

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 Friday, September 11, 2008 at 9:28 a.m.

APPEARANCES:

Earl Cherniak, Q.C.
Cynthia Kuehl

Independent Counsel appointed
pursuant to the *Complaints Procedure*

Chris Paliare
Richard Stephenson
Robert A. Centa

for The Honourable Paul Cosgrove

George K. Macintosh, Q.C.

for the Inquiry Committee

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1 Toronto, Ontario
2 --- Upon resuming on Thursday, September 11, 2008
3 at 9:28 a.m.

4 THE CHAIR: Mr. Cherniak.

5 MR. CHERNIAK: Good morning, Chief
6 Justice and panel. There is just one housekeeping
7 matter that I would like to deal with first. With
8 respect to volume 4, I am in the process marking up
9 a clean copy of volume 4 in the way that we
10 discussed.

11 Here is what Ms. Kuehl and I
12 propose, subject to the panel's wishes. We will
13 have that done by the weekend, and maybe even by
14 tomorrow. I am about half way through. What we
15 propose is it is really those tabs in particular 5
16 that I haven't yet read, and it is less than half a
17 volume of them.

18 With respect to tab 6, it was
19 never my intention to read any part of it. Tab 6
20 deals with the sort inquiry process, and it is just
21 extra pages to supplement those matters that are in
22 the rest of the book that demonstrate the sort of
23 inquiry process that the Court of Appeal referred
24 to. So I was never going to read those pages.

25 What I propose with respect to the

1 tabs in volume 5 that have not yet been read is
2 that after I mark them up, they will be photocopied
3 and we will, depending on the panel's wishes,
4 courier them either directly to the panel members
5 or to Mr. Macintosh for distribution to the panel
6 members. I am prepared to do it either way,
7 depending on whether we do it or not, but out of
8 the middle man.

9 THE CHAIR: I am sure Mr.
10 Macintosh would like something to do.

11 MR. MACINTOSH: I'm your man.

12 MR. CHERNIAK: We will do it that
13 way, as we have up to now. I expect it will be
14 winging its way to him either tomorrow or, at the
15 latest, on Monday, unless we are still here. If we
16 are still here on Monday, then it will be in your
17 hands on Monday morning for sure.

18 I am about to call my witnesses,
19 and I understand my learned friend wishes to
20 address you.

21 THE CHAIR: Thank you.

22 MR. PALIARE: Members of the
23 panel, before the witnesses are called, we wanted
24 to raise an issue about the admissibility of much
25 of the evidence to be adduced by Mr. Cherniak

1 through these witnesses.

2 I can advise you we have seen
3 their will-says and we do not want to interrupt the
4 flow of the evidence in any unnecessary fashion,
5 and, therefore, we ask the panel to be cognizant
6 of, and particularly Mr. Cherniak to be mindful,
7 that we object to evidence that he might adduce
8 that fits into three different categories.

9 The first category is having
10 witnesses talk about what is in the transcript;
11 that is, having a witness that wants to talk about
12 something that occurred at the trial in court, as
13 they saw it, in my respectful view, the transcript
14 is the best evidence.

15 It is more accurate, it is more
16 authoritative, and it is what should be relied on,
17 and there ought not to be evidence about a
18 witness's perception or someone in the audience's
19 perception of what occurred. That is category 1.

20 Category 2 is opinion evidence.
21 It breaks down into two different branches. One is
22 opinion evidence about Justice Cosgrove's state of
23 mind. Why was Justice Cosgrove doing thus and so?
24 In my respectful view, totally inadmissible from
25 any witnesses, but let alone these witnesses, and,

1 secondarily, evidence that goes to the ultimate
2 question for you to determine, that that kind of
3 opinion evidence ought not to be introduced.

4 The third category is hearsay.
5 That is, evidence should not be adduced or accepted
6 by the panel where somebody wants to get in the
7 witness box to talk about what others told them
8 about their state of mind, or what they thought
9 about the trial, or why it was they didn't want to
10 be there or whatever. It is hearsay.

11 Of course, we then are precluded
12 from cross-examining on that, and to simply say, We
13 are not putting it in for the truth, we are just
14 putting it in because that's what somebody said, in
15 my respectful view, isn't appropriate.

16 So I simply wanted to raise those
17 concerns to say Mr. Cherniak, in my respectful
18 view, should be cognizant of those items. We don't
19 want to be interruptive, but we will need to rise
20 perhaps from time to time to address those three
21 categories of evidence.

22 THE CHAIR: Thank you.

23 MR. CHERNIAK: May I just address
24 what my friend just said briefly? First of all,
25 with respect to the transcript, no witness will be

1 directed to anything in the transcript, but they
2 may well be asked -- and I know at least of two
3 occasions, two or maybe three witnesses, there will
4 be particular events that they will be asked about
5 in a general way, not so much as to what happened,
6 but from the perspective of the effect upon them or
7 what they were about to do. But of course with
8 respect to what actually happened at the trial, the
9 transcript is there and it is the evidence of what
10 actually happened. That's number 1.

11 With respect to the question of
12 hearsay, the kind of questions that I will be
13 asking will be asked in respect to the issue of
14 whether certain things were said and not whether
15 they were true and the effect of certain things
16 having happened as to how they were able to do
17 their job, for instance.

18 In respect of that, this is an
19 inquiry and not a court of law, and to the extent
20 the hearsay rule is breached, I don't expect it
21 will be, based on what I understand the evidence
22 is. This inquiry process is not governed by the
23 Rules of Evidence, in my respectful submission.

24 With respect to Justice Cosgrove's
25 state of mind, I do not expect that any witness

1 will actually try to get into Justice Cosgrove's
2 state of mind. They may well talk about their own
3 state of mind, and, as I remember one learned juror
4 saying back in the 19th century: The state of a
5 man's mind is as much a fact as the state of his
6 digestion. That kind of evidence is indeed, in my
7 submission, admissible.

8 With respect to the ultimate
9 question, I do not expect anybody, any of these
10 witnesses, is going to talk about in any way as to
11 what this panel should find or not find. I just
12 don't think that is a concern, at all.

13 With that, I would like to call my
14 witnesses. Two of the witnesses are Crown
15 attorneys. The first witness is Mr. Flanagan, who
16 is a Crown attorney. Mr. Humphrey was acting as a
17 Crown attorney. So I can assure you that with
18 respect to the -- I can tell you that with respect
19 to the Crown attorneys, all our dealings with them
20 have been with the knowledge of and concurrence of
21 the Ministry. We always went through the Ministry.

22 They are here because I asked them
23 to be here, not because they have volunteered to be
24 here. The Ministry has advised me that it was not
25 necessary to subpoena them. I think the panel

1 should know that. They didn't come knocking on my
2 door and say, Can we testify? They were contacted
3 by me after contact with the Ministry.

4 They met with Ms. Kuehl and myself
5 at my request. They prepared will-says --
6 will-says that were prepared, which they approved,
7 based on what they told us, and we were advised it
8 was not necessary to subpoena them. That's the
9 basis of them.

10 I am only calling one of the
11 police officers, Detective Inspector Bowmaster,
12 and, again, the same situation pertains.

13 The one lay witness I am calling
14 is Mr. Foster, who, again, did not volunteer to
15 come here. We contacted him. We met with him, did
16 a will-say, supplied it to my friend, and he is
17 here because independent counsel asked him to be
18 here. He is not actually here at the moment. He
19 is on a flight, but he will be here soon.

20 With that, I would like to call
21 Crown attorney Curt Flanagan. I am going to give
22 the witness this microphone. It is more important
23 that all the panel members fully hear the answers
24 rather than the questions.

25 MS. CHOWN: Mr. Flanagan, can you

1 state your full name for the court, please?

2 MR. FLANAGAN: Curt Michael
3 Flanagan.

4 SWORN: CURT MICHAEL FLANAGAN

5 EXAMINATION-IN-CHIEF BY MR. CHERNIAK:

6 Q. Mr. Flanagan, I understand
7 you were called to the Bar in 1982?

8 A. I was called to the Bar in
9 1982, correct.

10 Q. And you were at one time an
11 assistant Crown attorney in Ottawa?

12 A. I was an assistant Crown
13 attorney from 1984 to 1993.

14 Q. And then in 1993, you were
15 appointed the Crown attorney for the Judicial
16 District of Leeds and Grenville?

17 A. Correct.

18 Q. Just for the benefit of the
19 non-Ontario members of the panel, where is Leeds
20 and Grenville?

21 A. Leeds and Grenville is a
22 jurisdiction that is between Frontenac, which is
23 the Kingston area of Ontario, and I suppose Ottawa
24 and Cornwall. So if you are going on the 401,
25 Brockville is the next city really after Kingston

1 on your way to going to Ottawa. So it is eastern
2 Ontario.

3 Q. Brockville is right on the
4 St. Lawrence River, as I recollect it.

5 A. Yes.

6 Q. And Brockville is the
7 judicial seat of Leeds and Grenville?

8 A. Brockville is where -- yes,
9 Brockville is where my office is as the Crown
10 attorney.

11 Q. I understand that you were
12 the lead Crown in the trial of Regina versus Julia
13 Elliott leading up to and when the trial commenced
14 in September 1997; is that correct?

15 A. Yes, that's correct.

16 Q. The panel has heard, as I
17 advised you, considerable portions -- by no means
18 all, but considerable portions of what transpired
19 at the Elliott trial while you were involved, and
20 subsequent to it.

21 My question -- and I am not going
22 to ask you in any detail about the trial, because
23 we have the transcript and we know what happened at
24 the trial as it affects this inquiry.

25 My question to you is: How did

1 the Elliott trial, in respect of your part in it,
2 which I think ended some time in the spring of 1998
3 --

4 A. It depends what you mean by
5 my part. My part as Crown counsel would have ended
6 in March 1998, but I was called as a witness on two
7 separate occasions after that.

8 Q. I am not talking for the
9 moment about your sojourn, if I can call it that,
10 as a witness, but the portion of the trial where
11 you were the lead Crown attorney.

12 My question is: How did the way
13 the Elliott trial went compare in your experience
14 with other serious murder trials, in your
15 experience?

16 A. The Elliott trial was
17 completely different than any murder trial that I
18 have prosecuted, and I have prosecuted many. The
19 murder trial, quickly after the trial, became an
20 inquiry if you like, targeted --

21 Q. You mean after the trial
22 commenced?

23 A. Yes. Became a targeted
24 inquiry into conduct of Crown counsel and police
25 officers, and so it wasn't really a trial. It was

1 more of an inquiry into our actions based on
2 innuendo and speculation by defence counsel thrown
3 before the court without any foundation,
4 evidentiary foundation, whatsoever.

5 Basically, very quickly after the
6 trial started, defence counsel would make
7 scurrilous, in my respectful view, malicious
8 allegations of Crown counsel and police. The
9 allegations included suborning perjury, obstruct
10 justice, conspiracy; and, as a result of that, the
11 trial judge just embarked on a path to explore any
12 avenue suggested by defence counsel.

13 As a result of that, I was taken
14 off the case. More appropriately, I was compelled
15 to testify. It was argued that I wasn't a
16 compellable witness, but the trial judge decided
17 otherwise, and basically the trial Crowns, myself
18 and Mr. Findlay, were witnesses.

19 Any witness that the defence
20 suggested that may have anything to do with this
21 giant conspiracy was called, and away we went on
22 that track.

23 So when you ask me the question
24 what was it like, it was absolutely a completely
25 different experience. It was an atrocious

1 experience. It was a very unsettling experience to
2 be attacked professionally without any foundation,
3 without any evidence.

4 Q. I am going to come to that
5 aspect of it in a moment. Can you help with this:
6 We have heard about the -- in the evidence that's
7 been read, we have heard about the restrictions
8 placed upon you and Mr. Findlay. Mr. Findlay was
9 your assistant Crown attorney?

10 A. Yes.

11 Q. We have heard about the
12 restrictions placed upon you communicating with
13 witnesses, with the police, and indeed I think with
14 each other, and, ultimately, with Crowns that were
15 called in to deal with the case while the question
16 of your compellability and Mr. Findlay's
17 compellability was under issue.

18 Can you help us with the effect
19 that those rulings had on your ability, in the
20 first place, to conduct the Elliott trial, and, in
21 the second place, to give assistance to subsequent
22 Crowns to conduct the Elliott trial?

23 A. In the first place, it
24 prevented me from conducting the trial as a Crown
25 prosecutor. The orders that were made by the trial

1 judge essentially prevented pretty well anybody
2 from talking to anybody. It was, you couldn't talk
3 to pretty well any police officer or clearly any
4 person that was a potential witness.

5 I couldn't talk to my assistant
6 Crown. I couldn't prepare or talk to witnesses
7 with the view that you were -- after this motion,
8 you were going to continue as the prosecutors,
9 because we were the prosecutors for this case.

10 So it completely hamstrung me as
11 Crown counsel to be able to effectively do
12 anything.

13 I am reminded, frankly, when Mr.
14 Findlay -- for example, there was the
15 compellability motion for Mr. Findlay, and there
16 was an argument in court. Counsel had raised --
17 defence counsel had suggested that Mr. Findlay
18 can't remain in court because he is Mr. Flanagan's
19 eyes and ears, and Mr. Findlay was taken out of
20 court. So you can see, what does that say about
21 the Crown prosecutor, again, based on nothing,
22 based on no evidentiary value.

