

15 THE COURT: Yes.

16 MR. HUMPHREY: Yes. No,
17 that's fair enough but again,
18 just as a matter of thinking
19 where he could have gotten
20 the information from. When
21 he's making the notes on the
22 24th, he has no other way of
23 knowing what her address
24 might be, unless he did get
25 it from her on the 18th."

1 So that is the evidence
2 surrounding the credibility findings and the
3 Charter breach findings against Laderoute in the
4 March 1998 reasons, and in the final reasons.

5 If we go back to Paragraph 314 of
6 the Reasons of Justice Cosgrove of September 7,
7 1999, Paragraph 314:

8 "I find that the continuing
9 conduct of Constable
10 Laderoute, in misleading RCMP
11 Project Audition
12 investigators in May 1999
13 when he told them he had
14 copied the information
15 recorded in his August 18,
16 1995, notepad, from the
17 passport on that date, and on
18 not August 24, 1995, as he
19 admitted to in
20 cross-examination before the
21 jury and in February 1998, is
22 a breach of the applicant's
23 Charter rights."

24 The finding seems to be somewhat
25 broader than any other finding, because that refers

1 to everything in the passport and not just the
2 license.

3 Obviously, Justice Cosgrove was
4 not persuaded by anything Mr. Humphrey said.

5 That brings me to the end of
6 Volume I, and I will take you now to Volume II, Tab
7 2(C).

8 THE CHAIR: But this is
9 particular 2(D)?

10 MR. CHERNIAK: Yes, which deals
11 with disqualifying Crown James Stewart.

12 The next matter deals with the
13 serial disqualification by Justice Cosgrove of
14 successive Crowns who were dealing with the matter,
15 and the restrictions he put on those Crowns in
16 respect of the contact they could have, and the
17 information they could pass to their successors.

18 Particular 2(D) states that
19 Justice Cosgrove denied the Crown counsel of its
20 choice by disqualifying James Stewart from being
21 counsel, and required any future Crown counsel
22 involved at trial had to have no prior knowledge
23 and no prior involvement whatsoever in the case.

24 By doing so, Justice Cosgrove
25 denied the Crown the ability to have counsel with

1 any knowledge of the case, and appears to suggest,
2 with no basis, the fact that previous involvement
3 inhibited Crown from carrying out his or her
4 duties.

5 The actual ruling of Justice
6 Cosgrove on this issue appears at page 6682, and I
7 will come to that in due course.

8 The issue before the court on
9 February 19, 1998, which is the date Mr. Stewart
10 appeared, was whether Crown attorney Flanagan in
11 Brockville -- you will recall that evidence was
12 being led in this case before the jury in February.

13 The issue was whether Crown
14 Flanagan would be called to testify, and what we
15 have here is the argument on the motion as to
16 whether he could be called to testify.

17 You will see that Mr. Murphy
18 argued that Mr. Stewart was not independent,
19 because he was involved in certain pre-trial
20 discussions, and therefore was not qualified as
21 sufficiently independent to argue the motion on
22 behalf of the Crown in respect of the Flanagan
23 disqualification.

24 On page 6645, Mr. Stewart
25 identifies himself, and Mr. Murphy makes an

1 objection right at the start:

2 "Thank you, Your Honour.
3 Here is the preliminary
4 problem. Mr. Flanagan
5 indicated he had retained, in
6 quotation marks, "independent
7 counsel" to come and speak
8 because of the alleged
9 conflict with respect to his
10 meeting with the police
11 investigation and the abuse
12 of process motion which is
13 now before the Court and
14 which has been served on the
15 Crown yesterday, as well as
16 being faxed to Your Honour."

17 What happened was they came into
18 this abuse of process motion some twelve days or so
19 into the trial, and Mr. Murphy wished to subpoena
20 Mr. Flanagan to give evidence.

21 Mr. Murphy continues:

22 "The preliminary problem is
23 this: I am looking over this
24 morning and Mr. Stewart, who
25 I know obviously from -- as

1 Crown Counsel from Ottawa, is
2 now representing himself --
3 perhaps I shouldn't speak for
4 him, but the inference is
5 that he's representing
6 himself as independent
7 counsel on this matter for
8 Mr. Flanagan. There are two
9 points I have about that,
10 Your Honour. First, Mr.
11 Stewart is not independent.
12 Mr. Stewart has been involved
13 in pre-trial discussions
14 involving this case, at which
15 Mr. Flanagan was present,
16 along with himself, and that
17 was in August or September --
18 I believe it was September of
19 this year, if not prior to
20 that time. For that reason
21 alone, Mr. Stewart can in no
22 way, in my respectful
23 submission, be characterized
24 or represent himself
25 reasonably as being

