

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 Tuesday, September 2, 2008 at 9:32 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

1 EXHIBIT NO. 8: Book of
2 evidence volume 5.

3 MR. CHERNIAK: One of the reasons
4 that the books of excerpts are as lengthy as they
5 are is that it was considered appropriate to
6 provide the surrounding context of the trial in
7 respect of each particular of the allegations put
8 forward in the notice, and I will refer as I go
9 along to the particulars in the evidence, but from
10 the trial evidence in the proceedings that are
11 relevant to each particular.

12 I don't propose to read all the
13 material in the evidence books. That would take
14 much longer than we have available to us, but,
15 rather, to direct you to the pages most relevant to
16 the particular in consideration, and I will
17 summarize other portions, but it is the evidence
18 itself that is the case that I present to the
19 extent it differs from what I say.

20 It is important to appreciate at
21 the outset that while there are separate
22 allegations of misconduct against Justice Cosgrove
23 with a number of particulars under each allegation,
24 it is really only one complaint of misconduct, with
25 several aspects to it.

1 The complaint is that Justice
2 Cosgrove misconducted himself in how he conducted
3 the Elliott trial towards the Crown, towards Crown
4 counsel, the police, the witnesses and the public.

5 The misconduct that is the basis of the complaint
6 of the Attorney General in the case that
7 independent counsel is presenting is not that he
8 granted a stay of a prosecution that was reversed
9 by the Court of Appeal; rather, the case presented
10 relates to the conduct of the proceedings and the
11 misuse of the Charter.

12 Independent counsel -- and I am
13 sure this panel appreciates the distinction between
14 a judicial decision that is simply wrong and
15 subject to reversal and conduct that is capable of
16 supporting a recommendation for removal, which may
17 or may not have within it a judicial decision.

18 The case that independent counsel
19 is presenting is that the conduct of the Elliott
20 trial is capable of supporting a finding that has
21 brought the administration of justice into
22 disrepute and is capable of satisfying the Marshall
23 test for a recommendation for removal.

24 The reasons of the Court of Appeal
25 that Chief Justice Finch asked me about earlier are

1 relevant not because they reverse the findings of
2 Justice Cosgrove, but because they are capable,
3 along with the evidence of the trial, of supporting
4 the conclusion that the administration of justice
5 was brought into disrepute by the manner in which
6 the trial was conducted to such an extent that the
7 Marshall test is met.

8 The fact that there were 150
9 Charter breaches by the Crown and the police that
10 were found almost entirely not to be justified is
11 relevant not because of the decisions themselves,
12 but what Justice Cosgrove's use of the Charter
13 shows about his suspicions about the particular,
14 complaint of suspicions and bias against Crown,
15 Crown counsel and the police that are
16 particularized in the notice.

17 While some of the allegations and
18 particulars in the notice deal with orders and
19 findings made by Justice Cosgrove in the Elliott
20 trial, the issue before this Inquiry Committee,
21 again, is not whether those decisions were right or
22 wrong, but whether in undertaking the inquiries
23 that resulted in those decisions and the
24 circumstances that led up to them, along with other
25 matters that occurred in the course of the trial,