23 So it completely hamstrung the
24 Crown attorney in relation to be able to continue
25 with the case.

1 With respect to your second point,
2 obviously you can't have counsel -- however many
3 that may be, you can't have counsel step into a
4 murder case without talking to counsel that was
5 previously on it to at least give the person the
6 proper background and what the case is about, and
7 we were prevented from doing that.

8 So when Mr. Stewart stepped in,
9 who was the senior Crown in Ottawa at the time,
10 when he stepped in, albeit he was on for about 20
11 minutes, on the record, you couldn't necessarily
12 talk to him after he finished in relation to court.

13 When Mr. Ramsay came in, you couldn't brief Mr.
14 Ramsay because of these orders.

15 So it made it very difficult, if
16 not impossible, with respect to continuing with
17 respect to the case.

18 Q. Thank you. The third area I
19 want to ask you about is the effect, if there was
20 an effect, on you and, from your observation, your
21 colleague, Alan Findlay -- first of all, do you
22 live in Brockville?

23 A. Alan Findlay was my --

24 Q. Do you live in Brockville or
25 did you live in Brockville at that time?

1 A. I live just outside the city
2 limits in Brockville, yes.

3 Q. Brockville is not that big,
4 so it's --

5 A. Brockville is very small.

6 Q. And it is quite lovely, too,
7 but it's small, is it? Anyway, you live there.
8 Mr. Findlay lived in the Brockville area?

9 A. Mr. Findlay lived in
10 Brockville.

11 Q. He lived in Brockville. My
12 question to you is the effect on you and, to your
13 observation, Mr. Findlay in the Brockville area
14 during and following the trial?

15 A. The effect was significant.
16 I think you have to understand; you have to put it
17 into context. This was a high profile, if you
18 like, murder case that occurred in a jurisdiction
19 that is very small.

20 The City of Brockville, where the
21 trial took place, is about 25,000 people, maybe 30,
22 tops. You are in a very small jurisdiction. When
23 defence counsel makes allegations that the Crown
24 attorney, who is the chief administer of justice in
25 that town, is engaging in things like conspiracy,

1 having witnesses trying to change their evidence,
2 obstructing justice, misleading the court, and then
3 when the trial judge makes findings against the
4 Crown attorney and the police in relation to this
5 so-called giant conspiracy, it has a tremendous
6 effect.

7 You are the Crown attorney in a
8 very small town. Everybody -- this case was front
9 page. When this decision came out about all the
10 breaches -- and I forget how many that the trial
11 judge found, but I know it was in excess of 100.

12 When this case came out, it was on
13 the front page of the Brockville Reporter and
14 Times. It was on the front page of the Ottawa
15 Citizen. It was on the front page of the Ottawa
16 Sun. And so you in a small jurisdiction, as the
17 administration of justice, sure it's going to have
18 an effect.

19 Your reputation -- the most
20 important thing to a lawyer is his integrity and
21 his credibility, and I would go a little further
22 than that. With respect to a Crown attorney, that
23 is extremely important. You represent the public,
24 and for the breaches the trial judge found and the
25 allegations, the criminal allegations that were let

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

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

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

15 I saw the judgment. I lost sleep
16 over it. I was stressed over it, and I think you
17 have to put it into context. This isn't a
18 situation that happened in a day. This is a
19 situation that went on for an extended period of
20 time, where I'm called as a witness in March, asked
21 all kinds of questions about whether or not I
22 coached witnesses or whether or not I tried to
23 suppress or obstruct justice by not preventing
24 evidence -- or preventing evidence from going to
25 the court without any foundation, and then I'm

1 called about seven, eight months later in Ottawa to
2 testify, and again the same allegations made to me.

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

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

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

21 My kids are in school in a small
22 town. Everybody knows what you do. In a small
23 little town, you're the Crown attorney. People
24 know you're the Crown attorney. People know your
25 kids, your kids -- that their father is the Crown

1 attorney. So, yes, it had a tremendous personal
2 effect.

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

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

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

1 trial.

2 Q. Did the Court of Appeal
3 judgment help?

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

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

20 Q. I've got one last area to ask
21 you about. Were you the Crown when Julia Elliott
22 was -- how did she come back? Was she extradited?

23 A. Yes.

24 Q. From?

25 A. Costa Rica.

1 Q. Were you the Crown dealing
2 with the --

3 A. The retrial?

4 Q. The retrial.

5 A. Yes.

6 Q. What happened?

7 A. The Court of Appeal, as you
8 know, sent it back for a trial on second degree
9 murder. It always a second degree murder
10 indictment, or at least when we started the trial
11 it was. We were, at that time, prepared to go to
12 trial on the second degree murder.

13 We made -- in preparation for the
14 trial, it became very clear to me that --

15 Q. This is what year, sir?

16 A. I beg your pardon?

17 Q. What year, approximately? To
18 help you, the Court of Appeal judgment came out in
19 December of 2003.

20 A. I am going to say '04. When
21 working with the investigating officer -- there was
22 a new investigating officer, a case manager, so to
23 speak -- it became very clear to me that a certain
24 percentage of the witnesses didn't want to have
25 anything to do with this trial anymore because of

1 what they were put through on the first trial, this
2 ad nauseam cross-examination with respect to every
3 little bitty piece of stuff.

4 Ultimately, the Crown accepted a
5 manslaughter. Was that the reason that I accepted
6 a manslaughter? It was a factor that I accepted a
7 manslaughter. There are other reasons, which would
8 include closure for the family, pretrial custody,
9 the fact that it was dated, the prolonged --
10 protracted, rather, proceedings, memories of
11 witnesses, things of that nature.

12 Is it the be all and end all why I
13 took a manslaughter? No, but it was a factor, and
14 it was a significance factor.

15 Q. What was the sentence?

16 A. The sentence? Julia Elliott
17 had done six years pretrial custody before she pled
18 guilty, and she got an additional seven years.
19 There is a -- I'm not going to use the word "rule",
20 but there certainly is a legal concept that
21 pretrial custody is worth two-for-one in relation
22 to the six years.

23 Obviously, there was also other
24 orders made, DNA orders and things of that nature,
25 but that was essentially the sentence, Mr.

1 Cherniak.

2 Q. I have been asked to ask you
3 one other question.

4 A. Yes.

5 Q. That is, in the time leading
6 up to the first trial, the time leading up to
7 September 1997, was there some plea bargaining?

8 A. Whenever you -- I won't say a
9 hundred percent of the time, but clearly the vast
10 majority percentage of the time when you're dealing
11 with a murder case, there is going to be discussion
12 of resolution, whether that's on a second degree,
13 what the parole eligibility might be, whether
14 you're on a second degree, whether there's a
15 manslaughter in the cards, so to speak.

16 So, yes, there was -- my memory is
17 there was discussion, not with Mr. Murphy, not with
18 counsel that was on the trial, but with previous
19 counsel, Mr. Neville.

20 Q. And the nature of the
21 discussion?

22 A. The nature of the discussion
23 was with respect to -- I can say that manslaughter
24 was talked about. I can say I'm not sure if there
25 was a formal basis of which facts it would be based

1 on, but manslaughter was talked about in relation
2 to it, yes. And I don't know, you know, for the
3 number of years, et cetera, but that's early on in
4 the process, right?

5 This would have taken place after
6 a prelim, so this is before pretrial motions, where
7 you get evidence in that may not necessarily have
8 gone in. So this is at the very -- not the
9 earliest, but after the preliminary, there was
10 discussions, yes.

11 Q. And that was not with Mr.
12 Murphy?

13 A. That was not with Mr. Murphy.

14 Q. And it absolutely didn't
15 happen?

16 A. It didn't happen, no.

17 MR. CHERNIAK: Those are my
18 questions.

19 THE CHAIR: Mr. Paliare.

20 CROSS-EXAMINATION BY MR. PALIARE:

21 Q. Mr. Flanagan, I just have a
22 couple of small areas. In terms of the penalty
23 that ultimately was imposed on Ms. Elliott, just
24 doing the numbers, I take it that that amounted to
25 about 19 years, six times the two, plus the seven?

1 A. Yes, if you take the two for
2 one, sir, and add the seven, it is 19, yes.

3 Q. Right. And the other area,
4 Mr. Flanagan, was when you said that manslaughter
5 was talked about pretrial, I take it it's fair to
6 say that that was the discussion not only raised by
7 the defence, but also by the Crown, as a
8 possibility in terms of the way in which that
9 matter could be disposed of, recognizing it never
10 happened, but that it was not just talked about by
11 the defence, but also by the Crown?

12 A. I think when you engage in
13 discussions about resolution, it would involve both
14 parties. I think part of the difficulty was -- if
15 you are talking about manslaughter, for example,
16 part of the difficulty was: What is the
17 evidentiary basis for manslaughter?

18 I mean, you can't just accept a
19 plea for manslaughter without counsel saying to
20 you, and I mean defence, Here's the facts that
21 could justify a manslaughter, so to speak.

22 So in answer to your question,
23 yes, I mean, the discussion would have involved the
24 Crown and the defence.

25 Q. I have no other questions.

1 Thank you.

2 MR. CHERNIAK: I have no
3 re-examination.

4 THE CHAIR: Thank you very much,
5 Mr. Flanagan.

6 THE WITNESS: Thank you.

7 MR. CHERNIAK: May I call my next
8 witness, Chief Justice?

9 THE CHAIR: Yes.

10 MS. CHOWN: Would you state your
11 full name, sir?

12 MR. BOWMASTER: Glen George
13 Bowmaster.

14 SWORN: GLEN GEORGE BOWMASTER

15 EXAMINATION-IN-CHIEF BY MR. CHERNIAK:

16 Q. Mr. Bowmaster, where do you
17 reside, please? Where do you live?

18 A. I live north of Kingston at
19 the present time.

20 Q. So in the Kingston area?

21 A. Yes, I'm about an hour north
22 of Kingston.

23 Q. And I understand that you
24 were in the Ontario Provincial Police as an Ontario
25 Provincial police officer for some 38 years?

1 A. Yes, sir, I was.

2 Q. And you retired in what year,
3 sir?

4 A. 2005, December.

5 Q. And since that time, you have
6 been employed by the Royal Canadian Mounted Police;
7 am I correct?

8 A. For approximately the last
9 year I have, yes.

10 Q. In what capacity?

11 A. I'm an advisor in national
12 security to the RCMP.

13 Q. That work takes you where?

14 A. Around the country.

15 Q. And what rank did you retire
16 with? What was your final rank in the Ontario
17 Provincial Police?

18 A. I retired as a detective
19 inspector.

20 Q. Right. In the years 1998 and
21 1999, what was your rank?

22 A. Detective inspector.

23 Q. I understand that -- we have
24 heard, and I think you've heard me say, and we have
25 talked -- this panel has heard a great deal of

1 evidence, of the evidence, by no means all, of the
2 events that transpired at the Elliott trial.

3 We've heard that you came into the
4 matter sometime in early August, I believe, of 1998
5 as the case manager to replace Detective Inspector
6 MacCharles?

7 A. Yes, sir, that's correct.

8 Q. And just remind us -- we have
9 heard a little bit of evidence about it -- what's a
10 case manager?

11 A. A case manager is in charge
12 of an investigation from the onset, and I guess the
13 best way to categorize it, they're responsible for
14 the speed, direction and the flow of an
15 investigation.

16 In this instance, the
17 investigation was pretty much completed, because
18 the matter was before the court. So at that point,
19 because Inspector MacCharles was away -- he was off
20 due to illness -- my job really was more of a
21 facilitator to be there to provide advice to our
22 officers and any guidance that they would need
23 during the judicial process.

24 Q. Had you performed the role of
25 case manager in other cases?

1 A. Yes, sir, I had.

2 Q. And, commonly, does the role
3 of case manager in a case such as this involve
4 contact with the various investigating officers who
5 may be witnesses in the trial?

6 A. Yes, sir, it does. You're
7 pretty much in contact on a daily basis throughout
8 the process.

9 Q. As I say, we've heard a lot
10 of the evidence, so I would like you to, first of
11 all, give us some idea, in a short time, about the
12 effect of what was going on in the trial, from
13 August 1998 when you became involved, on your
14 ability to do your job as case manager?

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

22 But having said, I was still in a
23 position to advise them and help them through the
24 case. So at the very beginning, I went into the
25 court and I really had no appreciation for what Mr.

1 McGarry had said to me until I was there for the
2 first day.

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

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

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

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

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

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

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

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

23 And in this case, everybody was so
24 afraid that what they were going to do was going to
25 offend the court, and they themselves were

1 virtually on trial throughout this whole
2 experience. They didn't want to testify. They
3 didn't want to have anything to do with it.

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

11 And of course I think most police
12 officers consider that they are an officer of the
13 court, and anything they can do to speed up or help
14 the process, that's as much their part as it is the
15 trial judge, the defence or the Crown attorney, for
16 that matter.