1 independent in the sense of
2 the word that was used last
3 week, or in the accepted
4 definition of the term
5 "independent counsel". He
6 has been involved in the
7 case; he has been involved as
8 a colleague in a consultative
9 capacity, if not greater
10 capacity, than merely
11 consultative, with Mr.
12 Flanagan in pre-trial
13 discussions concerning this
14 case; and for that reason
15 alone, in my submission, he
16 is not independent at all. My
17 second submission goes to
18 that issue as well, Your
19 Honour. Independent counsel,
20 in my submission, where there
21 is now an abuse of process
22 application before the Court
23 which raises issues and
24 inferences of Crown
25 involvement in police

1 misconduct on this
2 investigation -- independence
3 requires someone outside the
4 Attorney General of Ontario's
5 Ministry to appear on the
6 matter. Another barrister
7 and solicitor other than one
8 -- first of all, other than
9 any, in my submission,
10 Attorney General counsel,
11 whether from the highest
12 echelons of the Ministry or
13 from a regional location such
14 as Ottawa, and not least,
15 somebody who hasn't been
16 involved in the case at
17 critical points."

18 Justice Cosgrove says he doesn't
19 understand the submission, and Mr. Murphy:

20 "No, Sir, I'm saying this!
21 It might even be closer to --
22 It might even be closer to
23 arguably being independent if
24 the Attorney General's
25 Ministry sent somebody down

1 here from Toronto, but I'm
2 not saying -- I'm saying that
3 even that isn't sufficiently
4 independent. Mr. Stewart,
5 however, has been directly
6 involved in this matter, in
7 the pre-trial discussions of
8 this matter, as recently as
9 September of '97, based on my
10 information. It's for that
11 reason that I -- I -- in my
12 respectful submission, he in
13 no way qualifies as being
14 independent --"

15 Mr. Murphy goes on at some length
16 about his position, and at page 6649 he says:

17 "So, we have, Your Honour, a
18 conflict of interest, in my
19 submission, that extends to
20 the highest levels of the
21 Ministry of the Attorney
22 General. And even if Renee
23 Pomerance or one of her
24 colleagues was to arrive down
25 here this morning, in my

1 submission the Attorney
2 General is not competent to
3 represent itself and should
4 not be accepted by Your
5 Honour as independent. Mr.
6 Stewart even more so --"

7 And he sets out why by reference
8 to certain cases, and he repeats at the bottom of
9 page 6650 that Mr. Stewart was involved in the case
10 at a critical point in September 1997 when the
11 trial started, and says that if accepted:

12 "-- he is no less in the
13 position of trying to justify
14 his conduct and judgment as
15 well as that of Mr. Flanagan
16 with whom he was personally
17 engaged as a colleague and an
18 advisor in the pre-trial
19 discussions. For him to
20 appear this morning is -- is,
21 in my submission,
22 unacceptable. He is not
23 independent counsel."

24 Mr. Murphy goes on at some length
25 again, and refers again on page 6652 to the

1 pre-trial discussions.

2 He appears to be giving evidence
3 because he says, at Line 6 on page 6652:

4 "He proffered opinions and
5 participated in those
6 discussions, and for that
7 reason alone, I think he is
8 tainted. And I am surprised
9 that Mr. Flanagan would,
10 knowing that, allow him to
11 appear or present him or
12 offer him to the Court as
13 being independent."

14 The Court then calls upon Mr.
15 Stewart to make his reply.

16 Mr. Stewart makes the point that
17 he is not a witness, and there has not been any
18 allegation that he will be, and he then makes this
19 point:

20 "The fact that Counsel makes
21 allegations or says today,
22 for example, that so and so
23 is implicated or whatever,
24 are just that: they are
25 allegations. There will have

1 to be evidence in regards to
2 it. If you follow it to the
3 logical conclusion, Your
4 Honour, what it basically
5 means is that if Counsel
6 makes an allegation against
7 the Crown in a given case,
8 whether it's baseless or not,
9 they then have the right to
10 decide who should be the
11 Crown Attorney on the case.
12 THE COURT: I'm sorry, who
13 does?
14 MR. STEWART: The defence
15 decides. If they make an
16 allegation and then a Crown
17 -- and my argument is going
18 to be later, Your Honour,
19 dealing with the case law and
20 the evidence here, that Mr --
21 THE COURT: No, Counsel, you
22 offend the Court.
23 MR. STEWART: I'm sorry?
24 THE COURT: I'm sorry, -- you
25 offend the Court with your

1 argument. You should not,
2 having been challenged as a
3 person properly to make
4 argument before the Court,
5 extend that argument and
6 assume that you will continue
7 as Counsel. You should
8 address the point raised by
9 Mr. Murphy, which is your
10 status before the Court. Not
11 Mr. Flanagan's, not the law
12 involved on the matter, but
13 the issue of your status as
14 being independent.

