

APPENDIX E

STATEMENT BY JUSTICE COSGROVE

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1. This is an extremely humbling and chastening experience. It is one I certainly never hoped for, but it is one from which I have learned a great deal.
2. The trial in *Her Majesty the Queen v. Elliott* was extraordinarily difficult for me and, I am sure, for everyone involved. I have thought about that trial virtually every day for ten years. It was like nothing I had seen before or since. By September 1997, I had presided over thousands of cases during my 15 years on the bench. Not one of them, nor all of them together, prepared me adequately for the challenges of this case. I offer that not as an excuse, but in partial explanation for the mistakes I made.
3. To be clear, I made many mistakes in that trial. In my desire to discharge my obligations as a judge and to provide a fair trial to a person accused of a horrific crime, I at times lost my way. I approached each decision I made with an open mind and I never acted in bad faith, but I now realize that I made a series of significant errors that affected that proceeding.
4. On December 4, 2003, the Court of Appeal released its decision allowing the Crown's appeal from my order staying the proceeding. Almost every trial judge knows the sting of a court of appeal allowing an appeal from one of your judgments. This was not the first time for me. However, these reasons were very different. I read the decision carefully. I was humbled. I thought I had done my best in very difficult circumstances. Nevertheless, the Court of Appeal found that I had made many errors in my findings of fact and I had misapplied the law on numerous occasions. I accept their reasons without reservation.
5. I have reflected on the Court of Appeal's decision for the past five years. I have thought about what it said about that case and what it said to me as a judge. The Court of Appeal's reasons for decision have affected me greatly. I have no doubt they have made, and will make me, a better trial judge. I fully appreciate my duties and responsibilities as

a judge. I have changed, and will continue to change, my approach to judicial decisions based upon the insights I have obtained from the reasons of the Court of Appeal.

6. In addition, I have learned a great deal from this inquiry process. Let me assure you that Justice Sopinka was absolutely correct when he wrote in Ruffo that "a disciplinary inquiry is a traumatic ordeal for a judge." I can think of no process more difficult for a judge than to have the question of whether she or he ought to be removed from office considered in public by a panel of fellow judges and eminent counsel.

7. I have spent many hours reflecting carefully on the Notice provided to me by Independent Counsel. It has not been easy to see my actions characterized that way. I had tried to do my best.

8. Nevertheless, I want to acknowledge freely that I made many findings against the Ministry of the Attorney General and its senior representatives, Crown counsel, police officers and public officials that were set aside by the Court of Appeal. I erred in so doing and I regret those errors. I regret the effect of my findings on them. Moreover, my reasons contained several references to individuals that were not before the court. That was an error, which I regret. I recognize now that my efforts to ensure a fair trial for the accused and to get at the truth made it very difficult for the Crown counsel to prosecute the case effectively. I regret very much the effect my erroneous judicial decisions had on the Ministry of the Attorney General, its counsel and the trial process.

9. As I have mentioned, the trial was extremely difficult. Counsel for both parties aggressively represented their client's interests. From my position, it was a very difficult trial to manage. I tried a variety of techniques to maintain civility in the courtroom and to keep the proceedings focused on the relevant issues at hand. With hindsight, my attempts met with only modest success. I regret that at times I did not try harder and that I did not have more success. In particular, I regret any intemperate, denigrating or unfair language that I may have used during what was the most stressful trial experience of my judicial career.

It is certainly not typical of my conducting the courtroom, and I have and will continue to ensure that I always conduct myself in the best traditions of the judiciary.

10. During this inquiry process, I have had the opportunity to review much of the trial transcript. From time to time, defence counsel used extravagant rhetoric to characterize the conduct of Crown counsel and the police. Some of his statements simply had no place in a courtroom. While I interjected from time to time in an attempt to curb his excesses, it is now evident to me that I did not intervene forcefully or often enough. I should have. I will in the future.

11. With hindsight, I recognize that I erred in my discretionary exercise of the contempt jurisdiction. I accept that it is to be used with restraint, and that it is a serious matter to threaten anyone with contempt of court. I appreciate the purpose of the contempt power and have carefully reviewed the CJC's Guidelines on the Use of Contempt Powers. I will continue to be guided by them in the future.

12. I also recognize that some of my judicial decisions, while made in good faith and for the purpose of ensuring a fair trial, unnecessarily expanded the scope of the trial and diverted attention from the central issues of the proceeding. These decisions were wrong. They unnecessarily delayed the proceeding and wasted scarce resources on matters that, with the benefit of hindsight, were not material to the proceeding.

13. This proceeding has emphasized for me the importance of the work of the judiciary. I have spent much time reviewing the CJC's Ethical Principles for Judges. It is an aspirational document and it is one I work towards every day. I recognize that judges must exhibit and promote high standards of judicial conduct so as to reinforce public confidence. I recognize that at times in the *Elliott* trial my conduct did not meet the highest standards articulated in the Ethical Principles for Judges. I assure the Inquiry Committee that I have and will continue to dedicate myself to striving to meet those standards at all times.

14. For the significant errors described above, I sincerely and unreservedly apologize to the Ministry of the Attorney General, its counsel and senior representatives, the police officers and civilian witnesses and counsel that came before me during this case, the public and this Inquiry Committee.

15. Finally, I would like to apologize to the family of the victim of this crime who, as a result of my legal errors, experienced a significant delay in achieving the closure arrived at by having a criminal prosecution reach its substantive conclusion.

16. I want to address the timing of this apology. At the time of the events, and for years afterward, I had a steadfast belief in the correctness of my decisions. Although they were criticized, I, like every trial judge I know, believed my decisions were the right ones. When the Court of Appeal issued its reasons, its harsh assessment of my decision came as a shock to me. Obviously, I accepted their authority to review and correct my judgment. Nevertheless, I was sustained by my view that I had approached the case, and its many problems, in good faith, and to the best of my ability. That overriding belief has informed my view of the case, and this proceeding before the CJC.

17. Recently, I began to prepare for the current hearing. My preparation has profoundly affected my appreciation of the circumstances of this case. Both on my own and with my counsel, I have spent literally weeks reviewing the record of the trial proceedings, and even reviewing the bench books I created at the time. Finally, I have spent days in this room hearing Independent Counsel's reading passages of the evidence from the proceeding. All of these steps have caused me to re-live the trial, but for the first time from an entirely different perspective.

18. As a trial judge, I have spent 24 years assessing the actions of others. This process required me to step back and assess my own actions and how they affected others. It has been a revealing and chastening process. That experience has driven home the need for me to make this apology to those affected by my actions, and to make this statement at this time.

19. I have been a judge for 24 years. Aside from my family and my faith, it is the most important thing in my life. I wish to continue to serve the public as a member of the Superior Court of Justice. However, under the circumstances, it is my view that it would be inappropriate for me to sit in the future in cases involving the Attorney General of Canada, Her Majesty the Queen in Right of Canada, the Attorney General of Ontario, or Her Majesty the Queen in Right of Ontario, and I will take the steps to ensure that will not occur.

20. I stand before you humbled and chastened. While I always acted in good faith, at times my actions were inappropriate.

21. I assure the Inquiry Committee that I will at all times in the future execute my office with the objectivity, impartiality and independence that the public is entitled to expect from a judge.