17 Q. Now, there was an occasion in
18 the trial when you, in effect, were charged with
19 contempt of court by Justice Cosgrove?

20 A. I was cited for contempt,
21 yes.

22 Q. You were cited for contempt?

23 MR. CHERNIAK: I can just advise
24 the panel that the events that the officer is going
25 to briefly talk about involved Constable Alarie,

1 A-L-A-R-I-E, and you will find that in volume 4. I
2 just haven't got to that matter, but you will see
3 in volume -- I can't remember what tab. Ms. Kuehl
4 will remind me. It is one of the tab 5 tabs.

5 You will see the evidence of
6 Constable Alarie, and following that evidence or as
7 a result of that evidence, you will see the events
8 where -- 5E Ms. Kuehl reminds me. You will see the
9 events that culminated in Detective Inspector
10 Bowmaster being cited for contempt.

11 BY MR. CHERNIAK:

12 Q. The panel will at some point
13 -- we just didn't get to the reading of that part
14 of it, so they're going to see that evidence, and
15 I'm not going to go over it. I'm not going to ask
16 you to review that evidence.

17 But, first of all, what happened
18 to the contempt charge?

19 A. It was dismissed by Mr.
20 Justice Chadwick.

21 Q. At some point after the
22 trial?

23 A. Yes, I think I was cited in
24 July of '99, and it was dismissed in December of
25 1999.

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

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

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

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

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

25 He asked me -- without getting

1 into any hearsay here, he was concerned of what was
2 happening, and he conveyed to me that he had heard
3 rumours and he was reluctant.

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

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

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

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

1 You go home and you tell your wife
2 you just got cited for contempt of court. What
3 does that mean? It means you'll have a hearing.
4 What is the end result? I don't know. Could go to
5 jail, I suppose. Would that be what the outcome
6 would be? I don't know. It had a really large
7 effect. It had a devastating effect.

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

12 A. I believe that's what it was.

13 Q. The last area that I want to
14 ask you about is your experience about the ability
15 to keep the family, the victim's family, aware of
16 what was happening and your observations of them.

17 First of all, just tell us
18 generally, what is the relationship in the ordinary
19 case between the police and the victim's family in
20 terms of information passing?

21 A. In most cases, the victim's
22 family have -- generally, in a number of cases,
23 they're being interviewed, or at least if they're
24 not being interviewed, they are in constant
25 communication with the police.

1 The police are responsible, in
2 today's world, to keep the family advised of an
3 investigation, how it is progressing, without
4 discussing evidence, of course, and that goes even
5 before any court process is involved.

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

10 Q. She was sort of a witness
11 coordination constable?

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

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

25 The police, in my estimation, when

1 a trial ends up being unsuccessful, rarely do the
2 victims blame the court, blame the Crown. They
3 will blame the defence, and they will often blame
4 the police, because the police are the ones who
5 conducted the investigation. If the trial fails,
6 then obviously they didn't do a good enough job.

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

12 The Crowns, of course, weren't
13 really able to speak to them. It was a situation
14 of -- you know, it was impossible. No one could
15 speak with anyone.

16 Q. You mentioned Detective
17 Debbie Roy?

18 A. Yes.

19 Q. Was she also Debbie Walker at
20 some point during the trial?

21 A. Yes, she was.

22 Q. Debbie Roy and Debbie Walker
23 are the same person?

24 A. Yes, she changed her name.

25 Q. Those are my questions

1 questions. Thank you.

2 THE CHAIR: Mr. Paliare.

3 MR. PALIARE: No questions, Mr.
4 Bowmaster.

5 THE CHAIR: Thank you, sir.

6 MR. CHERNIAK: I am going call
7 David Humphrey.

8 MS. CHOWN: State your full name.

9 MR. HUMPHREY: David Martin
10 Humphrey.

11 AFFIRMED: DAVID MARTIN HUMPHREY

12 EXAMINATION-IN-CHIEF BY MR. CHERNIAK:

13 Q. Mr. Humphrey, you were called
14 to the Bar of Ontario in 1985?

15 A. Yes, I was.

16 Q. And since that time, you have
17 been practising criminal law?

18 A. Yes, for two years with the
19 Ministry of the Attorney General, and ever since
20 1987 as a defence lawyer.

21 Q. And which firm?

22 A. It is now Greenspan,
23 Humphrey, Lavine.

24 Q. I want to take you back to
25 late 1998. Were you, along with Harvey Strosberg,

1 retained and, indeed, with the advice of Honourable
2 Sydney Robins, former Justice in Appeal, retained
3 to render some kind of assistance or involvement in
4 the Elliott trial? At that time, it would have
5 been in Ottawa.

6 A. Yes, that's right. It is my
7 recollection that sometime late in November, I
8 received the first contact from the Ministry and
9 agreed to act along with Harvey Strosberg and
10 recently retired Justice Robins to essentially take
11 over the role of the Crown for the balance of the
12 abuse of process motion that had been initiated by
13 the defence.

14 Q. As I understand, that was the
15 retainer for the abuse of process motion?

16 A. Well, there were more
17 components to it. One other component was that
18 being brought in as independent counsel, in
19 addition to assuming carriage of the ongoing abuse
20 of process motion, we would also conduct an
21 independent review of the case to determine whether
22 there was a reasonable prospect of conviction.

23 According to Crown policy, if
24 there is no reasonable prospect of conviction, the
25 Crown ought not to proceed with the prosecution.

1 Q. And do I understand it was
2 never suggested that once the abuse of process
3 motion, the motion for stay was completed, that you
4 would continue on to do the prosecution of the
5 trial if there was one?

6 A. No. It was made clear to us,
7 and we made it clear to the court, that we were
8 only there for the two purposes I described and
9 that once the abuse of process motion was finally
10 completed, assuming no stay, the prosecution of the
11 trial, proper, would be assigned to a new Crown,
12 and eventually that became a woman by the name of
13 Sheila Walsh.

14 Q. Again, the panel has listened
15 to a very considerable amount of the evidence, by
16 no means all, of the events that went on right from
17 the start of your retainer when you first showed up
18 in court until the final day of the hearing in
19 September of 1999. So I am not going to go into
20 that evidence. It's been given.

21 A. As I understand it, you knew that
22 there had been some restriction on the ability of
23 previous Crown counsel to instruct you?

24 A. Yes. We were aware that
25 previous Crown counsel had been told that they

1 couldn't communicate with their predecessors, and
2 it was our understanding that the same restriction
3 probably applied to us, as well.

4 Q. Just give us some idea --
5 again, we have heard about it to some extent. Give
6 us some idea as to the effect that had on the way
7 you were able to carry out your retainer?

8 A. It is important to bear in
9 mind the context in which we were operating. We
10 were being asked to come in and assume carriage of
11 this very serious and complicated case. It was a
12 murder case. It involved an indignity to the body.
13 There was some complexity to the case itself.

14 There was, in our estimation,
15 incredible complexity in trying to understand the
16 procedures that had taken place on the abuse of
17 process motion up to the point that we were given
18 carriage of the case.

19 It is my recollection that
20 sometime in December, before our December 23rd
21 appearance before the court, we had been provided
22 with 21 boxes of materials. It was our expectation
23 that we'd have to review all of it to inform
24 ourselves about the underlying case and to
25 understand the complex history that the case had

1 followed up to the point that we assumed carriage
2 of it.

3 Like anyone taking over any case,
4 the best way to understand what you've taken on is
5 to speak to the lawyer who went before you. If you
6 have an appeal, the first thing you want to do is
7 speak to the trial lawyer and understand what the
8 case was all about.

9 In our view, it was all the more
10 important in the context we found ourselves in,
11 because there had been a team of lawyers who had
12 taken the case through a preliminary inquiry and
13 right up through pretrial motions and a trial that
14 was eventually mis-tried, and then there was
15 another team of lawyers who understood sort of the
16 middle component of the case, which was a lot of
17 the abuse of process motion that took place until
18 they, Mr. McGarry and Mr. Cavanagh, were called as
19 witnesses.

20 And we wanted to be able to speak
21 to them to make sure we understood what we were
22 dealing with, that we understood the underlying
23 case and we understood what all these motions were
24 about.

25 We eventually were able to review

1 the materials in those boxes. When I say "we", it
2 was a team effort. It was me, Jane Kelly and Amir
3 (ph.) Saksnadjer and we had to hire a couple of --

4 Q. Could you just spell that
5 last name for the reporter, because she's going to
6 ask me and I don't know the answer?

7 A. I'll try. I think it's
8 S-A-K-S-N-A-D-J-E-R. I will have to check my
9 BlackBerry on that.

10 Q. Thank you.

11 A. And, as well, we had to hire
12 a couple of articling students, because we were
13 really in sort of crisis mode trying to review, as
14 much as we could, as fast as we could, and then to
15 try and make sense of it all.

16 So we had everybody reading
17 different portions of transcripts and preparing
18 summaries trying to get up to speed and make sure
19 we understood the case. And not being able to
20 speak with the lawyers who had previously had
21 carriage of the case, we weren't really confident
22 that we put it altogether.

23 We could see the evidence, but we
24 couldn't necessarily connect all the threads. One
25 of the concerns that I always had was, as we went

1 through this abuse of process motion, the evidence
2 had, I think, by the time we came on, for the most
3 part been presented by the defence in support of
4 the motion, although eventually it all spun out of
5 control; and when we got into the summer of '99,
6 several further witnesses were called by the
7 defence.

8 But I had a very difficult
9 decision to make, which is whether there were any
10 witnesses that might be called by the Crown to
11 provide evidence and provide answers to the
12 allegations made in the defence notice of
13 application.

14 My great worry was that the trial
15 Crowns who went before me may well know that there
16 are witnesses out there who have evidence that can
17 answer many of these allegations, but I couldn't
18 talk to them. I couldn't ask them that very basic
19 question.

20 Q. Was there a disparity between
21 your ability to get the kind of knowledge and the
22 background as you needed and what you observed
23 about Mr. Murphy's knowledge base?

24 A. Mr. Murphy had the advantage
25 that every lawyer would have in every normal case.

1 They would have been the trial counsel from the
2 start of the trial right through the trial.

3 So he not only had the advantage
4 over us in that he had long ago reviewed the
5 underlying evidence. He knew the underlying case
6 inside out, but he had lived through all the
7 pretrial motions, the aborted first trial and the
8 entirety of the abuse motion up to the point when
9 we took over.

10 So I would often find myself in
11 court and Mr. Murphy would stand up and, off the
12 top of his head -- he had a fabulous memory -- he'd
13 start citing chapter and verse something that had
14 previously happened in court and he had an obvious
15 advantage over me, in that he had lived the
16 experience and I had not.

17 Q. The panel has heard, because
18 I have read to them or referred them to, a number
19 of -- how shall I put it -- very long arguments or
20 addresses by Mr. Murphy and, from time to time,
21 some pretty extravagant language in the course of
22 those excursions.

23 I am not going to ask you about
24 them, because the panel has heard them, but I do
25 want you to give the panel the benefit of your

1 view, based on your own experience as the defence
2 counsel, of the kind of latitude that Mr. Murphy
3 was given by Justice Cosgrove to do what he did?

4 A. By way of criticisms leveled
5 at opposing counsel?

6 Q. Yes, by way of whatever. You
7 were there; I wasn't.

8 A. We had before our December
9 23rd, 1998 appearance, we had certainly read some
10 of the transcripts and we had read a lot of the --
11 I will be neutral here -- the very colourful
12 language that Mr. Murphy had used, but even with
13 some forewarning about his techniques and tactics,
14 I was taken aback when we arrived on December 23rd
15 and he launched into quite a speech essentially
16 criticizing Mr. Strosberg and myself as a couple of
17 Bay Street lawyers.

18 I can advise you neither of us
19 practices on Bay Street, and, at the time, Mr.
20 Strosberg didn't even practice in the City of
21 Toronto.

22 But, in any event, there was quite
23 a speech basically denouncing us as a couple of Bay
24 Street lawyers who were coming in and trying to
25 tell the court and Mr. Murphy how to conduct the

1 have been a little better while I was there than it
2 had been before, but there were still outbursts
3 from my perspective. I remember much later in the
4 proceedings Mr. Murphy accused me essentially of
5 being a stain on the administration of justice when
6 I attempted to, and did, bring the application for
7 a stay of Justice Cosgrove's order directing that
8 the Crown disclose to the defence some of its work
9 product. I thought that was completely improper
10 and out of line.

11 But, as I said, I think the tone
12 may have been a little better during my tenure, and
13 that may have been, to some extent, the result of
14 my strategy, because I took, very consciously, a
15 very non-confrontational approach to the case and
16 tried to take that posture in the court, not being
17 overly aggressive.

18 I was trying to convey the
19 impression that whatever the court thought of the
20 Crowns beforehand; we were independent; we were
21 going to come in; we were going to be calm,
22 non-confrontational, try and help the court
23 understand the evidence before it, the issues put
24 in play by the defence and to see why there was
25 simply no merit in these allegations of Charter

1 breach.