15 MR. STEWART: Certainly."

16 In regards to that, he says that
17 the case law becomes important, and he then refers
18 to the case law.

19 The Court then says, at page 6655:
20 "Does that case law deal with
21 the issue of whether the
22 second Crown filling in for
23 the first Crown should be
24 independent, or what is meant
25 by independent?"

1 MR. STEWART: Your Honour,
2 the aspect of independent --
3 I believe Mr. Flanagan used
4 that term; that's what Mr.
5 Murphy has taken it from.
6 The issue is whether Mr.
7 Flanagan is a witness or not,
8 and that's why I'm here on
9 that motion; to argue that
10 motion, to deal with that
11 issue. Your Honour will
12 decide that one way or the
13 other, --

14 THE COURT: No, Counsel! The
15 issue before the Court this
16 morning is the presentation
17 of a motion by Counsel for
18 the Defence for a stay based
19 on abuse of process.

20 MR. STEWART: Correct.

21 THE COURT: That is the
22 matter before the Court, and
23 that is the matter that I
24 understood you to rise to say
25 that you were acting as

1 independent counsel to argue
2 that motion. The other one
3 is an ancillary motion, and
4 if you had read the
5 transcript of the discussion
6 between Counsel and myself
7 yesterday you would have
8 realized that the main motion
9 before the Court is the stay
10 of process."

11 Mr. Stewart then says, in the
12 middle of the page:

13 "My position, Your Honour, is
14 that that becomes important,
15 and why there has to be
16 counsel that can't be Mr.
17 Flanagan. Normally Mr.
18 Flanagan --

19 THE COURT: Well, how can the
20 Court feel confident that you
21 are not Mr. Flanagan if you
22 are a lawyer who has worked
23 as a colleague of Mr.
24 Flanagan in the preparation
25 of the material for this

1 Court which is challenged by
2 Defence?

3 MR. STEWART: Well, in
4 regards to that, Your Honour,
5 the Crown has the right to
6 pick who their Counsel will
7 be. I mean, my friend
8 indicates that --

9 THE COURT: Well, surely it
10 has to be somebody else who
11 is not potentially the same
12 person or tarred with the
13 same allegation of the
14 Defence? And I say it no
15 higher than that: an
16 allegation. Counsel is
17 saying that Mr. Flanagan is
18 involved in the abuse of the
19 process, and if you indeed
20 are a colleague of Mr.
21 Flanagan and have advised him
22 in these proceedings, then,
23 in a sense, you are Mr.
24 Flanagan before this Court.
25 MR. STEWART: Well, Your

1 Honour, in regards to it: the
2 abuse, as I understand this,
3 is to deal with a meeting at
4 Mr. Flanagan's house and to
5 deal with certain evidence --
6 THE COURT: Well then,
7 Counsel, you totally
8 mis-understand what the Court
9 is about this morning. The
10 application is for a stay on
11 abuse of process.

12 MR. STEWART: Correct.

13 THE COURT: One of a number
14 of items listed happens to be
15 the role of Mr. Flanagan in
16 that.

17 MR. STEWART: But if Mr.
18 Flanagan -- if that portion
19 of the abuse did not exist,
20 then Mr. Flanagan would be
21 arguing this motion at this
22 point in time."

23 Mr. Stewart at the bottom of page

24 6658:

25 "I am here to argue that

1 portion, but obviously, from
2 the documents that were
3 served yesterday that I've
4 read, it would appear that
5 it's a mega-motion, if I can
6 use that term; it's 16 pages.
7 I am prepared to deal with
8 that. Because I'm here and
9 I'm going to be dealing with
10 the Flanagan issue, and I'm
11 prepared to deal with --
12 THE COURT: Well, let's go
13 back to the "portion" of the
14 motion dealing with Mr.
15 Flanagan's involvement, as
16 alleged.
17 MR. STEWART: Yes.
18 THE COURT: Mr. Flanagan, it
19 is alleged, is involved as
20 set out in paragraph-- at
21 page 14 of the Notice of
22 Motion: "There is a
23 reasonable inference on the
24 evidence presented before the
25 Honourable Court that the