2 Q. We have heard in the
3 presentations so far about a number of excursions
4 that were made during the trial into matters that
5 were not directly related to the Julia Elliott
6 prosecution. I don't want you to get into details
7 about them, but did that happen?

8 A. Constantly.

9 Q. Just give me a couple of
10 examples of what you are talking about.

11 A. I understand it is before the
12 panel, but there was the Radek Bonk incident that
13 comes to mind.

14 MR. PALIARE: Excuse me, Chief
15 Justice. This is one of the areas in which I
16 raised the issue at the outset that from the
17 will-say there are these examples that are before
18 you, and the transcript is there. Moreover, it's
19 been read to you, and, in my respectful view, you
20 are not going to be assisted by Mr. Humphrey's
21 recollection of what occurred.

22 I haven't objected so far to
23 issues that don't deal with the transcript itself,
24 but I don't see, in my respectful view, how you are
25 aided by Mr. Humphrey's recollection of what

1 occurred at the trial. In my respectful view, this
2 evidence shouldn't be adduced.

3 THE CHAIR: I guess we can't
4 really tell whether he is going to be of assistance
5 until we hear what he has to say, and, if it is of
6 no assistance, I guess we will just ignore it, Mr.
7 Paliare.

8 MR. CHERNIAK: First of all, Chief
9 Justice, I don't propose to ask Mr. Humphrey
10 anything about his recollection of the incident. I
11 want him to get to that point.

12 BY MR. CHERNIAK:

13 Q. My only question to you, sir,
14 is: What was your view at the time of the
15 relevance of it?

16 A. My view was that that was a
17 completely irrelevant issue in relation to all the
18 matters before the court and it was essentially a
19 waste of time.

20 Q. Then we have heard about the
21 attendance of Inspector Nugent of the RCMP, who was
22 in charge of the two investigations, the
23 Cumberland/Toy investigation and the Elliott
24 investigation, and the panel has been read a good
25 deal of the evidence about the report and the

1 investigation that he was in the process of doing
2 when he was in court in March 1999.

3 In the context of the nature of
4 what happened at that time as opposed to the
5 details of it, can you comment on that?

6 A. What had happened was I had
7 heard something about the status of the RCMP
8 investigation, and, ordinarily, as Crown counsel,
9 what I would do is I would make inquiries of the
10 RCMP and try and find out whether there was
11 anything that I should have, as the Crown with
12 carriage of the Elliott prosecution, in order to
13 make appropriate disclosure to the defence.

14 So I had had some conversation
15 with Mr. Murphy indicating that I intended to do
16 that. I indicated that intention on the record,
17 because, as Mr. Flanagan said, this is a case where
18 Crown counsel were walking on eggshells. I can
19 tell you that I was very, very cautious with
20 everything I did in this case.

21 In the ordinary case, I wouldn't
22 dream of telling the court that I was going to make
23 inquiries and make disclosure in relation to the
24 RCMP investigation, but, in the context of this
25 case, I thought it was prudent. Then when I raised

1 it with the court, essentially I was told, Well,
2 you can't contact the RCMP and get that
3 information, and then we went off and Justice
4 Cosgrove directed Debbie Walker come in and
5 essentially take dictation from him of the
6 questions he wanted to ask of Detective Nugent as
7 to the status of his investigation, and then away
8 we went. And it's all reflected in the transcript.

9 We had several days where
10 Detective Nugent eventually came in and was asked
11 about the status of his investigation, and his file
12 was seized and all the rest.

13 Q. I have in your will-say the
14 issue with respect to Ms. Proulx and Mr. Williams,
15 but I think we have covered that in the evidence,
16 so I won't ask you about that any further.

17 There is one thing. You mentioned
18 that Inspector Nugent's file was seized in respect
19 of one or both investigations?

20 A. It's interesting. I'm not
21 sure I recall. I think that the file was
22 essentially both the investigation into the
23 MacCharles, Snider and Dougherty throwing the gun
24 in the lake incident.

25 Q. Snider and Dougherty were two

1 OPP constables in the Cumberland matter?

2 A. That's correct. So that was
3 one of the investigations being conducted by
4 Inspector Nugent. The other investigation was into
5 whether there was any evidence that Detective
6 Inspector MacCharles had in any way tainted the
7 evidence in the Elliott case.

8 And it was my understanding that
9 both investigations were being conducted
10 concurrently, and, frankly, my assumption was is
11 that the briefcases containing the investigative
12 file brought to court by Detective Inspector Nugent
13 probably contained his entire investigation.

14 Q. I do want to ask you about
15 this in a little more detail. I want to take you
16 back to the very last day, September 7th, 1999, of
17 the trial when Justice Cosgrove I think orally gave
18 his reasons. Maybe just tell us. I know they are
19 very long. How did that actually --

20 A. They were very long. My
21 recollection is that he had the written judgment
22 and had extra copies, actually, for those who
23 wanted them, members of the public or members of
24 the media, and that he went about reading his
25 lengthy judgment from start to finish.

1 So my recollection is it
2 essentially started first thing in the morning. We
3 took a break and he hadn't finished reading his
4 judgment until close to lunch time.

5 Q. Had you done anything in
6 preparation or in expectation as to what you
7 expected that judgment to be?

8 A. I can tell you one of the
9 things I did was I didn't expect there to be a
10 stay, but I had learned to be prepared for the
11 unexpected in this case. So I had actually given
12 thought to the possibility of a stay and the need
13 to immediately launch a Crown appeal.

14 So I had spoken to senior --

15 Q. Just to stop there, I want to
16 you to expand on it, but why would you want to
17 immediately launch a Crown appeal?

18 A. Because she was in custody.
19 She had no status in Canada. I assumed that if
20 there was a stay of the proceedings, there would be
21 no further criminal law jurisdiction to hold her.
22 The only other jurisdiction to hold her in the
23 country would be an immigration warrant, and I
24 understood there was an immigration warrant in
25 existence.

1 So if there was a stay, it was my
2 hope and intention that I would be able to serve
3 Ms. Elliott immediately with a notice of appeal so
4 that the appeal could be properly launched
5 immediately before she left the jurisdiction and
6 created challenges to personal service.

7 Q. And you say that you knew
8 something about an immigration warrant. Did you do
9 something about that?

10 A. I did. It's my recollection
11 that during the morning break, I could see the way
12 this was going, and I could actually see the
13 likelihood of a stay, so I checked in the courtroom
14 to make sure that there was an immigration officer
15 present with an immigration warrant that we'd heard
16 about or at least I had read about as part of the
17 previous proceedings.

18 In fact, I met the woman who had a
19 warrant. I confirmed that she had a warrant
20 authorizing the detention of Ms. Elliott for an
21 immigration inquiry.

22 Q. Anything to do with the
23 charge against her?

24 A. It's my understanding it had
25 to do with charges against her in Barbados. I was

1 satisfied that there was a warrant in existence and
2 she would be in custody at least for a couple of
3 days, and I would only need the balance of the day
4 to complete a notice of appeal and have her
5 personally served.

6 Q. Just tell the panel what
7 happened.

8 A. What I recall happening is
9 that Justice Cosgrove finished reading his
10 judgment, entered the stay of proceedings, and then
11 there was a lawyer who was part of the Crown team
12 in the Cumberland prosecution, and the Cumberland
13 prosecution was ongoing before the jury, and the
14 Crown --

15 Q. In another courtroom,
16 obviously?

17 A. In another courtroom in the
18 same courthouse. The Crowns in the Cumberland
19 prosecution were concerned that the jury not be
20 made aware that Justice Cosgrove had found them to
21 be Charter breaches.

22 Q. In other words, they were
23 concerned that the jury in the Cumberland
24 prosecution -- they were concerned that the jury
25 not know that those Crowns had been found --

1 A. It was my recollection
2 that --

3 Q. I am just trying to
4 understand what you're saying.

5 A. And I'm trying to recall the
6 details. They were concerned that the jury, before
7 whom they were arguing the case, not hear and be
8 exposed to the findings by Justice Cosgrove of
9 Charter breaches, and it is my understanding the
10 concern was Charter breaches found to have been
11 committed by them and perhaps by some of the
12 officers who were involved in the Cumberland
13 prosecution, because Detective Inspector MacCharles
14 and Constables Dougherty and Snider were very much
15 involved in the Cumberland prosecution.

16 That Crown attended. As I recall
17 it, I introduced him to the court and said he had a
18 motion to bring seeking a ban on publication, a
19 temporary ban on publication, to prevent the
20 mischief that might flow from the Cumberland jury
21 hearing about all these Charter breaches.

22 So that lawyer argued the motion
23 relatively briefly, and the application was
24 dismissed.

25 My impression at that point was

1 that everything was done. And what I recall then
2 happening is Mr. Murphy was on his feet, and this
3 was sort of the crescendo of the case, from my
4 perspective.

5 I remember looking at him and he
6 had either taken off his gown and/or his tabs, but
7 I remember looking at him thinking all is done,
8 he's starting to shed his court garb and get ready
9 to go outside, and then he turns around and he sees
10 this woman.

11 Q. The immigration officer?

12 A. That's exactly right. And
13 then he immediately turned to Justice Cosgrove and
14 announced that he wanted to bring an application to
15 quash the immigration warrant. I'm not sure when,
16 but, in pretty short order, I was on my feet, as
17 well, and I remember standing there looking at Mr.
18 Murphy. He is asking the court to quash the
19 warrant, and then the court asks the immigration
20 officer to come forward -- and that's all in the
21 transcript -- and she is trying to explain that the
22 warrant she has nothing to do with the charges that
23 were just stayed. And the court says, Well, I've
24 heard that story before, and then quashes the
25 warrant.

1 I attempted to put some comments
2 on the record. I didn't believe at that point
3 there was any ability on my part to change the
4 court's mind, but I was trying to make some obvious
5 observations about lack of notice, lack of
6 jurisdiction, lack of opportunity for someone
7 representing the Department of Immigration to make
8 submissions on whether or not the warrant issued by
9 -- I believe it was by the Deputy Minister of
10 Immigration, should be quashed, and I was
11 essentially cut off.

12 Q. What about your ability to
13 serve the notice of appeal?

14 A. Well, what happened was is I
15 told the OPP to put Ms. Elliott under immediate
16 surveillance and told them that I would have a
17 notice of appeal in their hands within about half
18 an hour. I did that, but I was informed they had
19 essentially lost Ms. Elliott. She had gone over to
20 her lawyer's office. They were camped out outside.

21 I got the warrant over to them, as
22 I said, in maybe half an hour, a little bit more,
23 and then it turns out they hadn't thought to
24 conduct surveillance of all the exits and she'd
25 left another exit --

1 Q. So it didn't get served?

2 A. It did not get served that
3 day or in Canada; that is right.

4 Q. But ultimately it did?

5 A. It did. I think it was about
6 four days later it was ultimately served on her in
7 Barbados.

8 Q. I understand that you, among
9 others, including, David Scott, Q.C. in Ottawa and
10 before him Robert Armstrong, Q.C., now Justice
11 Armstrong, were involved in the appeal, along with
12 all the Ministry people?

13 A. Yes, that's correct. I was
14 one of many counsel on the appeal.

15 Q. Those are my questions.

16 THE CHAIR: Mr. Paliare.

17 MR. PALIARE: Thank you.

18 CROSS-EXAMINATION BY MR. PALIARE:

19 Q. Mr. Humphrey, did you come to
20 know about an offer that was on the table by the
21 Crown to the defence before the trial began, in
22 terms of what the Crown was prepared to accept from
23 Ms. Elliott in terms of a plea?

24 A. At some point, and I am
25 trying to recall when it was and I'm trying to

1 recall when I heard it, who I heard it from, but at
2 some point I was made aware that there had been
3 extensive resolution discussions between the Crown
4 and, I had understood, Mr. Neville.

5 Q. Yes.

6 A. Who, was at the time, lead
7 defence counsel for Ms. Elliott. It was my
8 understanding that the discussions were around a
9 plea to the offence of manslaughter, in that there
10 were discussions about a sentence of 12 years.

11 Now, I didn't have the particulars
12 as to whether that was firm. I recall that when I
13 had carriage of the file, Mr. Murphy indicated that
14 he wished to have resolutions with the Crown, and
15 so we actually had to get permission from the court
16 to relax the non-communication order so that Sheila
17 Walsh, who had ultimate carriage of the trial once
18 we got through the stay application, so that she
19 could have resolution discussions with Mr. Murphy,
20 and so that she could speak to the predecessor
21 Crowns.

22 And it may have been through
23 discussions with Ms. Walsh that I heard something
24 about these earlier discussions of a possible
25 manslaughter resolution and a possible 12-year

1 sentence.

2 Q. That being offered by the
3 Crown as a resolution?

4 A. That's my understanding.

5 Q. Thank you. One of the things
6 I indicated to the court, I take it -- it is not
7 all that relevant, but Mr. Murphy is currently a
8 federal Crown?

9 A. To my astonishment, that's
10 what I heard when I was last in Ottawa.

11 Q. Thank you. Thank you very
12 much for coming.

13 MR. CHERNIAK: I have no
14 re-examination, but I can't help but observe that I
15 did not object to the hearsay being asked of this
16 witness.

17 THE CHAIR: Thank you very much.

18 MR. CHERNIAK: I do have one more
19 witness. I don't expect he will be long. I think
20 it would be appropriate if we had the morning
21 break.

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

23 --- Upon Resuming at 11:14 a.m.

24 THE CHAIR: Mr. Cherniak.

25 MR. CHERNIAK: I would like to

1 call Steven Foster, please.

2 MS. CHOWN: Can you state your
3 full name, please?

4 MR. FOSTER: Steven Foster.

5 SWORN: STEVEN FOSTER

6 EXAMINATION-IN-CHIEF BY MR. CHERNIAK:

7 Q. Have a seat, Mr. Foster.

8 A. Yes.

9 Q. Mr. Foster, you live in
10 Ottawa, do you not?

11 A. Kemptville, actually, half
12 way between Ottawa and Kingston.

13 Q. I understand that you are an
14 aircraft mechanic?

15 A. That's correct, yes.

16 Q. And you are employed where?

17 A. With Execair in Ottawa.

18 Q. Just tell us briefly what you
19 do with Execair?

20 A. Well, I repair aircraft as a
21 flight engineer with NAV Canada.

22 Q. What's NAV Canada?

23 A. They do the flight inspection
24 and monitors the air navigation system in Canada.

25 Our end of it is to fly the aircraft that perform

1 checks on the runways and the approaches,
2 navigation aids.

3 Q. You are one of the people
4 that goes around to all the airports in Canada and
5 makes sure the navigation aids are working?

6 A. Yes, that will land on the
7 runway.

8 Q. Keep doing that, will you,
9 please?

10 THE CHAIR: Can we ask you to just
11 keep your voice up a little bit so that we can all
12 hear you?

13 THE WITNESS: Absolutely.

14 BY MR. CHERNIAK:

15 Q. I take it that testifying in
16 court is not something you do on a regular basis?

17 A. This will be my second time.

18 Q. Can you tell us, your father
19 was the victim in the Elliott murder trial?

20 A. That's correct.

21 Q. Your father's name?

22 A. Lawrence Foster, Lawrence
23 Robert Foster.

24 Q. And how many siblings do you
25 have?

1 A. I have one brother; one
2 brother and -- that's all, one brother.

3 Q. We have heard a bit about the
4 Foster family as a generic group that was involved
5 in one way or another as spectators at this trial.
6 Who are we speaking of when we talk about the
7 Foster family? Who is that?

8 A. Well, my father had two
9 brothers, Len and Vic, and two sisters, Eileen and
10 Violet, and of course their extended family, you
11 know, cousins and such.

12 Q. How many of them lived in the
13 general Ottawa area?

14 A. Virtually all of them,
15 everybody.

16 Q. We've heard in the evidence
17 that has been read that you were actually involved
18 in this matter from day one when you went to check
19 on your father's apartment at some point?

20 A. That's correct.

21 Q. I think we have heard that as
22 a result of what you found, you called the
23 Kemptville Police Department and Officer Laderoute
24 showed up?

25 A. That's correct.

1 Q. Do you recollect that?

2 A. Yes, I do.

3 Q. And then an OPP detective
4 named George Ball showed up?

5 A. Umm-hmm.

6 Q. And I understand that you
7 were called to give evidence about your involvement
8 both at the preliminary -- I think at the
9 preliminary hearing, but certainly at the trial?

10 A. Yes, I was.

11 Q. And one thing we haven't
12 heard, and I don't want to go into it in any
13 detail, is the panel hasn't been offered your
14 testimony itself. I just want to ask you a bit
15 about your testimony.

16 How were you treated in
17 cross-examination?

18 A. I thought I was treated quite
19 shabbily. It was a pretty rough ride. I wasn't
20 expecting it, being a witness, in that I felt like
21 I was being treated as the accused. I mean, it's a
22 blur now, when I look back on it, because there's
23 the fog of time, of course, but I do remember how
24 it felt, and it felt as though Justice Cosgrove
25 was, I think, abandoning me on the stand.

1 Q. Were there some accusations
2 leveled at you by defence counsel?

3 A. Yes, counsel Murphy, that's
4 correct. He was calling me all sorts of names. I
5 guess a bigot was one of them, amongst others, and
6 I was taken aback by it, because, first of all,
7 it's untrue, but that line of questioning -- and I
8 understand it's a courtroom situation.

9 There's freedom to ask questions
10 and cross-examine, and such, but I didn't expect
11 for a moment that I would be accosted like that on
12 the stand. I mean, I was in shock, anyway, as
13 anybody would be, following the death of my father.

14 You know, I won't get into all
15 that. I'm not going to cry crocodile tears for
16 anybody, but it was a pretty tense moment facing
17 the trial and having to take the stand in it, to
18 start with. To then face that sort of acrimonious
19 assault, I was stunned, quite frankly.

20 Q. Let me bring you to another
21 part of the trial. The panel has had an
22 opportunity to listen to the bulk of what happened
23 when there was the suggestion -- I am trying to use
24 a neutral word here -- the suggestion that you
25 would be cited for contempt.

1 A. Yes.

2 Q. And you were asked to come to
3 court the next day with a lawyer, and you did, as a
4 result of an incident that occurred in the
5 cafeteria, I guess?

6 A. That's correct.

7 Q. I am not going to ask you to
8 go through the details of that, because the panel
9 has heard that. I would just like to get your
10 reaction to the suggestion, the citation for
11 contempt?

12 A. Yes, I suppose it's further
13 to initially being put on the stand and sort of how
14 I felt about counsel Murphy, that as time wore on
15 -- I mean, I was getting a pretty good grudge going
16 for this character, who I think performed like a
17 wing nut, but that's my opinion, and, you know,
18 he's free to do whatever he wanted to do.

19 But, in the same vein, he was in a
20 public cafeteria. And, again, I won't get into all
21 the details. There's not many of them.

22 I simply found myself at the
23 coffee dispenser with him up beside me, and, you
24 know, I said to him -- the exact words were, "Have
25 you always been such a pain in the ass?" Because,

1 really, I'd just about had it with the theatrics
2 and the circus-like atmosphere it was taking, you
3 know, what should have been a trial for the truth,
4 and it was turning it into something other.

5 You know, my emotions got the
6 better of me and I did say what I said, and I
7 didn't otherwise, you know, assault him or anything
8 like that. He flew out of control, and I guess he
9 thought he'd use the moment for his advantage and
10 tried to get a bunch of people on his side in the
11 cafeteria, you know, that I shouldn't be anywhere
12 near him or something.

13 But, anyhow, further to that, when
14 we got back into the courtroom -- and all I did was
15 went and sat back down with my aunt and uncle,
16 anyway, in the cafeteria.

17 Q. Your aunt and uncle being
18 whom?

19 A. Violet and Larry Pender.

20 Q. Yes.

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

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

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

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

24 Q. Just to follow through from
25 that, I'm going to come back to some other matters

1 in a moment, but just to follow through from that,
2 you remember when the stay was granted?

3 A. Yes, I do.

4 Q. Did that have an effect on
5 you?

6 A. Yeah. I wasn't in the
7 courtroom that day, partially because you have a
8 job and a life and, you know, you have to get out
9 and put bread on the table. So I wasn't able to be
10 at the court for all these proceedings, which 90
11 percent of them seemed to be about voir dires and
12 internal matters.

13 Q. About?

14 A. Voir dire.

15 Q. Voir dires, that's pretty
16 good.

17 A. I heard the terms a few
18 times. So I wasn't there for that. Some other
19 family members were there. Of course, they were
20 pretty broken up over it. I was almost in
21 disbelief that it had happened, although I had been
22 warned ahead of time that it may at any point in
23 time happen. But it had been going on for so long
24 that I was almost turning it off at that stage, but
25 then when the stay was granted and I heard that,

1 you know, the door was open and away she went, and
2 that was it and that was all. I mean, it's a
3 stunning conclusion to that episode, that period in
4 our life.

5 I think most -- I can speak I
6 think for most of my family, extended family
7 included, in saying that we were disgusted with the
8 events. I think the Crown tried as best they
9 could, and many times they'd call us for meetings
10 and they'd simply say, Well, here's where we're
11 going, maybe four months, around six months from
12 now, something might happen.

13 They were never able to tell us
14 really any meat of the case, what was going on, and
15 in the end I think we were left deflated, you know.
16 It was kind of a despondent, hopeless situation at
17 that stage, because she had fled, and the chance of
18 getting her back, who knows if the appeal is going
19 to be successful. Then there's extradition, and
20 you know the whole story.

21 They chased her around Central
22 America to find her. That they even did find her,
23 bring her back and have a successful conclusion, in
24 that she's in jail now, I think was surprising, but
25 it left us all quite bitter.

1 There's moments where there's
2 friction amongst the family, too, over these
3 things, where you get into discussions over what
4 should be done and what shouldn't, you know, when
5 it come time to deal with the possibilities of a
6 plea bargain and such. So that posed difficulties,
7 but that is a separate issue to what we are talking
8 about today. But it was difficult.

9 Q. Thank you for coming, Mr.
10 Foster. Those are my questions. My friend may
11 have some questions.

12 MR. PALIARE: I have not. Thank
13 you.

14 MR. CHERNIAK: Thank you very much
15 for coming, Mr. Foster.

16 THE CHAIR: Thank you, Mr. Foster.

17 MR. FOSTER: Okay, no problem.
18 Thank you.

19 MR. CHERNIAK: Members of the
20 panel, with the exception of giving you some
21 marked-up pages of volume 4, particular 5, that
22 concludes the case that I intend to present to you
23 on this inquiry.

24 At some point, I have some
25 submissions to make, but as far as the presentation

1 of the case, that's it.

2 THE CHAIR: Mr. Paliare.

3 MR. PALIARE: We have no evidence
4 to call in addition to what you have heard, and we
5 will not be bringing any motion with respect to
6 these matters.

7 MR. CHERNIAK: Just so I
8 understand it, there is a notice of motion that was
9 adjourned to the trial. Do I understand that that
10 motion is now withdrawn?

11 THE CHAIR: Your application on
12 the jurisdiction question is abandoned, I take it?

13 MR. PALIARE: Yes, it is.

14 MR. CHERNIAK: I am prepared to
15 make some final submissions. I do not expect to be
16 particularly long. I am prepared to do it now or
17 whenever the panel wishes to me.

18 THE CHAIR: Well, Mr. Paliare
19 indicated some concern yesterday about just what
20 exactly there was in volume 4 or Exhibit 7 that had
21 to be addressed or responded to. Where do we stand
22 on that issue?

23 MR. PALIARE: We were uncertain as
24 to what was going to happen at that moment, Chief
25 Justice Finch, and so we are content with what Mr.

1 Cherniak intends to do.

2 He is obviously going to provide
3 us with a copy of the marked-up version that he is
4 going to provide to you, and we are content that
5 you have that marked-up version. I'm assuming we
6 are not going to have any representations to make
7 with respect to the marked-up version. That is
8 perfectly fine with us.

9 THE CHAIR: Mr. Cherniak, would it
10 be useful or productive for us to be familiar with
11 what is in Exhibit 4 before you make your final
12 submissions?

13 MR. CHERNIAK: I don't think that
14 is necessary. It is there. I think, as I
15 remember, particular 5 deals with the contempt
16 citations. You have heard some of them, and what
17 is there is the balance of them, but they are not
18 different in kind.

19 As I said at the very outset, the
20 case that I'm presenting is not based on any one or
21 any two or even any few of the events that occurred
22 at the trial. It is based on the totality of it,
23 but you have heard enough now that you have a
24 pretty good flavour of what happened, and what is
25 in the balance of particular 5, it is more of the

1 same. It is just different with respect to
2 different individuals.

3 You have heard a bit about the
4 Bowmaster one, which is tab E, and I can't remember
5 now just who the others are. Can you just list the
6 ones in the other tabs? It's in the notice.

7 MS. KUEHL: The balance deal with
8 the five police officers for contempt for the
9 delayed production of their notes, the evidence
10 this something morning from Detective Inspector
11 Bowmaster with respect to his discussions with
12 Constable Alarie, an incident where Detective
13 Constable Ball was cited in contempt for an
14 out-of-court interaction with defence counsel.

15 You have heard already the
16 particular with respect to the immigration officer,
17 which also forms part of that tab. The possible
18 citation of contempt against Superintendent Hutton,
19 you have heard the evidence with respect to the
20 allegations made against him in his
21 cross-examination.

22 There was a subsequent attendance,
23 under the threat of arrest or a citation, that he
24 attend court, and, finally, Detective Inspector
25 Bowmaster was also threatened with a citation for

1 advising a constable to obtain counsel.

2 THE CHAIR: Thank you.

3 MR. CHERNIAK: As I say, they are
4 not different in kind. I'm in the panel's hands,
5 of course. If I had to, I could have those pages
6 for you today, marking them up, but I just didn't
7 get to do them all.

8 THE CHAIR: That's fine. If you
9 are prepared to go to submissions?

10 MR. CHERNIAK: I am. The things
11 I'm going to say don't depend on any particular
12 element of what I put before you. They are based
13 on all of them.