1 above-mentioned misconduct,
2 which was alleged
3 interference with witnesses,
4 and unlawful actions by the
5 police investigators was
6 known or ought to have been
7 known about by the Crown
8 Attorney; that he either
9 directed the police to do
10 what they did, or that he was
11 aware of what they were doing
12 and that it was improper and
13 that he didn't do anything,
14 or finally, that he was
15 wilfully blind to the police
16 misconduct." Those are the
17 allegations of the
18 involvement, improper
19 involvement of Mr. Flanagan.
20 Counsel this morning says --
21 and you haven't commented on
22 it -- that you've advised Mr.
23 Flanagan in these
24 proceedings. So, in a sense,
25 you stand in the position of

1 Mr. Flanagan.

2 MR. STEWART: So that would
3 mean then, Your Honour, that
4 if someone has any contact
5 with a case and you are the
6 Crown and the Defence lawyer
7 makes the allegation, whether
8 there are any grounds for it
9 or not in regards to that
10 matter, that anybody that has
11 touched the case cannot argue
12 or appear on that case?

13 THE COURT: Why do you
14 quibble with me, Counsel?
15 Why do you not answer the
16 question of what your
17 involvement in this case has
18 been, as an officer of the
19 court?

20 MR. STEWART: Sure, I have no
21 problem with that.

22 THE COURT: Would you tell me
23 then, please?

24 MR. STEWART: Yes. Before
25 the trial even started I had

1 some discussions with Mr.
2 Flanagan and Mr. Griffiths in
3 regards to -- in regards to
4 the case. The case hadn't
5 even started. There have
6 been a couple of times during
7 the case where I've talked to
8 Mr. Flanagan about the
9 ongoing matter. I did not
10 realize there was any problem
11 with the case at all until
12 Tuesday night when I got a
13 phone-call that Mr. Flanagan
14 may be subpoenaed.

15 THE COURT: Well, let's
16 quantify that. How much
17 time, in terms of minutes
18 spent, have you spent
19 involved in this trial?

20 MR. STEWART: Up until
21 Tuesday, Your Honour, because
22 Tuesday was when I received
23 the phone-call -- four hours?
24 Maybe a little bit longer
25 than that, I -- I didn't -- I

1 wasn't marking it, and that's
2 over the last six months.

3 THE COURT: And what was the
4 nature of your involvement in
5 that four hours?

6 MR. STEWART: I had a
7 discussion with Mr. Griffiths
8 and Mr. Flanagan as to the
9 possible resolution of the
10 case, -- and had made a few
11 phone-calls, maybe two or
12 three, for Mr. Flanagan,
13 concerning the case as it was
14 going on. And that was it.

15 THE COURT: Subsequently?

16 MR. STEWART: Yes.

17 MR. MURPHY: Your Honour?

18 Sorry.

19 MR. STEWART: That's to my
20 best recollection.

21 THE COURT: Do you have any
22 jurisprudence or any comment
23 on the policy or principles
24 or practice of the engagement
25 of independent counsel?

1 MR. STEWART: Well, Your
2 Honour, --

3 THE COURT: What is the
4 purpose of independent
5 counsel?

6 MR. STEWART: Well, Your
7 Honour, this term has come up
8 in regards to this case, but
9 there is always going to be a
10 Crown Attorney on the case.
11 This is the State and the
12 accused, so there can't --
13 it's not a civil case. This
14 isn't an inquest. This isn't
15 a situation where we talk
16 about somebody having a
17 conflict with a person in
18 that direction. There is
19 always going to be a Crown
20 Attorney involved with the
21 case. As I say, this is not
22 an inquiry. This is a
23 criminal matter. It will
24 always be the State and the
25 individual. And in relation

1 to this particular case,
2 there is no potential for me
3 to be a witness in regards to
4 it. The accused shouldn't
5 have the situation where they
6 can make certain allegations
7 and then pick who the
8 prosecutor is. And that's,
9 in effect, -- Your Honour may
10 not agree with me, but
11 that's, in part, what's going
12 on here. I come in, Senior
13 Counsel, to deal with this
14 matter, and all of a sudden I
15 can't. I supposedly can't
16 deal with it because I've
17 talked to somebody and
18 consulted on an ongoing case,
19 and now I start to read
20 materials and find out what
21 the case is about; I've been
22 reading transcripts and
23 whatever for the last two
24 days, and I suggest that
25 that's -- when we talk about

1 independent counsel we talk
2 about independent counsel in
3 the sense that they aren't
4 going to be witnesses; that
5 they are independent of the
6 investigation of the matter,
7 and the allegations. But if
8 you follow my friend's
9 logical -- the logical
10 conclusion to it, every time
11 there's any kind of
12 allegation, that all of a
13 sudden the Crown has to get
14 off and anybody that knows
15 that Crown, whether they are
16 from head office or whatever,
17 cannot deal with it."

18 Mr. Stewart then goes on to
19 mention certain cases, and in the middle of page
20 6663 he says:

21 "Well, of course I'm not
22 independent in the sense that
23 I'm a Crown. Well, of
24 course, because the Crown is
25 involved in this case -- we

1 are one of the parties. I
2 don't know if the Court has
3 any other questions."

4 The Court then invites comments
5 from Mr. Murphy, and he refers on page 6664 to
6 pre-trial meetings, and Mr. Stewart says:

7 "I had never discussed with
8 Mr. Neville about this case
9 at all. In fact, I thought
10 he was on it, but I had never
11 talked with Mr. Neville."

12 And Mr. Murphy says at the bottom
13 of the page:

14 "So, whether he was
15 physically present or not,
16 Your Honour, -- for him to
17 now suggest that his
18 involvement is scant, or
19 peripheral, or non-central,
20 is, in my submission,
21 specious, and it is
22 attempting to down-play the
23 fact that he is quite
24 directly in a position now,
25 potentially, if not actually,

1 to try to justify his prior
2 involvement and the opinions
3 that he offered in the
4 context of those pre-trial
5 discussions with Defence
6 Counsel."

7 And further down, he says:

8 "And Mr. Stewart can in no
9 reasonable way, in my
10 submission, suggest that he
11 isn't involved more than
12 merely at an arm's length or
13 by a few hours of -- a few
14 hours or four hours is not
15 insignificant, in my reply,
16 in any event."

17 And Mr. Murphy refers to the
18 earlier transcript, and Mr. Flanagan refers to the
19 need in that transcript for counsel to argue the
20 motion.

21 Mr. Murphy argues that there has
22 been no reasonable acceptable response to the
23 issues, and at page 6668, the court adjourns to
24 give Mr. Stewart an opportunity to review the
25 jurisprudence, to see if he wishes to offer the

1 court any jurisprudence on the issue of independent
2 counsel.

3 And the Court then states:

4 "The Court is concerned that
5 in fact, and the appearance
6 is, that this Counsel, Mr.
7 Stewart, because of his
8 involvement in these
9 proceedings, does not, could
10 not be described as
11 independent. Certainly not
12 to get around the issue which
13 is referred to by Justice of
14 Appeal Twaddle in
15 Deslauriers. You see that
16 what Justice Twaddle is
17 talking about is the
18 objectivity and the
19 appearance of objectivity of
20 counsel. That's why Mr.
21 Flanagan is not here; it is
22 alleged that there is
23 improper conduct, and so,
24 objectively, how can someone
25 being challenged be objective

1 or appear to be objective?
2 And if that is the case, the
3 same argument is made and
4 gives the Court great
5 difficulty with Mr. Stewart's
6 factual involvement and,
7 therefore, the perception
8 that he potentially is privy
9 to the area of the case which
10 has been challenged by
11 Defence in the motion."

12 The matter is resumed at page
13 6670, but we are almost at four o'clock, so perhaps
14 this is a reasonable place to end for the day.

15 THE CHAIR: How do you feel you
16 are getting along time-wise, Mr. Cherniak?

17 MR. CHERNIAK: We have finished
18 Volume I, and I think it is fair to say we will be
19 into next week before I finish all of the evidence
20 references.

21 I am trying to be cautious to give
22 you the context you need for the particulars.

23 My intent is to finish the reading
24 of the evidence, and have our witnesses here on
25 Thursday.

1 THE CHAIR: Is there anything you
2 want to say about timing, Mr. Paliare?

3 MR. PALIARE: I don't think so,
4 no.

5 THE CHAIR: All right. We will
6 resume at nine-thirty tomorrow.

7 --- Whereupon the hearing was adjourned
8 at 4:02 p.m., to be resumed at 9:30 a.m.
9 on Thursday, September 4, 2008.

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

Catherine Southworth, Computer-Aided Transcription

and

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

Nancy Greggs, CCR