14 THE CHAIR: All right.

15 CLOSING SUBMISSIONS BY MR. CHERNIAK:

16 MR. CHERNIAK: Thank you. If I
17 can conclude in this way: Based on the evidence
18 that I called, and leaving aside, for the moment,
19 the statement of Justice Cosgrove -- based on the
20 evidence that I called, my submission in the
21 notice, and my submission at the start and my
22 submission was and is that the case that I have
23 presented supports the allegations of misconduct
24 particularized in the notice, and that the findings
25 and conclusions could flow from that evidence are

1 capable of rising to the level needed for a -- it
2 would lead to a recommendation for removal from the
3 bench. That's how I started and that is how I
4 finished with respect to the case I have presented.

5 I reiterate that whether it has or
6 has not reached that level, whether that evidence
7 does or does not reach that level, and whether the
8 recommendation should or should not be made is
9 entirely for this panel, and I do not believe it is
10 part of my function to tell you what I think you
11 should do.

12 If I'm wrong in that, somebody
13 will tell me that, but that is the way I have
14 interpreted, for better or for worse, the role of
15 independent counsel. It's different than if I was
16 pleading a case on behalf of a client. I don't
17 have a client.

18 I don't propose at this point to
19 go through the evidence in support of that
20 proposition, because it is contained in the
21 material that is filed, and, while I didn't present
22 argument as I was reading it, my view is that the
23 evidence on the printed page speaks for itself and
24 that the conduct of the Elliott trial, virtually
25 from start to finish, and certainly from

1 mid-February 1998 to September 1997 (sic), was not
2 properly conducted by Justice Cosgrove.

3 The misconduct -- and I use that
4 term "misconduct" -- in the way the trial went was
5 in commission with respect to the treatment of
6 Crown attorneys, the Ministry and its lawyers and
7 the police, the federal Crown, civilian witnesses,
8 such as Hutton and the doctors and the Bell Canada
9 people and the family, and the misconduct on the
10 case that I presented was also in omission by what
11 amounted, in my view, to virtually a complete
12 failure to rein in the excesses of defence counsel,
13 who put on what I think, in my experience -- and I
14 have had a lot of experience in criminal and civil
15 courts across this country -- can only be described
16 as one of the most disgraceful exhibitions that has
17 ever been seen in a Canadian courtroom. And as
18 best I can tell, Mr. Murphy conducted himself in
19 that way virtually every day.

20 That conduct was virtually
21 unchecked by Justice Cosgrove. Rather than check
22 it, many times he simply called on Crown counsel to
23 respond, even when the excesses were really -- were
24 beyond outrageous. I'm sure the panel will
25 recollect the passages that I'm thinking of.

1 With that background, the issue
2 for me, when I knew about it, and the issue for
3 this panel is whether the statement by Justice
4 Cosgrove that he made voluntarily yesterday tips
5 the balance such that you feel yourself able to
6 conclude, assuming without the statement you would
7 have concluded, that there be a recommendation for
8 removal. And, again, that's for you, not me.

9 The question is if that's where
10 you would have gone based on the case that I have
11 presented, the question is for you is whether the
12 statement by Justice Cosgrove, which is really the
13 only evidence that is relevant against or in
14 addition to the case that I have presented -- and I
15 will come to what I submit is the relevance of the
16 book of letters of support in a moment, but my view
17 on the issues that I am speaking of, whether the
18 balance is tipped by Justice Cosgrove's statement
19 is enough, assuming you would have otherwise come
20 to the conclusion for removal, to allow you to come
21 to a recommendation for admonition or censure, or
22 however the Canadian Judicial Council words what it
23 does, of what I characterized yesterday of a strong
24 or pointed nature.

25 I am certainly of the view, again,

1 without telling you what to do, that at the very
2 least, and on any view of all of the evidence, the
3 evidence is capable of resulting in a
4 recommendation for a strong and pointed admonition,
5 or something stronger.

6 Coming to the statement, I want to
7 give you my views of the statement. I gave some of
8 them to you, and I want to reiterate some of them
9 and elaborate on a couple of things I said. I
10 took, for better or for worse -- and it's just me,
11 not you -- I took the statement at its face value.

12 And I assumed, and I think with good reason,
13 watching Justice Cosgrove deliver it, that it was
14 sincerely given. That's my view.

15 I took it as an admission of the
16 conduct summarized in the notice and detailed in
17 the evidence in the exhibits which I read, and a
18 concession by Justice Cosgrove that what occurred
19 was, from start to finish, of the conduct outlined,
20 inappropriate judicial conduct.

21 I know the word "misconduct"
22 wasn't used, but I am just telling you how I took
23 it, inappropriate judicial conduct or, to put it
24 another way, judicial misconduct. And because I
25 took it that way, that is what moved me to take the

1 view that I did.

2 The opinion that I expressed
3 yesterday, as I say, was predicated on that view of
4 the statement. That may not be your view, but it's
5 predicated on that view. And I simply do not
6 accept Mr. Paliare, what I thought he said
7 yesterday. And remember that I invited both he and
8 Justice Cosgrove to comment on what I said.

9 So I simply do not accept Mr.
10 Paliare's submission that the statement that was
11 made was not an admission of judicial misconduct.
12 If that's the right interpretation of it, that it
13 did not admit judicial misconduct, I would have,
14 would have and do have, a different -- I would not
15 have qualified my recommendation.

16 But my view is, notwithstanding
17 what I thought Mr. Paliare said yesterday, that the
18 statement that Justice Cosgrove made, combined with
19 the evidence that preceded it and that it
20 references, can be read in no other way but then as
21 an admission or concession that there was
22 inappropriate judicial conduct, which amounts to
23 judicial misconduct.

24 I gave little weight, and I give
25 no weight at all when I consider the statement,

1 because I knew what was coming, to the expressions
2 of -- I am sorry, I am ahead of myself.

3 I gave little weight in
4 considering the statement to the expressions of
5 good faith and best efforts that are contained in
6 the statement. I don't say I paid no attention to
7 it. They are there, but I didn't think they were
8 particularly germane to my view, because those are
9 subjective views after the fact by Justice
10 Cosgrove.

11 The gravamen of the particulars in
12 the notice and the evidence that I read to you is
13 the conduct of the trial, and the things that
14 didn't happen that should have happened, looked at
15 objectively.

16 The notice was not based on -- the
17 particulars in the notice in the case I presented
18 was not based on an absence of good faith. I don't
19 think those words would appear anywhere in the
20 notice. They were based on what occurred at that
21 trial, and what did not occur that should have
22 occurred at that trial, irrespective of whether
23 they were done in good faith or not.

24 The question of good faith may
25 have relevance on what actually happens, but that's

1 not what I -- that wasn't particularly germane to
2 me when I considered it.

3 What moved me to give you the
4 opinion that I expressed yesterday, in the light of
5 the jurisprudence that I was aware of -- Ms. Kuehl
6 and I reviewed again before I came to the
7 conclusion I did -- was a recognition in the
8 statement that the conduct of the trial, and not
9 just the legal and factual decisions that were
10 reversed, was wrong.

11 The fact they were reversed is a
12 fact, but the fact they were reversed isn't the end
13 of the story. It's just the fact they were
14 reversed. The question is whether those reversals,
15 those reversed also amounted to inappropriate
16 judicial conduct, which may or may not be the case
17 in any particular situation.

18 Of course, much of what I read to
19 you and much of what is relied on in the
20 particulars doesn't have to do with any decision at
21 all, whether reversed or not. It simply has to do
22 with what occurred during the trial, and, as I say,
23 almost as importantly in many instances what did
24 not occur.

25 So I took it that there was a

1 recognition in the statement that what happened in
2 that trial did not meet the standard required of
3 the judiciary, and not just as a question of the
4 law or a fact that is the subject to the normal
5 appellate process.

6 There was a statement in the
7 statement, which again I thought was sincerely
8 given, that a hard and humbling lesson had been
9 learned, such that the conduct was unlikely to be
10 repeated. There was -- and I appreciate that those
11 people like Curt Flanagan and like Inspector
12 Bowmaster and many of the others who are not here,
13 I appreciate they may not think that the apology
14 goes far enough.

15 If it was me sitting there -- and
16 Curt Flanagan, a lawyer we all know. Everyone in
17 this room, certainly all of us who are lawyers,
18 know how important, how centrally important, a
19 lawyer's reputation is. I mean, if we don't have a
20 reputation, we have nothing.

21 So I can appreciate that there
22 will be those who do not think that the apology
23 goes far enough, and those would be the people who
24 were affected by it, because they were affected by
25 it in ways that we just heard. I think we really

1 heard and saw from Mr. Flanagan the tip of the
2 iceberg, and I think we can take it that virtually
3 everybody who was affected by that trial would be
4 able to tell us a similar story to that Mr.
5 Flanagan did.

6 But having said that, the apology
7 was an unreserved one, and it was to all of those
8 who were subject to the way that the trial was
9 conducted and misconducted and in respect of whom
10 the wrong and the hurtful factual findings were
11 made. That was important to me.

12 There was a recognition that it
13 would be inappropriate -- by Justice Cosgrove that
14 it would be inappropriate for Justice Cosgrove to
15 sit in the future on any case involving the federal
16 or provincial governments or Attorneys General,
17 which, among other cases, would certainly mean all
18 criminal trials.

19 In fact, as I understand it,
20 because of the position taken by the Chief Justice
21 of our Superior Court, that has been the case in
22 one way or another since the Attorney General's
23 complaint was lodged, and there might have been
24 some hiatus there between the Federal Court Trial
25 Division's judicial review in the Court of Appeal,

1 but I think that's been the case, generally
2 speaking, since that time.

3 There is the fact that Justice
4 Cosgrove, by the time this matter is ultimately
5 decided by the Judicial Council as a whole, because
6 we are really only in a weigh step here, will
7 likely have less than a year to serve before he
8 reaches mandatory retirement.

9 So on that basis, and again on the
10 assumption that I am right that Justice Cosgrove no
11 longer takes the position that the conduct, as
12 revealed in the case that I have presented and that
13 he has admitted to in his statement, does not
14 amount to judicial misconduct. If that's the
15 position he takes, I take a different position than
16 the one that I'm putting before you.

17 Based on all of those things, my
18 view was as I expressed yesterday, and remains,
19 that on the whole of the evidence, and taking into
20 account Justice Cosgrove's statement at the high
21 level, at the very high level, of misconduct that
22 has to be there to result in the ultimate penalty
23 for a Superior Court judge that a recommendation
24 for removal by both Houses of Parliament, something
25 as I understand it has actually never happened, got

1 to that stage in the history of the country, I
2 think my view is it is not there.

3 But as I have said, and I say it
4 again, that's me, and this is a matter entirely for
5 the judiciary, whose responsibility it is to
6 maintain the integrity of the system of justice,
7 and the judiciary, the independence of the
8 judiciary and the integrity of our system of
9 justice, and the accountability of the justice
10 system and individual justices.

11 That is an integral part of the
12 concept of an independent judiciary under the rule
13 of law. It is your responsibility. It is a heavy
14 responsibility. It is not mine.

15 Let me say a word about the
16 question of delay, which I know, from what appeared
17 yesterday, troubles the panel, and it should
18 trouble the panel. I gave you some of my thoughts
19 in response to the questions from the Chief Justice
20 yesterday, and I have had a chance to reflect on it
21 further since I answered that question.

22 It certainly would have been
23 preferable, in my view, if the statement had come
24 at an earlier date to this panel. It would have
25 been, apart from anything else, a lot less costly.

1 There has been a lot effort put into this matter
2 since the Attorney General of Ontario complained.

3 The question arises, the question
4 I asked myself when I thought about this further
5 after the Chief Justice's question, is whether the
6 delay itself is relevant to the issue of whether
7 the appropriate recommendation is removal or a
8 lesser recommendation that I spoke of.

9 I suggest that there is at least a
10 reasonable argument that it is not; that delay in
11 admitting in conceding misconduct once a complaint
12 is made is not in and of itself misconduct.

13 Rather, it is a failure to recognize and admit to
14 the misconduct, own up to it, make the appropriate
15 apologies and behaviour modification, but there is
16 at least an argument that you might want to think
17 about as to whether delay itself can amount to
18 judicial misconduct as opposed to a failure to
19 recognize it and deal with it promptly when it
20 occurs.

21 So it seems to me, if that
22 analysis has any weight, that the delay that
23 occurred in this case goes more to the question of
24 the nature and form of the proper strong and
25 pointed admonition or censure, however you call it,

1 that I have referred to, rather than to the issue
2 of removal itself.

3 That's the thought that came to me
4 when I pondered over the Chief Justice's question
5 at more length following yesterday's session.

6 That really concludes what I to
7 say. I don't think I can be of more help to you,
8 unless the panel thinks there's ways that you would
9 like me be of more help to you.

10 I could, if the panel wished me
11 to, do a more complete summary of where all the
12 evidence I have read actually takes us. My own
13 view was it likely wasn't necessary. You have
14 heard it. You have heard it recently. It is all
15 there. Some of it was -- even though I was reading
16 it -- some of it is pretty dramatic stuff, and I
17 suspect it is fresh enough in your mind, but I
18 could certainly -- Ms. Kuehl and I could certainly
19 summarize it in the way we would in a factum, did
20 the panel wish us to do that. I didn't feel it was
21 necessary, but I'm in your hands on that.

22 That concludes my submissions,
23 unless the panel has anything else they would like
24 me to address.

25 MR. NELLIGAN: I wonder, Mr.

1 Cherniak, you referred earlier in your remarks that
2 you might deal with the effect that the letters
3 that were submitted by Mr. Paliare yesterday has on
4 the --

5 MR. CHERNIAK: I am sorry. I
6 meant to do that and I must have missed it in my
7 notes. I made these notes earlier this morning.
8 I'm sorry, I meant to do that.

9 I don't think they are relevant to
10 the issue of whether there should be removal or not
11 removal. The reason I say that is that even though
12 many of them come from -- really most of them come
13 from eminent jurists who have worked with or still
14 work with Justice Cosgrove, none of them have read
15 the record that you have seen. None of them were
16 at the trial.

17 They are speaking more to what
18 they have observed about the man, but certainly in
19 my experience, one judge doesn't really know what
20 goes on in another judge's courtroom, no matter how
21 good the relationship is between those judges. You
22 have to be in that courtroom to know how a judge
23 really conducts a trial.

24 Lawyers are at a somewhat better
25 advantage, because they do appear before a variety

1 of judges and they know what goes in the courtroom.
2 But by and large, one judge doesn't know what goes
3 on in another's courtroom, and none of them --
4 although Mr. Paliare said that he sent them the
5 notice, none of them would have had the opportunity
6 to read what actually happened at that trial.

7 My view is that those letters,
8 they certainly form no part of the view I took, and
9 I would say that they are relevant to whatever
10 disposition that the panel made if it were short of
11 a recommendation for removal, but I suggest they
12 don't one way or the other tip the balance on the
13 question of whether there should be a
14 recommendation for removal or not.

15 I hope that's an answer to your
16 question, sir. That's my view.

17 HON. MACDONALD: There is just one
18 aspect of your submission, Mr. Cherniak, that I
19 didn't quite get. It involves your position on the
20 issue of whether or not the acknowledgement and the
21 apology amounts to judicial misconduct.

22 You certainly have concluded that
23 you believe it is judicial misconduct, either by
24 commission or omission. Justice Cosgrove may not
25 acknowledge that.

1 The question I have for you is:
2 Is your submission premised on the fact that he
3 acknowledged this to be judicial misconduct?

4 MR. CHERNIAK: Absolutely.
5 Absolutely it is. Absolutely it is. If I thought
6 that the position that Justice Cosgrove was taking,
7 whether himself or through Mr. Paliare, was that --
8 I see what that statement says, but I don't concede
9 for a moment that it amounts to judicial misconduct
10 that could attract whatever disposition, whatever
11 findings and conclusions the Canadian Judicial
12 Council makes.

13 That would really be tantamount to
14 saying, in my view, you don't have the jurisdiction
15 to deal with this, because you are not a court of
16 appeal and you deal with allegations of misconduct
17 under the Judges Act; you do not deal with error.

18 So if I thought for a moment that
19 notwithstanding what Justice Cosgrove said, the
20 position he is taking is that there is not a
21 concession that what is contained in the case that
22 I have presented amounts to judicial misconduct, I
23 would not have changed the view that I expressed at
24 the outset of this hearing.

25 HON. MACDONALD: There's an

1 element of an acknowledgement that is the premise
2 of your --

3 MR. CHERNIAK: Absolutely.

4 HON. MACDONALD: Thank you.

5 MR. CHERNIAK: I mean, if this
6 statement hadn't been given and if it hadn't
7 contained the elements that I listed -- and my view
8 that it is a concession of judicial misconduct -- I
9 never would have changed my -- modified my
10 recommendation.

11 HON. MACDONALD: But there is a
12 further contingency, and that is that there be an
13 acknowledgement that it's --

14 MR. CHERNIAK: I mean to say I
15 took it that way. What concerned me was what was
16 said by Mr. Paliare yesterday that it wasn't
17 judicial misconduct, and that's why I said I invite
18 you now to say, Is that the case? And I didn't get
19 an answer. I said I take it that way, that's what
20 it is, and I invited both Mr. Paliare and Justice
21 Cosgrove to say something and there was silence,
22 but there wasn't an accession to it, either.

23 But I say the modification of my
24 views that I gave you is premised on the
25 proposition that Justice Cosgrove's statement

1 amounts to an admission of judicial misconduct,
2 inappropriate judicial conduct, which, to me, is
3 the same thing as saying judicial misconduct.

4 THE CHAIR: Let me just follow
5 Chief Justice MacDonald's question with this: We
6 will hear from Mr. Paliare further on this issue,
7 no doubt, later today, but yesterday there appeared
8 to be a difference of opinion between the two of
9 you as to what the statement was.

10 You said you thought it was an
11 acknowledgement of misconduct. I understood Mr.
12 Paliare to say, no, it is not an acknowledgement of
13 misconduct. It is an acknowledgement of errors
14 found by the Court of Appeal, for which I express
15 regret.

16 Now, I am not sure it is the job
17 of a body like ours to interpret the statement. My
18 question is: If that remains the position, if
19 counsel for the judge says this is not an
20 acknowledgement of misconduct, aren't we bound to
21 accept his interpretation of it?

22 MR. CHERNIAK: I mean, not really
23 bound to accept his interpretation. If Mr. Paliare
24 says that, then my recommendation that -- sorry, I
25 misspoke. It is not my recommendation.

1 My opinion to you that the
2 statement has tipped the balance, such that my
3 opinion can be modified in the way that I told you,
4 no longer stands. I withdraw that position.

5 My position is predicated on what
6 I understood was a concession of inappropriate
7 judicial -- I mean, I appreciate that the judge
8 doesn't say, I am guilty of misconduct, but there
9 is, as I read it -- I mean, he has heard the
10 evidence, just like this panel has, and there is,
11 the way I read it, a concession that what I put
12 before this panel amounts to inappropriate judicial
13 conduct, and to me that is misconduct and -- sorry,
14 excuse me. Ms. Kuehl, is giving me some --

15 Again, we wouldn't be here and you
16 don't have jurisdiction if it is not judicial
17 misconduct. That's what your jurisdiction is. I
18 guess we have to hear from Mr. Paliare on that. If
19 Mr. Paliare --

20 HON. WACHOWICH: We just don't
21 hear that word.

22 MR. CHERNIAK: -- puts it the way
23 that he suggested as he did yesterday, then, you
24 know, I've got a different view. I am sorry, sir.

25 HON. WACHOWICH: I am sorry, I

1 interrupted you, Mr. Cherniak. We just don't hear
2 that word, do we, in that apology? We hear
3 apologize, I regret. The word is not there, is it?

4 MR. CHERNIAK: I know the word is
5 not there, sir, but I took it that way. Mr.
6 Paliare knows I took it that way. We did have some
7 discussions, and I didn't -- I'm not putting words
8 in anybody's mouth, but I took that statement to be
9 an admission of inappropriate judicial conduct, and
10 to me it is just the same as judicial misconduct.

11 HON. WACHOWICH: Thank you.

12 THE CHAIR: Thank you, Mr.
13 Cherniak. It is ten past twelve, Mr. Paliare.
14 Would you like to commence your submission at 1:30?

15 MR. PALIARE: I would, if you
16 didn't mind, sir. I would have wanted at least a
17 10-minute break, and so it may be more appropriate
18 to come back at 1:30.

19 THE CHAIR: All right. 1:30 it
20 is.

21 MR. PALIARE: Thank you.

22 --- Luncheon recess at 12:07 p.m.

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

24 THE CHAIR: Mr. Paliare?

25 MR. PALIARE: Yes, thank you,

1 members of the panel.

2 We want to start by addressing
3 directly the question posed by the panel: Does
4 Justice Cosgrove's statement amount to an admission
5 of judicial misconduct?

6 The short answer to that question
7 is yes. However, I think it appropriate to explain
8 what we mean by that statement, and how we get to
9 it.

10 As you know, Justice Cosgrove's
11 statement encompasses a number of different items.

12 One of the items it deals with is the legal and
13 factual errors identified by the Court of Appeal.

14 When the issue arose yesterday, it
15 was in the context of the question posed to me by
16 Justice Finch. I went back and looked at the
17 transcript, and it was in the context of -- and I
18 am paraphrasing here, "What about this finding
19 against Mr. Bowmaster?"

20 My response to that was it was a
21 matter for the Court of Appeal as to whether he was
22 right or wrong.

23 It was in that context that I
24 responded.

25 As Mr. Cherniak pointed out, and I

1 Whether the answer was
2 misunderstood, or it was my fault -- and I am
3 certainly prepared to take responsibility -- my
4 answer was driven by my view that I understood the
5 question to be about Mr. Bowmaster: "Isn't that
6 judicial misconduct?"

7 The answer, then and now, as it
8 relates to Bowmaster is the same; the answer is no,
9 it can't be.

10 You may say, "Mr. Paliare, you are
11 just dead wrong on that," but I am just telling you
12 what my understanding was of the question, what my
13 answer to the question was, and what it was driven
14 by.

15 That is how that arose and, as I
16 reviewed the transcript again over the lunch hour,
17 it was fortified in my thought process then and my
18 answer at the time.

19 It is clear to me that the debate
20 has moved beyond that issue. But Justice
21 Cosgrove's statement goes well beyond the question
22 of errors of law and errors of fact.

23 In our mind, he makes a full and
24 complete admission of inappropriate judicial
25 conduct. Justice Cosgrove did that advisedly, and

1 for a very simple reason.

2 As Mr. Cherniak has indicated to
3 you on many occasions, the question of whether or
4 not conduct meets the standard of judicial
5 misconduct is one which is exclusively your
6 decision. It is for you to make that decision.

7 In Justice Cosgrove's mind, it was
8 simply not appropriate for him to do so. It seems,
9 however, abundantly clear to us that the committee
10 wants to hear directly from Justice Cosgrove on
11 this issue, and that is why I answered the question
12 at the outset.

13 But I needed you to know how it
14 was we came to that determination. As well, if you
15 have been through the transcript from yesterday, I
16 think it fair to say that neither Mr. Cherniak nor
17 I used the term "judicial misconduct".

18 Throughout, it had been talked
19 about as inappropriate judicial misconduct, and
20 there wasn't any doubt that we clearly admitted to
21 that.

22 It was my understanding that Mr.
23 Cherniak accepted that and that ultimately, it
24 would be for this panel to determine whether, when
25 you look at all of the facts including the

1 statement by Justice Cosgrove, you would conclude
2 that there was or was not judicial misconduct.

3 We submit that Justice Cosgrove's
4 position is that the evidence, quite the contrary
5 to my friend, Mr. Cherniak -- here is where we
6 don't agree -- does not establish judicial
7 misconduct warranting removal.

8 He takes the position: Forget the
9 statement. It wasn't the statement; this conduct
10 warrants judicial removal, and we --

11 MR. CHERNIAK: No, that is not
12 what I said. I said it is capable of warranting
13 the conclusion.

14 MR. PALIARE: I am sorry. It
15 wasn't my intention to mis-state it. But we
16 disagree with that proposition.

17 Our view is, in terms of whether
18 or not there is judicial misconduct warranting
19 removal, we say that there is not, even without the
20 statement.

21 I don't want to repeat what I said
22 in my opening, but I would ask you to go back to my
23 opening in which I set out for you the basic
24 principles that have been enunciated by the CJC,
25 wherein errors of fact and law as found by a Court

1 of Appeal are not sufficient to warrant removal.

2 As well, in our respectful view,
3 what you have here are decisions made by Justice
4 Cosgrove in the course of his decision-making, and
5 they were wrong. But they were never made in bad
6 faith.

7 In my respectful view, my friend
8 says, "I never asserted bad faith." That is true,
9 he did not; it is not in his claim. And the
10 Attorney General never asserted bad faith.

11 I don't want to repeat that
12 argument, because I did set it out with some care.
13 But I would ask you to go back to it because, we
14 say respectfully, making numerous errors does not
15 move the yardsticks from a finding that you would
16 not be able to make a finding of judicial
17 misconduct to one that does, simply because there
18 are now more of them.

19 We say that the evidence does not
20 establish judicial misconduct warranting removal.
21 We submit that was the case, whether or not the
22 statement had been made.

23 The statement has been made, and
24 your task is to determine the effect of all of the
25 evidence, including the statement.

1 In our respectful view, Justice
2 Cosgrove has acknowledged inappropriate judicial
3 conduct which -- and I am going to take you to two
4 cases -- can be equated to judicial misconduct, if
5 the panel chooses to do so.

6 In order to further assist you
7 with respect to this question, it would be useful
8 for me to look how the CJC has handled two cases in
9 the past.

10 They used the two different terms
11 of "inappropriate judicial conduct" and "judicial
12 misconduct" to get them to the same place, that is
13 to give an admonition, i.e. something less than
14 warranting removal.

15 That brings me to Justice
16 MacDonald's question about jurisdiction, and I want
17 to take you to that so you can understand, both
18 from a jurisdictional point of view and a practical
19 point of view -- and more importantly, how and why
20 it was we have framed the argument from the
21 beginning until now; it was on the basis of these
22 decisions.

23 The two decisions are Marshall and
24 Flynn, and I will tell you at the beginning that
25 they are handled differently by the CJC.

1 Starting with Marshall, which is
2 at Tab 11, here is what the CJC says on page 27,
3 "The Test":

4 "Is the conduct alleged so
5 manifestly and profoundly
6 destructive of the concept of
7 the impartiality, integrity
8 and independence of the
9 judicial role that public
10 confidence would be
11 sufficiently undermined to
12 render the judge incapable of
13 executing the judicial
14 office?"

15 That is the question, and at the
16 bottom of the page they say:

17 "We say this because, in our
18 view, the serious criticisms
19 of the reference court by the
20 Commission may be merged into
21 a single comprehensive
22 question which may be stated
23 as follows --"

24 And let me pause for a moment and
25 plug into that sentence "the serious criticisms of

1 the Court of Appeal of Justice Cosgrove's
2 decision".

3 They are, in my respectful view,
4 equatable because the question in issue in that
5 case dealt with serious mistakes made, and
6 inappropriate language to Donald Marshall.

7 Over the page, they say:

8 "Was the misconduct
9 justifying removal from
10 office for the court to
11 characterize the conduct of
12 Mr. Marshall as it did,
13 having regard to all of the
14 circumstances it knew from
15 the record which it had
16 before it?"

17 If I can then take you to page 32,
18 the first paragraph at the top:

19 "We wish at the outset to
20 state our strong disapproval
21 of some of the language used
22 by the reference board in its
23 comments about Mr. Marshall."

24 And I would add parenthetically,
25 "i.e. an admonition to them by the CJC."

1 "In reviewing the record
2 before the reference court,
3 we cannot help but be struck
4 by the incongruity between
5 the court's legal conclusion
6 that Mr. Marshall's
7 conviction in 1971 was
8 'unreasonable' and 'not now
9 supported by the evidence',
10 and its obiter observation
11 that nonetheless 'any
12 miscarriage of justice' was
13 'more apparent than real'.
14 Surely it cannot be seriously
15 argued that the conviction of
16 an innocent man, let alone
17 who was at the time an
18 adolescent, who was then
19 unfairly incarcerated for
20 more than ten years was
21 anything but a blatant
22 miscarriage of justice."

23 At the bottom of page 33, they go
24 on to say:

25 "The real question, however,

1 is whether inappropriate
2 language, even grossly
3 inappropriate language,
4 constitutes judicial
5 misconduct in circumstances
6 of this case, keeping in mind
7 that the reference court was
8 entitled, in the performance
9 of its judicial duty, to
10 analyze the evidence and
11 comment about it."

12 The same obligation that Justice
13 Cosgrove had, in terms of deciding the case of
14 Elliott.

15 At page 35, the last paragraph
16 states:

17 "We take it as a presumption,
18 however, that judges ought
19 not to be removed from office
20 for legal error."

21 And I would put that in the
22 plural.

23 "Having found that the five
24 judges in the collegial
25 decision-making capacity were

1 inappropriately harsh in
2 their condemnation of the
3 victim of an injustice they
4 were mandated to correct, we
5 nonetheless accept the
6 submissions of all counsel
7 that the removal from office
8 is not warranted. While the
9 remarks in obiter were, in
10 our view, in error and
11 inappropriate in failing to
12 give recognition to manifest
13 injustice, we do not feel
14 that they are reflective of
15 conduct so disruptive that it
16 rendered the judges incapable
17 of executing their office
18 impartially and independently
19 with continued public
20 confidence."

21 At page 36, in the paragraph above
22 the conclusion:

23 "We do not make our
24 criticisms lightly. We are
25 deeply conscious that

1 criticism can itself
2 undermine public confidence
3 in the judiciary, but on
4 balance conclude in this case
5 that that confidence would
6 more severely be impaired by
7 our failure to criticize
8 inappropriate conduct than it
9 would by our failure to
10 acknowledge it."

11 And so I say to you, Justice
12 MacDonald, that admonitions can be given in
13 circumstances where there is not a finding of
14 judicial misconduct.

15 Here is what the CJC does in the
16 Flynn case, which is at the tab before that.

17 In Flynn, the CJC specifically
18 determined that the conduct did reach the standard
19 of Section 65.2, but then separately determined
20 that it did not reach the standard of removal; in
21 other words, a two-part test as opposed to the one-
22 part test. So they are very different approaches.

23 At page 23, Paragraph 39, they
24 say:

25 "Accordingly, we must now

1 consider whether Mr. Justice
2 Bernard Flynn has failed in
3 the due execution of his
4 office, in particular with
5 regard to his duty to act in
6 a reserved manner and, if so,
7 whether the alleged
8 misconduct is so manifestly
9 and profoundly destructive of
10 judicial impartiality,
11 integrity and independence
12 that the confidence of the
13 litigants or of the public in
14 its justice system would be
15 undermined, rendering the
16 judge incapable of performing
17 the duties of his office."

18 At page 43, Paragraph 76, they
19 say:

20 "We consider that the
21 statements made by Mr.
22 Justice Bernard Flynn,
23 reported in the newspaper, Le
24 Devoir, on february 23, 2002,
25 were inappropriate and

1 unacceptable. Accordingly,
2 we answer the first question
3 put to us as follows: The
4 judge in question failed in
5 the due execution of his
6 office in regard to the duty
7 to act in a reserved manner,
8 and thus infringed the
9 provisions of Paragraph
10 65.2(c) of the Judges Act.
11 Now what to do?"

12 MR. MACDONALD: So they took the
13 extra step of marrying the impugned conduct to a
14 section of the Act?

15 MR. PALIARE: They did. That is
16 exactly it, and that is what I wanted to bring to
17 your attention.

18 In Paragraph 77, they say:

19 "In answer to the second
20 question, we now apply to the
21 impugned conduct of Mr.
22 Justice Flynn the test for
23 removal set out in Marshall,
24 which has been considered
25 earlier in these reasons.

1 The question may be posed as
2 follows: Is the breach of
3 the duty to act in reserved
4 manner demonstrated by Mr.
5 Justice Flynn so manifestly
6 and profoundly destructive of
7 judicial impartiality,
8 integrity and independence
9 that it undermines individual
10 confidence in the justice
11 system, thereby rendering the
12 judge incapable of performing
13 the duties of his office. In
14 this connection, we
15 particularly noted the
16 following: the irreproachable
17 career of the judge in
18 question, the isolated nature
19 of the incident complained
20 of, the unlikelihood of a
21 similar incident reoccurring,
22 the judge's acknowledgement
23 of his remarks, his letter
24 and the acknowledgement made
25 by his counsel that the judge

1 in question made a mistake in
2 making the statements
3 complained of to the
4 journalist."

5 They are all comments endorsed by
6 my friend, Mr. Cherniak, on the penalty phase.

7 "We remain convinced that the
8 judge in question retains his
9 independence and complete
10 impartiality to continue
11 deciding matters brought
12 before him now and in future.

13 I view of all of the
14 circumstances, we are of the
15 opinion that the conduct of
16 Mr. Justice Bernard Flynn has
17 not incapacitated or disabled
18 him from the due execution of
19 his office within the meaning
20 of s. 65.2 of the Judges Act,
21 and thus we do not recommend
22 his removal."

23 From our perspective, we say to
24 the panel that either approach, either Marshall or
25 Flynn, is perfectly acceptable from our

1 perspective. We are not advancing one or the
2 other; there are those two different approaches.

3 We say that like in the Marshall
4 case and the Flynn case, Justice Cosgrove has
5 admitted his actions were inappropriate. We do not
6 dispute that an admonition may be appropriate.

7 One other difference that Mr.
8 Cherniak and I have -- and I must say we are, to
9 use the vernacular, on the same page with respect
10 to most of our submissions to you. But where we do
11 part company again is the letters that we filed.

12 In our respectful view, they are
13 absolutely relevant to the determination of whether
14 Justice Cosgrove should be removed from the bench.

15 They do not go to the question of
16 your deciding the conduct part of it, whether or
17 not the conduct did or didn't amount to judicial
18 misconduct or inappropriate judicial conduct. They
19 don't go to that.

20 And my friend is quite right, when
21 you get a letter from a judge, they don't know what
22 went on in the judge's court in that case, nor do
23 they know what happens most of the time.

24 But like Justice Flynn, where the
25 CJC made comments about this very issue, we say

1 they are relevant to determining whether the
2 conduct that you find constitutes sufficient
3 gravity to warrant removal.

4 The letters did not come just from
5 jurists. They came from the regional senior
6 judges, who have administrative duties over him.
7 They came from lawyers who had practiced in front
8 of him, who then became jurists. And they came
9 from lawyers who have practiced in front of him for
10 many years.

11 What you can glean from those
12 letters, in my respectful view, is that this case
13 was an anomaly in a twenty-four year career in
14 which Justice Cosgrove has provided distinguished
15 service in a judicial capacity, acting as what his
16 colleagues describe as a "judicial workhorse".

17 The letters, in my respectful
18 view, are important with respect to the
19 determination of what you recommend as being the
20 appropriate disposition of the matter, once you
21 determine how you are going to characterize that
22 conduct.

23 I hope I have made my position
24 clear on what I understood to be a central issue
25 for you this morning. That is not only my

1 position; it is obviously Justice Cosgrove's
2 position as well.

3 I had a hard time with my friend
4 trying to differentiate between me and Justice
5 Cosgrove. They are one and the same; those are the
6 submissions we make on his behalf, with his
7 knowledge and with his concurrence.

8 Unless the panel has any
9 questions, those are our submissions.

10 MR. CHERNIAK: I have just a
11 couple of observations to make, Chief Justice.

12 Let me take issue with one of the
13 first propositions my friend made, with respect to
14 errors of fact and law that are often the subject
15 matter of appeal.

16 Of course, in and of themselves,
17 they do not amount to matters that would be the
18 proper subject matter of a finding of judicial
19 misconduct.

20 But they can be combined with the
21 way they were made, and amount to facts and
22 circumstances that would amount to judicial
23 misconduct and could lead to a finding -- not
24 because the findings themselves were in error, but
25 because in the course of getting there, there were

1 facts that amount to judicial misconduct.

2 You don't get a pass because, in
3 part, there was judicial error. Judicial
4 misconduct doesn't have to be combined with errors
5 that would be reversible. And the fact that there
6 were reversible errors doesn't get you out of it.

7 You have to look at the
8 circumstances, and I did my best to differentiate
9 and only put before you those matters that, in my
10 view, could amount to judicial misconduct. But
11 some of them had, as an aspect to them, errors of
12 the kind that were reversible by the court on
13 appeal.

14 So that is one point at which we
15 part company.

16 My friend started out by saying
17 that there is an admission of judicial misconduct,
18 and I think that clarifies it.

19 But then, at some point, he seemed
20 to say that, in effect, it was still open to you, I
21 guess, to not find that there was judicial
22 misconduct.

23 I think we have an admission here
24 that there was inappropriate judicial conduct that
25 amounts to misconduct, and the issue left for you

1 is what to do about it.

2 I think what one has to do -- I
3 have never actually taken you to the Judges Act,
4 which was the subject matter of the cases referred
5 to.

6 But it is important to know what
7 Section 65.2 of the Judges Act says, and you will
8 find it at Tab 1 of the case book.

9 The way I read it is that Section
10 65.2 reads:

11 "Where, in the opinion of the
12 Council, the judge in respect
13 of whom an inquiry
14 investigation has been made,
15 has become incapacitated or
16 disabled from the due
17 execution of the office of a
18 judge by reason of (b) having
19 been guilty of misconduct, or
20 (c) having failed in the due
21 execution of that office --"

22 Parts (a) and (d) do not really
23 apply here.

24 "-- the Council may recommend
25 that the judge be removed

1 from office."

2 The operative word there is "may",
3 and the two operative sections are (b) and (c).

4 But it certainly doesn't mean
5 that, unless you find that the misconduct or
6 failure to duly execute the office would justify a
7 recommendation for removal, you don't do anything.

8 It simply means that you may
9 recommend removal from office. Certainly it leaves
10 open that you could find either one of those two
11 things, and recommend something less than removal
12 from office.

13 That is the issue for you. I
14 simply don't agree that you can come to any
15 recommendation other than to dismiss the -- to say,
16 "We will make no recommendation at all," without
17 there being a finding of judicial misconduct.

18 Again, I start and end with my
19 friend's first statement, that he agrees there has
20 been an admission of judicial misconduct. The
21 issue is what the recommendation ought to be on the
22 basis of all of the evidence.

23 Those are my submissions.

24 THE CHAIR: Thank you. We are
25 very grateful to all of you for your assistance in

1 this case.

2 We have no idea when our report
3 will be ready, but you will hear it in due course.

4 --- Whereupon the hearing was concluded

5 at 2:02 p.m.

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